# United States Courts Opinions: United States District Court Eastern District of California: TEDDY BRIAN SANCHEZ, Petitioner, v. KEVIN CHAPPELL

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## Body

United ***States*** District ***Court*** Eastern District of California has issued the following order:

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UNITED ***STATES*** DISTRICT ***COURT***
EASTERN DISTRICT OF CALIFORNIA
TEDDY BRIAN SANCHEZ,
Petitioner,
v.
KEVIN CHAPPELL, Warden of San Quentin

***State*** Prison,
Respondent.
Case No. 1:97-CV-06134-AWI-SAB
DEATH PENALTY CASE
MEMORANDUM AND ORDER (1)
DENYING PETITION FOR WRIT OF
HABEAS CORPUS, and (2) ISSUING
CERTIFICATE OF APPEALABILITY FOR
CLAIMS 8, 59 AND 61
(ECF No. 38 )
ORDER DENYING MOTION FOR

EVIDENTIARY ***HEARING***
(ECF No. 120)
ORDER DENYING MOTION AND
REWEWED MOTION TO PRESERVE
TESTIMONY
(ECF No. 150 & 160)
ORDER DENYING MOTION FOR CASE
MANAGEMENT CONFERENCE
(ECF No. 159)
ORDER GRANTING REQUEST TO SEAL
AND PROTECT SUPPLEMENTAL LODGED
DOCUMENTS
(ECF No. 162)
CLERK TO FILE DOCUMENTS UNDER
SEAL
CLERK TO SUBSTITUTE RON DAVIS AS
RESPONDENT AND ENTER JUDGMENT
Case 1:97-cv-06134-AWI-SAB Document 163 Filed 07/23/15 Page 1 of 213
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Petitioner is a ***state*** prisoner, sentenced to death, proceeding with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. He is represented in this action by Nina Rivkind, Esq., California Bar Number 79173, and David Harshaw III, Esq. of the Office of the Federal Defender.

Respondent Kevin Chappell1

is named as Warden of San Quentin ***State*** Prison. He is represented in this action by Jamie Scheidegger, Esq., and Rachelle Newcomb, Esq., of the Office of the California Attorney General.

Before the ***court*** for a decision on the merits is the petition (ECF No. 38). Also before the

***Court*** are Petitioner's motions for evidentiary ***hearing*** (ECF No. 120) and to preserve testimony (ECF No. 150).

I.

BACKGROUND

Petitioner is currently in the custody of the California Department of Corrections and

Rehabilitation pursuant to a judgment of the Superior ***Court*** of California, County of Kern,

following his conviction by ***court*** trial on August 3, 1988 of the first degree murders of Juan Bocanegra ("Mr. Bocanegra") and Juanita Bocanegra ("Mrs. Bocanegra") (Cal. Pen. Code § 187), and of the separate (non-capital) first degree murder of Woodrow Tatman ("Mr. Tatman") (Cal. Pen. Code § 187). The multiple-murder special-circumstance allegation (Cal. Pen. Code § 190.2, subd. (a)(3)) as to the murders of Mr. Bocanegra and Mrs. Bocanegra was found true.

The trial ***court*** also found Petitioner used a deadly and dangerous weapon in the murders of the Mr. Bocanegra and Mrs. Bocanegra (Cal. Pen. Code § 12022, subd. (b)), and that Petitioner was guilty of the robbery of Mr. Tatman. (Cal. Pen. Code § 211.)

On September 21, 1988, a penalty phase jury was empaneled. During the penalty phase, the prosecution introduced evidence (see Cal. Pen. Code § 190.3) that in 1982 Petitioner was involved in the use of, or attempted use of, force or violence against a store owner, Mr. Ammarie, and against a friend, Mr. Pena. Defendant in turn offered evidence of his

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Pursuant to Fed. R. Civ. Proc. 25(d), Ron Davis, Acting Warden of San Quentin ***State*** Prison, is substituted as Respondent in place of his predecessor wardens.

Case 1:97-cv-06134-AWI-SAB Document 163 Filed 07/23/15 Page 2 of 213

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dysfunctional and impoverished upbringing and use of drugs and alcohol and mental issues and conditions.

On October 6, 1988, the jury returned a verdict of death. On October 31, 1988, the trial ***court*** denied Petitioner's motion to modify the verdict (Cal. Pen. Code § 190.4) and sentenced Petitioner to death for ***aiding*** and abetting the stabbing deaths of Mr. & Mrs. Bocanegra; to 25 years to life for the Tatman murder; to 5 years for the Tatman robbery; and to 2 years for the weapon enhancement.

On December 14, 1995, the California Supreme ***Court*** affirmed the judgment and sentence on direct appeal. People v. Sanchez, 12 Cal.4th 1 (1995). The California Supreme ***Court*** denied petition for rehearing but modified its opinion on February 21, 1996. People v. Sanchez, 12 Cal.4th 825b (1996). Petitioner's petition for writ of certiorari was denied by the United ***States*** Supreme ***Court*** on October 7, 1996. Sanchez v. California, 519 U.S. 835 (1996).

Petitioner filed a petition for writ of habeas corpus in the California Supreme ***Court***. The ***state*** petition was summarily denied on October 22, 1997. In re Sanchez, S049502.

On September 17, 1998, Petitioner filed his federal petition for writ of habeas corpus arguing insufficient evidence, actual innocence, prosecutorial misconduct and ineffective assistance of counsel based on allegations he did not assist Joey Bocanegra ("Joey") in killing Mr. Bocanegra, Joey's father, and that his assistance in the murder of Mrs. Bocanegra, Joey's mother, does not make him eligible for the death penalty.

Respondent filed an answer on October 19, 1998 and an amended answer on February 8, 1999, admitting jurisdictional and procedural allegations (except paragraphs, 1, 16, 18-20), asserting procedural defenses, and denying all claims 1 through 61.

On December 9, 1998, the ***Court*** found all claims to be fully exhausted.

On April 5, 1999, Petitioner filed a memorandum of points and authorities in support of the petition. On July 1, 1999, Respondent filed a memorandum of points and authorities in support of his answer. On August 16, 1999, Petitioner filed a reply to Respondent's memorandum.

Case 1:97-cv-06134-AWI-SAB Document 163 Filed 07/23/15 Page 3 of 213

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Petitioner was granted discovery of law enforcement records relating to: the Bocanegra crime scene, Petitioner's jail records, jailhouse informants Charles Seeley ("Seeley") and Rufus Hernandez ("Hernandez"), and coroner Dr. Holloway's autopsy notes. Petitioner was also authorized to take the deposition of Kern County District Attorney Investigator Dwight Pendleton regarding Seeley, and the deposition of Bakersfield Police Detective Stratton regarding Hernandez's heroin use.

Petitioner's request to expand the record was granted (ECF No. 134) for Exhibits 144-151 (declarations), Exhibits 421-434 (law enforcement records), Exhibits 527-528 (depositions), Exhibits 529-532 (Kern County ***court*** records), Exhibits 604-608 (Kern County jail records), and Exhibits 818-819 (other documents regarding Charles Seeley). Expansion of the record was denied for Exhibits 524-526 (***court*** orders), but with judicial notice to be taken of proceedings in the Northern District of California in Ashmus v. Woodford, Case No. C93-0594 THE regarding the constitutionality of California's death penalty statute.

Petitioner filed a motion for evidentiary ***hearing*** on March 18, 2003 (ECF No. 120),

seeking a ***hearing*** on forty-one of the sixty-one claims in his petition, twenty-six guilt and special circumstance phase claims and fifteen penalty phase claims.
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On March 3, 2004, Petitioner filed a second motion to expand the record to rebut

Respondent's arguments in opposition to the motion for evidentiary ***hearing***. The motion to expand the record was granted on September 27, 2005 (ECF No. 145) as to the supplemental declaration of defense psychologist, Dr. Froming, and as to records of Mr. Huffman, who was Petitioner's lawyer on unrelated burglary charges.
On June 25, 2014, Petitioner filed a motion to preserve testimony (ECF No. 150), seeking to depose seven witnesses, each of whom filed a declaration in support of instant petition.
Petitioner filed a renewed motion to preserve testimony on May 1, 2015.
On May 1, 2015, Petitioner filed a motion requesting a case management conference

2 The claims for which Petitioner seeks evidentiary ***hearing*** are: 2, 4, 6 - 18, 20 - 22, 24, 25, 28, 30 - 34, 36 - 38, 40,
43 - 48, 50 - 52, 54 and 60.
Case 1:97-cv-06134-AWI-SAB Document 163 Filed 07/23/15 Page 4 of 213

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(ECF No. 159) to discuss the above motion for evidentiary ***hearing***.
On June 23, 2015, Respondent filed a supplemental notice of lodging newly obtained

***state court*** documents, California Penal Code § 987.9 records # EE through # QQ, (ECF No. 161), and filed notice of his request to seal lodged documents # II and # QQ, (ECF No. 162).
II.
STATEMENT OF FACTS

This factual summary is taken from the California Supreme ***Court***'s summary of the facts

in its December 14, 1995 opinion. Pursuant to 28 U.S.C. §§ 2254(d)(2), (e)(1), the ***state court***'s summary of facts is presumed correct. Petitioner does not present clear and convincing evidence

to the contrary; thus, the ***Court*** adopts the factual recitations set forth by the ***state*** appellate ***court***.

See Vasquez v. Kirkland, 572 F.3d 1029, 1031 n.1 (9th Cir. 2009) ("We rely on the ***state***

appellate ***court***'s decision for our summary of the facts of the crime.").
A. Guilt Phase Facts
1. The Bocanegra Murders
On the afternoon of February 3, 1987, the police found the bodies of Juan and Juanita Bocanegra in their home. Juanita was found in her sewing room, and Juan was found in the kitchen. Both had sustained extensive stab wounds and head injuries. A piece of fabric was tied loosely around Juanita's neck, and another piece of cloth was found on her right wrist.
Kern County Sheriff's criminalist Gregory Laskowski analyzed the blood found at the scene and concluded that both victims were killed where their bodies were found. The blood splatter evidence showed that the attack began in the hallway near the bathroom. The fight then moved to the kitchen where large amounts of blood indicated that a struggle took place throughout the room. The evidence indicated a fierce struggle occurred throughout the house. Small amounts of diluted blood in the bathroom suggested that someone cleaned up after the attack. Laskowski also found evidence of two types of shoe tracks on the floor of the Bocanegra kitchen; one print had a "chevron pattern" and another, partial print, contained a "wavy sole design." A full wavy design shoe track in the bathroom was consistent with the print found in the kitchen. Both victims were found without shoes; Juanita's bloodstained slippers were found in the hallway.
Police found a knife block with four empty spaces in the kitchen. Two knives, without bloodstains, were in the kitchen sink. There were slash marks on the cabinets directly above the knife holder. That same evening, the police recovered a knife and sharpening stone that appeared to have blood on them. No fingerprints

were found on these items. But police did find a bloody palm print belonging to defendant's accomplice Robert Reyes on the doorknob inside the Bocanegra front



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door. Autopsies performed on both Juan and Juanita revealed that they died as a result of massive hemorrhaging due to multiple stab wounds, although the type of instrument that inflicted the wounds could not be conclusively determined.

On February 4, 1987, the Bocanegras' Dodge Colt station wagon was found abandoned. There were extensive bloodstains on both the interior and exterior of the car. Fingerprints belonging to Joey Bocanegra were found on the interior driver's and right rear door windows and on the right rear door handle.

Two items of evidence linked defendant to the crimes. The missing Bocanegra television set was found in the same room at the Bakersfield Inn where defendant stayed at the time of the murders, and defendant sold the Bocanegras' vacuum

cleaner to Maria Rodriguez, a clerk employed by the inn. The remaining evidence used to convict defendant was based primarily on the circumstances of the crime, and incriminating statements made by defendant to police investigator Bob Stratton, jailhouse informant Rufus Hernandez, and newspaper reporter Michael Trihey.

2. The Tatman Murder

Woodrow Wilson Tatman was a frail, undernourished, 72-year-old man who often drank alcohol and was confined to a wheelchair. He rented a room at the Bakersfield Inn, and spent his days drinking alcohol and watching television. Rose McGrew was employed by the inn as a maid and she also lived on the premises. She helped care for Tatman and had last been in his room on February 1, 1987. Maria Charboneau also worked and lived at the inn, and she took care of Tatman's Social Security checks, and managed his finances. In the first week of February, Tatman received two Social Security checks. On February 2, Charboneau gave Tatman between $80 and $100. That was the last time she saw him alive.

On the afternoon of February 4, 1987, McGrew noticed that Tatman's drapes were still drawn and that he had not yet picked up his mail, which included his Social Security check. McGrew entered the room and found Tatman's body, lying on the floor near his bed. He was covered with a bedspread. Tatman's television, radio and electric skillet were missing from the room.

The autopsy report indicated that Tatman was killed by “massive blunt force injury to the left chest” which collapsed his left lung and caused substantial hemorrhaging. The blow to the chest was consistent with a heel stomp or with the application of an instrument approximately two inches by three inches in size. Tatman also sustained several superficial stab wounds to the chest and lower abdomen, as well as a head injury. It appeared that the superficial injuries had been inflicted intra or post mortem, and none contributed to death. It could not be determined what instrument caused the lower abdominal injuries, although it appeared that the chest wounds were inflicted by a screwdriver. Dr. John Holloway, the forensic pathologist who performed the autopsy, could not determine whether the wounds were caused by one or more individuals.

a. Statements Made to Jailhouse Informant Hernandez

Rufus Hernandez was incarcerated with defendant for two months during 1987. He had been charged with receiving stolen property and second degree burglary. Defendant spoke to Hernandez about the Bocanegra murders and Hernandez

entered into a ***plea*** bargain whereby he received six months in county jail and



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three years' probation in exchange for his testimony.

Hernandez testified that defendant told him he went with Joey Bocanegra to the Bocanegra house. Hernandez's testimony was inconsistent as to whether defendant said they went with the plan of robbing the Bocanegras or only with the plan of borrowing money from Juan Bocanegra. Defendant waited outside for

Joey, but entered the house when he ***heard*** Joey and Juan arguing in the hallway. Defendant claimed he tried unsuccessfully to stop the fight by hitting Juan with a curved metal bar. He thereafter threw the bar in the front yard. Defendant did not say whether Joey had stabbed Juan before or after defendant hit him.

Juanita, who ***heard*** the commotion from another room, came out of the bedroom yelling. Defendant slipped in a puddle of blood as he jumped over Juan to reach Juanita. He thereafter grabbed Juanita and told Joey that he should “shut up” his mother. Joey then stabbed his mother repeatedly and pushed her into the sewing room, where she was found. Defendant did not tell Hernandez that he did anything other than hold Juanita; instead defendant claimed that he saw Joey stab both victims with a kitchen knife. Defendant ended his story with the comment

that after the murders he threw the bar into the front yard, and that the knife was thrown into a canal. Defendant noted that Joey took the television, a toolbox, and his parents' hatchback automobile. Hernandez thereafter reported defendant's statements to police investigator Stratton.

b. Statements Made to Police Investigator Stratton

On February 19, 1987, Stratton met with defendant in the Kern County jail. Defendant had contacted the police through his attorney because he wished to offer statements about the Bocanegra crimes. Before commencing the interview, defendant waived his right to counsel after receiving the admonitions required by Miranda v. Arizona (1966) 384 U.S. 436 [16 L.Ed.2d 694, 86 S. Ct. 1602, 10 A.L.R.3d 974]. Thereafter, he told Stratton that about 10 a.m., on the day of the Bocanegra murders, he met Joey Bocanegra on the street and spoke to him for a few minutes before Joey walked home. Defendant then walked by the Bocanegra house and observed Joey leaving the home. At that point, the interview with Stratton ended.

One week later, Stratton again spoke to defendant. At this point, defendant asked Stratton a series of hypothetical questions, including: “What if I was present in the house; what if Joey hit his dad after his dad had refused to give him some money; and what if Joey's dad hit him back and what if Joey got real mad and grabbed a knife and started stabbing his dad; what if Joey's mother didn't know what was happening because she was in another room?”

c. Statements Made to Homicide Detective Boggs

On March 27, 1987, after waiving his Miranda rights, defendant was interviewed about the Tatman murder by Homicide Detective Boggs. Defendant had already been arrested for the Bocanegra murders and agreed to talk to the officer because he believed he could be spending the rest of his life in prison.

Boggs testified that defendant told him he wanted to rob Tatman of his refrigerator because he needed one. Defendant told Boggs that, because he was so intoxicated (from ingesting alcohol and drugs) at the time of the robbery, he could not remember the sequence of events.

According to Boggs, defendant asked Reyes to pry open Tatman's bathroom window with Reyes's screwdriver. Once inside, Reyes removed the contents of



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Tatman's refrigerator, and defendant moved it to a room next door that had been rented by Vicky Ornalez, a friend of the perpetrators.

Defendant told Boggs that when he returned to Tatman's room, Tatman was awake and Reyes was standing over him with a screwdriver in his hand. Defendant claimed he had no idea why Reyes was acting this way because both men had discussed trying not to awaken Tatman while they removed his property. Reyes then hit Tatman in the chest, pulled Tatman off the bed and onto the floor, and made multiple lunging movements downward with the screwdriver in his hand. Defendant asserted that the bed partially blocked his view, but he nonetheless believed Reyes was stabbing Tatman. After Reyes completed the murder, both defendant and Reyes returned to Vickie Ornalez's room.

d. Defendant's Post-Arrest Comments to Michael Trihey

Michael Trihey was a reporter for the Bakersfield Californian. Prior to trial, he interviewed defendant five times about the charges pending against him. On April 25, 1988, the paper published a Trihey article entitled, Accused Asks for Own Death, System Says No. According to Trihey, defendant told him that he was a “triple murderer” and that the Bocanegras and Tatman were killed for their Social Security checks.

B. Penalty Phase Evidence

The prosecution introduced evidence of defendant's criminal activity involving the use or attempted use of force or violence. (§ 190.3, factor (b).) On May 7, 1982, defendant assaulted store owner Hassan Ahmad Ammarie after defendant

asked Ammarie to “get him some bacon” and Ammarie refused. Defendant stabbed Ammarie in the left shoulder and neck. Ammarie was hospitalized for two weeks following the attack.
On June 2, 1982, defendant attacked an acquaintance, Arthur Melendez Pena, after Pena refused to comply with defendant's demand for money.

Several witnesses who had testified at the preliminary ***hearing*** also testified at the penalty phase. Homicide Detective Boggs testified defendant had told him that after removing Tatman's possessions to Ornalez's room, he and Reyes “kicked back, drank some whiskey, smoked some dope, ate some food and just relaxed for the rest of the evening.” Informant Rufus Hernandez and Police Detective Stratton also testified that defendant told Hernandez that he took an active role in the Bocanegra and Tatman slayings-including beating Juan and Juanita Bocanegra, and beating and assisting Reyes in stabbing Tatman. Stratton repeated Hernandez's statements to him that defendant and Joey Bocanegra went to Juan and Juanita's house and planned to rob them and that Tatman was robbed for his Social Security check. Rose McGrew, the Bakersfield Inn maid, repeated her guilt phase testimony about how she discovered Tatman's body.
With regard to the Bocanegra murders, Hernandez testified that defendant entered the house with a bar and “ran up to Joey's father and grabbed him and held him there until Joey went and got the knife and they just beat him and stabbed him.” When Juanita walked out of her sewing room, defendant “rushed” her: “That's when they both started killing her.... They just stabbed her numerous times and hit her in the head a few times with the bar, and the time, at the same time of doing that I guess Joey somehow managed to get her back inside the room, I guess, while he was hitting her....” The prosecution also introduced six color photographs of the victims and forty-eight other color photographs of the

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Bocanegra and Tatman crime scenes. Criminalist Greg Laskowski testified that the blood splatter in the hallway of the Bocanegra house was consistent with the prosecution's theory that multiple stabbings occurred there.

Defendant's penalty phase evidence consisted of testimony by friends, relatives, and a social anthropologist to the effect that defendant's dysfunctional and poverty-stricken, migratory family life severely hampered his ability to live a productive life. Defendant was rejected by his mother following his birth and was sent to live with his grandparents. When he was three years old, defendant's mother and stepfather unexpectedly wrenched defendant from his grandparents' home to move to Arkansas. Shortly thereafter, defendant's mother left defendant's stepfather, and took defendant and his half-brother to California. Defendant's mother remarried a man with three children, and the couple thereafter had five additional children.

Defendant's mother and his stepfather were alcoholics and drug abusers who were violent with each other and the children. His grandparents, who were often in charge of defendant, also drank heavily and abused drugs. Both defendant's mother and stepfather died in their middle 30's of acute alcoholism. Defendant tried to take care of his siblings, but took drugs to escape his difficult life. He eventually turned to crime because he had no marketable job skills to prepare him for life as an adult.

Penalty phase defense counsel Gary Frank attempted to persuade the jury that defendant should receive a sentence of life without the possibility of parole and "spend the remainder of his life in prison."

Sanchez, 12 Cal.4th 1, 17-23 (1995).

III.

JURISDICTION

Relief by way of a petition for writ of habeas corpus extends to a person in custody pursuant to the judgment of a ***state court*** if the custody is in violation of the Constitution or laws

or treaties of the United ***States***. 28 U.S.C. § 2254(a); 28 U.S.C. § 2241(c)(3); Williams v. Taylor, 529 U.S. 362, 375 (2000). Petitioner asserts that he suffered violations of his rights as guaranteed by the U.S. Constitution. The challenged conviction arises out of Kern County

Superior ***Court***, which is located within the jurisdiction of this ***Court***. 28 U.S.C. § 2254(a); 28 U.S.C. § 2241(d).

This action was initiated on November 20, 1997. Because this action was initiated after April 24, 1996, the amendments to 28 U.S.C. § 2254 enacted as part of the Antiterrorism and Effective Death Penalty Act (AEDPA) apply. See Lindh v. Murphy, 521 U.S. 320, 336 (1997); Van Tran v. Lindsey, 212 F.3d 1143, 1148 (9th Cir. 2000), overruled on other grounds by

Case 1:97-cv-06134-AWI-SAB Document 163 Filed 07/23/15 Page 9 of 213

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Lockyer v. Andrade, 538 U.S. 63, 71 (2003).

IV.

STANDARDS OF REVIEW

A. Legal Standard - Habeas Corpus

Under the AEDPA, relitigation of any claim adjudicated on the merits in ***state court*** is

barred unless a petitioner can show that the ***state court***'s adjudication of his 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); Harrington v. Richter, 562 U.S. 86, 98 (2011); Lockyer, 538 U.S. at 70-71; Williams, 529 U.S. at 413.

As a threshold matter, this ***Court*** must "first decide what constitutes 'clearly established

Federal law, as determined by the Supreme ***Court*** of the United ***States***.'" Lockyer, 538 U.S. at 71 (quoting 28 U.S.C. § 2254(d)(1)). In ascertaining what is "clearly established Federal law,"

this ***Court*** must look to the "holdings, as opposed to the dicta, of [the Supreme ***Court***'s] decisions

as of the time of the relevant ***state***-***court*** decision." Williams, 529 U.S. at 412. "In other words, 'clearly established Federal law' under § 2254(d)(1) is the governing legal principle or principles

set forth by the Supreme ***Court*** at the time the ***state court*** renders its decision." Id. In addition,

the Supreme ***Court*** decision must "'squarely address [] the issue in th[e] case'; otherwise, there is no clearly established Federal law for purposes of review under AEDPA." Moses v. Payne, 555 F.3d 742, 754 (9th Cir. 2009) (quoting Wright v. Van Patten, 552 U.S. 120, 125 (2008)); see also Panetti v. Quarterman, 551 U.S. 930, 949 (2007); Carey v. Musladin, 549 U.S. 70, 74 (2006). If

no clearly established Federal law exists, the inquiry is at an end and the ***Court*** must defer to the

***state court***'s decision. Carey, 549 U.S. 70; Wright, 552 U.S. at 126; Moses, 555 F.3d at 760. In

addition, the Supreme ***Court*** has recently clarified that habeas relief is unavailable in instances

where a ***state court*** arguably refuses to extend a governing legal principle to a context in which
Case 1:97-cv-06134-AWI-SAB Document 163 Filed 07/23/15 Page 10 of 213
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the principle should have controlled. White v. Woodall, --- U.S. ---, 134 S. Ct. 1697, 1706 (2014). The Supreme ***Court*** ***stated***: "'[I]f a habeas ***court*** must extend a rationale before it can apply to the facts at hand,' then by definition the rationale was not 'clearly established at the time of the ***state***-***court*** decision.'" Id. (quoting Yarborough v. Alvarado, 541 U.S. 652, 666 (2004)). If the ***Court*** determines there is governing clearly established Federal law, the ***Court*** must then consider whether the ***state*** ***court***'s decision was "contrary to, or involved an unreasonable application of," [the] clearly established Federal law." Lockyer, 538 U.S. at 72 (quoting 28 U.S.C. § 2254(d)(1)). "Under the 'contrary to' clause, a federal habeas ***court*** may grant the writ 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] ***Court*** has on a set of materially indistinguishable facts." Williams, 529 U.S. at 412-13; see also Lockyer, 538 U.S. at 72. "The word 'contrary' is commonly understood to mean 'diametrically different,' 'opposite in character or nature,' or 'mutually opposed.'" Williams, 529 U.S. at 405 (quoting Webster's Third New International Dictionary 495 (1976)). "A ***state***-***court*** decision will certainly be contrary to [Supreme ***Court***] clearly established precedent if the ***state*** ***court*** applies a rule that contradicts the governing law set forth in [Supreme ***Court***] cases." Id.

"Under the 'reasonable application clause,' a federal habeas ***court*** may grant the writ if the ***state*** ***court*** identifies the correct governing legal principle from [the] ***Court***'s decisions but

unreasonably applies that principle to the facts of the prisoner's case." Williams, 529 U.S. at 413. "[A] federal ***court*** may not issue the writ simply because the ***court*** concludes in its independent judgment that the relevant ***state court*** decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." Id. at 411; see also Lockyer, 538 U.S. at 75-76. "A ***state court***'s determination that a claim lacks merit precludes federal habeas relief so long as fair-minded jurists could disagree on the correctness of the ***state court***'s decision." Richter, 562 U.S. at 101, citing Yarborough, 541 U.S. at 664. The Supreme ***Court stated***:

As a condition for obtaining habeas corpus from a federal ***court***, a ***state*** prisoner



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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 fair-minded disagreement.
Id. at 103. In other words, so long as fair-minded jurists could disagree on the correctness of the ***state courts*** decision, the decision cannot be considered unreasonable. Id. at 101. In applying this standard, "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 fair-minded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the Supreme ***Court***]." Id. at 102. This objective standard of reasonableness applies to review under both subsections of 28 U.S.C. § 2254(d). See Hibbler v. Benedetti, 693 F.3d 1140, 1146-47 (9th Cir. 2012). If the ***Court*** determines that the ***state court*** decision is objectively unreasonable, and the error is not structural, habeas relief is nonetheless unavailable unless the error had a substantial and injurious effect on the verdict. Brecht v. Abrahamson, 507 U.S. 619, 637 (1993).

Petitioner has the burden of establishing that the decision of the ***state court*** is contrary to or involved an unreasonable application of United ***States*** Supreme ***Court*** precedent. Baylor v. Estelle, 94 F.3d 1321, 1325 (9th Cir. 1996). Although only Supreme ***Court*** law is binding on the ***states***, Ninth Circuit precedent remains relevant persuasive authority in determining whether a ***state court*** decision is objectively unreasonable. See LaJoie v. Thompson, 217 F.3d 663, 669 n.6 (9th Cir. 2000); Duhaime v. Ducharme, 200 F.3d 597, 600-01 (9th Cir. 1999).

The AEDPA requires considerable deference to the ***state courts***. "[R]eview under § 2254(d)(1) is limited to the record that was before the ***state court*** that adjudicated the claim on the merits," and "evidence introduced in federal ***court*** has no bearing on 2254(d)(1) review." Cullen v. Pinholster, __ U.S. __, __, 131 S. Ct. 1388, 1398-99 (2011). "Factual determinations by ***state courts*** are presumed correct absent clear and convincing evidence to the contrary." Miller-El v. Cockrell, 537 U.S. 322, 340 (2003) (citing 28 U.S.C. § 2254(e)(1)). However, a ***state court*** factual finding is not entitled to deference if the relevant ***state court*** record is

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unavailable for the federal ***court*** to review. Townsend v. Sain, 372 U.S. 293, 319 (1963), overruled by Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992).

If a petitioner satisfies either subsection (1) or (2) for a claim, then the federal ***court*** considers that claim de novo. See Panetti, 551 U.S. at 953 (when section 2254(d) is satisfied,

"[a] federal ***court*** must then resolve the claim without the deference AEDPA otherwise requires."); Frantz v. Hazey, 533 F.3d 724, 737 (9th Cir. 2008).
In this case, many of Petitioner's claims were raised and rejected by the California

Supreme ***Court*** on direct appeal. However, many of his claims were raised in his ***state*** habeas

petition to the California Supreme ***Court***, and summarily denied on the merits. In such a case

where the ***state court*** decision is unaccompanied by an explanation, "the habeas petitioner's

burden still must be met by showing there was no reasonable basis for the ***state court*** to deny

relief." Richter, 562 U.S. at 98. The Supreme ***Court stated*** that "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 fair-minded jurists could disagree that those arguments or

theories are inconsistent with the holding in a prior decision of this ***Court***." Id. at 786 (emphasis

added). Petitioner bears "the burden to demonstrate that 'there was no reasonable basis for the ***state court*** to deny relief.'" Walker v. Martel, 709 F.3d 925, 939 (9th Cir. 2013) (quoting Richter, 562 U.S. at 98). "Crucially, this is not a de novo review of the constitutional question," id., as "even a strong case for relief does not mean the ***state court***'s contrary conclusion was unreasonable," Id. (quoting Richter, 562 U.S. at 102); (see also Murray v. Schriro, 745 F.3d 984, 996-97, (9th Cir. 2014)).

When reviewing the California Supreme ***Court***'s summary denial of a petition, this ***Court*** must consider that the California Supreme ***Court***'s summary denial of a habeas petition on the merits reflects that ***court***'s determination that:

> [T]he claims made in th[e] petition do not ***state*** a prima facie case entitling the petitioner to relief. It appears that the ***court*** generally assumes the allegations in the petition to be true, but does not accept wholly conclusory allegations, and will also review the record of the trial ... to assess the merits of the petitioner's claims.

Case 1:97-cv-06134-AWI-SAB Document 163 Filed 07/23/15 Page 13 of 213

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Pinholster, 131 S. Ct. at 402 n.12 (quoting In re Clark, 5 Cal. 4th 750, 770 (1993) (citing People v. Duvall, 9 Cal. 4th 464, 474 (1995)). Accordingly, if this ***Court*** finds Petitioner has unarguably presented a prima facie case for relief on a claim, the ***state court***'s summary rejection of that claim would be unreasonable. Taylor v. Maddox, 366 F.3d 992, 1000 (9th Cir. 2004); Nunes v. Mueller, 350 F.3d 1045, 1054-55 (9th Cir. 2003).

For any habeas claim that has not been adjudicated on the merits by the ***state court***, the federal ***court*** reviews the claim de novo without the deference usually accorded ***state courts*** under 28 U.S.C. § 2254(d)(1). Chaker v. Crogan, 428 F.3d 1215, 1221 (9th Cir.2005); Pirtle v. Morgan, 313 F.3d 1160, 1167 (9th Cir. 2002). In such instances, however, the provisions of 28 U.S.C. § 2254(e) still apply. Pinholster, 131 S. Ct at 1401 ("Section 2254(e)(2) continues to have force where § 2254(d)(1) does not bar federal habeas relief."); Pirtle, 313 F.3d at 1167–68 (***stating*** that ***state court*** findings of fact are presumed correct under § 2254(e)(1) even if legal review is de novo).

V.

PROCEDURAL BARS

All of Petitioner's claims have been raised to the California Supreme ***Court*** and denied on the merits. In addition, some of his claims were denied as procedurally barred. As to those claims, Respondent has argued that California's timeliness rule for ***state*** habeas petitions, California's rule barring claims on ***state*** habeas that could have been presented on direct appeal, and California's contemporaneous objection rule are all adequate and independent ***state*** grounds that bar federal habeas review. The ***Court*** will not address procedural default with this order because all of the claims lack merit, and the ***Court*** finds the question of procedural default to be relatively complicated in this case. See Franklin v. Johnson, 290 F.3d 1223, 1232 (9th Cir. 2002) (***Courts*** may reach the merits of a case prior to addressing procedural default); Bell v. Cone, 543 U.S. 447, 451 n.3 (2005); Loggins v. Thomas, 654 F.3d 1204, 1215 (11th Cir. 2011).

VI.

REVIEW OF CLAIMS

Case 1:97-cv-06134-AWI-SAB Document 163 Filed 07/23/15 Page 14 of 213

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A. Claims Relating to Conviction and Sentence

1. Sufficiency of the Evidence - Claims 1

3

and 3

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In claims 1 and 3, Petitioner ***states*** that he was convicted and sentenced for the first degree murders of Mr. Bocanegra and Mrs. Bocanegra on insufficient evidence that he acted with deliberation and premeditation, see People v. Anderson, 70 Cal.2d 15, 26-27 (1968), depriving him of due process under the Fourteenth Amendment.

a. Clearly Established Law

A federal habeas ***court*** reviews challenges to the sufficiency of the evidence by determining whether in "viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Lewis v. Jeffers, 497 U.S. 764, 781 (1990). "A reviewing ***court*** must consider all of the evidence admitted by the trial ***court***, regardless whether that evidence was admitted erroneously." McDaniel v. Brown, 558 U.S. 120, 131 (2010). Sufficiency of the evidence claims raised in §

2254 proceedings must be measured with reference to substantive requirements as defined by ***state*** law. Jackson v. Virginia, 443 U.S. 307, 324 n.16 (1979). In cases where the evidence is unclear or would support conflicting inferences, the federal ***court*** "must presume -- even if it does not affirmatively appear in the record -- that the trier of fact resolved any such conflict in favor of the prosecution, and must defer to that resolution." Id. at 326. To prevail here, Petitioner must show "that the prosecution's case against him "was so lacking that the trial ***court*** should have entered a judgment of acquittal." McDaniel, 558 U.S. at 131.

The AEDPA adds another layer of deference over the already deferential Jackson standard. Under the AEDPA, the federal ***court*** may not grant a habeas petition unless it finds that the ***state*** ***court*** unreasonably applied the principles underlying the Jackson standard when reviewing the petitioner's claim. See e.g., Juan H. v. Allen, 408 F.3d 1262, 1275 n.12 (9th Cir. 2005); Jones v. Wood, 114 F.3d 1002, 1013 (9th Cir. 1997) (en banc) (recognizing that "unreasonable application" standard applies to insufficient evidence claim). "Expressed more

3 The legal bases of the Fifth, Sixth and Eighth Amendments were stricken as unexhausted. ECF No. 60 at 8:25-26.

4 The legal bases of the Fifth, Sixth and Eighth Amendments were stricken as unexhausted. ECF No. 60 at 9:1-3.

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fully, this means a reviewing ***court*** faced with a record of historical facts that supports conflicting inferences must presume -- even if it does not affirmatively appear in the record -- that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution." McDaniel, 558 U.S. at 133.

Evidence is sufficient under the due process clause where "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson, 443 U.S. at 319; see also Payne v. Borg, 982 F.2d 335, 338 (9th Cir. 1992).

b. Review of Claims 1 and 3

The ***state*** supreme ***court***, on direct appeal, considered claimed insufficiency of the evidence and rejected Petitioner's claim of "wading into [the] fight" and being ineffectual in the assaults; finding instead that the evidence clearly reflects that defendant ***aided*** and abetted Joey in killing both Mr. Bocanegra and Mrs. Bocanegra, as follows:

> [S]ubstantial evidence supports the trial ***court***'s finding that Joey Bocanegra intended to kill his parents, that he premeditated and deliberated the murders, and that defendant can be found vicariously liable for the murders as an aider and abettor. As we have observed, an aider and abettor must act with knowledge of the criminal purpose of the perpetrator and with an intent either of committing, or of encouraging or facilitating commission of, the offense. [Citation] We have also recognized that if the aider and abettor undertakes acts "with the intent that the actual perpetrator's purpose be facilitated thereby, he is a principal and liable for the commission of the offense." [Citation] Thus, the basis of liability for the perpetrator applies to the aider and abettor and extends to "the natural and reasonable consequences of the acts he knowingly and intelligently ***aids*** and encourages." [Citation] As we explain, we conclude that defendant shared Joey's intent to kill, and in assisting Joey in committing the crimes, understood, and facilitated, the full extent of Joey's criminal purpose.
>
> Hernandez testified, and defendant admitted to Detective Stratton, that defendant initially waited outside while Joey entered his parents' house. Defendant then entered the house after ***hearing*** the sounds of a fight between Joey and Juan. Defendant told Hernandez that he went inside the house to break up the fight between Joey and his father, but the facts belie his ***stated*** intent. When defendant entered the house, he saw Joey fighting with his father. Rather than come to

Juan's ***aid***, defendant grabbed a curved metal bar and commenced beating Juan. Joey's actions, according to defendant's statements to prosecution witnesses, indicated that Joey deliberated over his father's killing. Joey initially struck Juan in the hallway and then, in the kitchen, obtained a knife that he used to stab Juan. In our view, Joey formed a clear intent to kill, at the latest, during the altercation with his father, and obtained a kitchen knife to carry out that plan. Our cases hold



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that planning activity occurring over a short period of time is sufficient to find premeditation. "'The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly ....'" [Citation]

There was also ample evidence of motive. The evidence supports a strong inference that Joey entered his parents' house to rob them. When his father

resisted the robbery, Joey was motivated to murder him in order to gain access to both money and tangible goods, including a television set. Substantial evidence supports a finding that Joey believed Juan stood in the way of his plan.

Finally, the trial ***court*** could infer from the evidence that the manner of killing tended to demonstrate Joey acted with premeditation and deliberation. The attack occurred in a series of rooms, indicating that Juan's repeated attempts to break away from his murderers were consistently thwarted by the attackers' relentless pursuit of him, even after he was gravely wounded. A rational finder of fact could infer that the manner of killing, when combined with Joey's retrieval of the knife in the kitchen, and defendant's retrieval of a metal bar used in clubbing a defenseless Juan, is sufficient to support the trier of fact's implied finding that Joey formed the plan to kill his parents during the altercation, located the murder weapon, and along with defendant, deliberately murdered his father. [Citation]

The same evidence supports the trial ***court***'s finding that defendant shared Joey's intent and plan to kill Juan, and thus was liable, as an aider and abettor, for Juan's murder. [Citation] The killing of Juan ended after a prolonged knife attack and beating from which Juan attempted to defend himself. Defendant's personal involvement in the murder was substantial. Far from merely acting as a lookout, or beating Juan after he was already dead, defendant was actively involved in assisting Joey in Juan's murder. Defendant's admitted act of arming himself with a curved metal bar before joining the altercation between Joey and Juan indicates he shared Joey's plan. [Citation] From this evidence, the trier of fact could reasonably infer defendant knowingly engaged or assisted in Juan's murder as an aider and abettor. [Citation]
As to Juanita's murder, defendant asserts the evidence similarly does not support the conviction. He claims that he “did not personally kill Juanita [because] she was stabbed to death by Joey.” He asserts that there is “no evidence in the record that [he] held Juanita down, helped push her back to the sewing room, or had any contact with her while Joey was stabbing her.” He contends that there is no

evidence to support the People's theory that defendant ***aided*** Joey by hitting Juanita with a bar and that “[t]here is simply no evidence that [his] initial

grabbing of Juanita actually ***aided***, or even was intended to ***aid***, Joey's subsequent stabbing of his mother.” Finally, defendant asserts in his reply brief that his “efforts to tie and gag Juanita are altogether inconsistent with an intent to kill her.”

Again, the evidence supports the ***court***'s verdicts and refutes defendant's contention. Hernandez testified defendant told him that during the murder of Juan, Juanita screamed. Defendant grabbed Juanita and told Joey to “shut her up.” Joey then stabbed his mother 26 times. A bloodstained garment was wrapped around Juanita's neck, and her wrists had been tied together with a piece of fabric. The

pathologist (Holloway) opined that Juanita died of the stab wounds and that the ligature constriction of her neck was a possible contributing cause. She also had severe scalp injuries that Holloway concluded were consistent with those inflicted



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by a long bar or pipe less than one-half inch in diameter, similar to the instrument used by defendant to inflict Juan's scalp wounds. The trial ***court*** could reasonably infer from the evidence that Juanita was killed in order to keep her from being a percipient witness to the murder of her husband. Thus, viewing the evidence in the light most favorable to the People, we conclude a “rational trier of fact” could have been persuaded “that the killing was the result of preexisting reflection and weighing of considerations rather than mere unconsidered or rash impulse.”

[Citation] Defendant's participation in Juanita's murder, like his ***aiding*** and

abetting in Juan's killing, clearly supports a finding that defendant ***aided*** and abetted her murder. [Citation]
Sanchez, 12 Cal.4th at 33-36.
Under California law, "[m]urder is the unlawful killing of a human being . . . with malice aforethought." Cal. Pen. Code § 187, subd. (a). "[A]ll murder which is perpetrated . . . by any kind of willful, deliberate, and premeditated killing . . . is murder of the first degree . . . ." Cal. Pen. Code § 189; see People v. Berryman, 6 Cal.4th 1048, 1085) (1993) (overruled on other grounds, People v. Hill, 17 Cal.4th 800, 822-23 (1998). Premeditation and deliberation are generally established by proof of (1) planning activity; (2) motive (established by a prior relationship and/or conduct with the victim); and (3) manner of killing. People v. Anderson, 70

Cal.2d 15, 26-27 (1968). The California Supreme ***Court*** "sustains verdicts of first degree murder typically when there is evidence of all three types and otherwise requires at least extremely strong evidence of (1) or evidence of (2) in conjunction with either (1) or (3)." Id., at 27.

A person "***aids*** and abets the commission of a crime when he or she, acting with (1) knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose of

committing, encouraging, or facilitating the commission of the offense, (3) by act or advice ***aids***, promotes, encourages or instigates, the commission of the crime." People v. Beeman, 35 Cal.3d 547, 561 (1984).

The ***state court*** could reasonably have concluded that the fight with Mr. Bocanegra resulted from pursuit of the joint motive of Joey and Petitioner to obtain money from Mr.

Bocanegra, the ***stated*** reason for their going to the Bocanegra home. (See Clerk's Transcript on Appeal, hereinafter "CT", 502-504.) After the murders, in furtherance of this motive, Petitioner assisted Joey in removing property from the Bocanegra home (CT 484.) Some of this property

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was later found in Petitioner's room, or sold by him. (Reporter's Transcript on Appeal, hereinafter "RT", 25-29, 35-37, 67-69.)

Petitioner disclaims premeditation and deliberation in the murders, claiming Joey, and by extension Petitioner, acted rashly and on impulse. But the extended nature and duration of the struggles with Mr. Bocanegra and Mrs. Bocanegra, with Joey taking time to get a kitchen knife (CT 504; RT 2854), and Petitioner attempting to subdue and restrain each of the victims during Joey's assault on them, seeing Joey stab them, along with the multiple stab and blunt force wounds inflicted during room to room struggle with the victims, could reasonably suggest a plan to kill them. (CT112-120; 149-153; 181; 192-194; 357-383; 479-483; 488.) Each victim suffered multiple stab wounds, Mrs. Bocanegra was stabbed at least 26 times and had 6 scalp wounds and Mr. Bocanegra was stabbed at least eight times and had nine scalp wounds. (Id.) Both victims were left unassisted to bleed to death. (CT 112-114, 117-119.) There was evidence Mrs. Bocanegra's wrists had been tied together and that she had been gagged. (CT 113, 149-150, 153.) Jailhouse informant Hernandez consistently testified Petitioner told him that when fighting broke out between Joey and Mr. Bocanegra (CT 479-505), in the hallway (id.; RT 2843, 2852-2853), Petitioner responded by hitting Mr. Bocanegra on the head nine times with a curved bar (CT 479-505; CT 112-114; 117-119), that when Mrs. Bocanegra came out of a back bedroom and started yelling Petitioner grabbed her and told Joey to "shut her up." (CT 483, 488, 504.) Petitioner's claim that it was Joey who stabbed his parents to death (CT 488; RT 121-122), does not undermine evidence above that Petitioner ***aided*** and abetted Joey to that end.

The physical evidence is consistent with Hernandez's testimony. The evidentiary record reasonably suggests that Mr. Bocanegra was initially assaulted in the hallway and then murdered in the kitchen (CT 355-381). The coroner, Dr. Holloway, opined Mr. Bocanegra died from multiple stab wounds and that other conditions were the multiple blunt force trauma wounds to Mr. Bocanegra's head (CT 117-119); that Mrs. Bocanegra died from multiple stab wounds and had six wounds to her scalp (CT 112-115;, 153-154); that the scalp wounds were caused by an instrument different from that used to inflict the stab wounds; and that ligature construction was


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a possible contributing cause. (CT 112-119.)

Both at the preliminary ***hearing*** and the penalty phase, Hernandez testified that Petitioner struck Mr. Bocanegra with a bar (CT 479-482, 500-501, RT 2843-2844, 2854), and that he grabbed or "rushed" Mrs. Bocanegra, a witness to Mr. Bocanegra's murder (id.; RT 153, 189) and told Joey to "shut her up" (CT 483, 504; RT 2844). Hernandez testimony that the altercation between Mr. Bocanegra and Joey started in the hallway and moved to the kitchen is consistent with the bloodstain pattern evidence, (CT 355-383; 479, 487-488, 500-501; RT 2843-2845) and other crime scene evidence. (Id.) Petitioner's claim that a third person, Robert Reyes ("Reyes"), was in the house during the murders and may have ***aided*** Joey in the murders, is not substantially supported by the evidentiary record. (Id.; CT 131-133)

Petitioner attempts to discount testimony that he intended to rob the Bocanegras prior to their murder. Petitioner correctly notes that the trial ***court*** did not find him guilty of robbing the Bocanegras and found the robbery-murder special circumstance untrue on grounds Petitioner's

intent to rob arose after the murders. (CT 906; RT 235-237.) Even so, Petitioner has not controverted evidence that he used a metal bar during the murders. (CT 479-482, 500-501, RT 2843-2844, 2854RT 236). The trial ***court*** rejected Hernandez testimony, favorable to Petitioner, that Petitioner merely grabbed Mrs. Bocanegra. (CT 483.)

No facts or discrepancies between the testimony and the physical evidence establish or compel the conclusion that Hernandez, by virtue of his alleged substance addiction, his ***plea*** deal, or otherwise, was motivated to and did testify falsely or inaccurately. For reasons discussed in claim 7, the ***state court*** could reasonably have found Hernandez received no undisclosed sentence concession in return for his testimony. (***State*** Habeas Corpus Petition, hereinafter "SHCP", Ex. 900, pp. 4, 11; ***State Court*** Response to Petition, hereinafter "SResp.", Ex. B.)

The ***state court*** could reasonably conclude that Petitioner, sharing Joey's motive of obtaining money from Mr. Bocanegra, took Joey's side in the struggles with Mr. Bocanegra and Mrs. Bocanegra, verbally assisting and encouraging him and physically restraining and assaulting both victims. Petitioner's statements to Hernandez, Detective Stratton and reporter

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Trihey, and the physical evidence in the Bocanegra home are evidence of his guilt. Any inconsistencies in Hernandez's preliminary ***hearing*** testimony and his penalty phase testimony are not substantially material or probative of and do not preclude the possibility of his guilt and sentence to death.

Moreover, Petitioner inculpated himself in the murders. He asked Bakersfield detective Stratton "what if [he] was present at the Bocanegra home during the murders." (CT 77-78). He told newspaper reporter Trihey he was a "triple murderer." (RT 16-18.)

A rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt based on the evidence in the record. The ***state court***'s denial of these claims was not contrary to, or an unreasonable application of, clearly established federal law, or 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); Jackson, 443 U.S. at 319.

Claims 1 and 3 are denied.5

2. Actual Innocence - Claims 2 and 4

In claims 2 and 4, Petitioner claims actual innocence of the first degree murders of Mr. Bocanegra and Mrs. Bocanegra based on evidence existing before trial and later discovered evidence, such that his conviction and sentence represent a fundamental miscarriage of justice violating the Fifth, Sixth, Eighth and Fourteenth Amendments.

a. Clearly Established Law

i. Actual Innocence

The showing required for a free standing claim of actual innocence, i.e., a claim irrespective of constitutional error at trial or sentencing, is "extraordinarily high" and must be "truly persuasive." Herrera v. Collins, 506 U.S. 390, 417, (1993). To carry this burden Petitioner must affirmatively prove he is innocent. See Carriger v. Stewart, 132 F.3d 463, 476-77 (9th Cir. 1997).

5 Reyes pled guilty to first degree murder in the three homicides and to the robberies of Tatman and the Bocanegras and was sentenced to three consecutive terms of 25 years to life. People v. Robert Gabriel Reyes, Kern County Superior ***Court*** Case No. 34638. Charges against Joey Bocanegra were dismissed for insufficient evidence. People v. Jose Juan Bocanegra, Kern County Superior ***Court*** Case No. 34638.



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In Schlup v. Delo, 513 U.S. 298 (1995) the Supreme ***Court*** reached actual innocence as a gateway claim to consideration of otherwise barred Constitutional claims. “If a habeas petitioner . . . presents evidence of innocence so strong that a ***court*** cannot have confidence in the outcome of the trial unless the ***court*** is also satisfied that the trial was free of non-harmless constitutional error, the petitioner should be allowed to pass through the gateway and argue the merits of his underlying claims.” Schlup at 316. The Schlup ***court*** held that the proper standard is that a procedurally defaulted petitioner must show that a constitutional violation has probably resulted in the conviction of one who is actually innocent. Schlup at 326.
“The petitioner must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence.” Schlup at 327. Petitioner’s burden is to demonstrate that more likely than not, any reasonable juror would have reasonable doubt. House v. Bell, 547 U.S. 518, 538 (2006). See Sawyer v. Whitley, 505 U.S. 333, 346 (1992) (holding that in order to prove actual innocence, petitioner must show fair probability that rational trier of fact would have entertained reasonable doubt regarding the existence of facts which are prerequisites under ***state*** or federal law for imposition of the death penalty).

ii. ***State*** Law Aider/Abettor

California law requires an aider and abettor to share the specific intent of the perpetrator. Beeman, 35 Cal.3d at 560. An aider and abettor shares the perpetrator's specific intent by

knowing the full extent of the perpetrator's criminal purpose and giving ***aid*** or encouragement with the intent or purpose of facilitating the commission of the crime. Id. California's 1978 death penalty statute requires finding an independent intent to kill as part of the special circumstance for an aider or abettor of felony-murder. People v. Anderson, 43 Cal. 3d 1104, 1141-42 (1987). This is consistent with the Eighth Amendment which prohibits the death penalty for an aider and abettor of felony murder who does not actually kill, attempt to kill, intend that a killing or lethal force occur, or act with reckless indifference to human life. Enmund v. Florida, 458 U.S. 782, 797 (1982); Tison v. Arizona, 481 U.S. 137, 157-58 (1987).

Federal ***court*** review of instructional error under Beeman is subject to the standard from Brecht,

507 U.S. at 637, whether the error had a substantial or injurious effect on the verdict.

b. Review of Claims 2 and 4

The California Supreme ***Court*** denied these claims as raised in Petitioner's ***state*** petition for habeas corpus (***State*** Petition for Habeas Corpus, hereinafter "SHCP" or "SPet.", Claims A & B), to the extent they duplicated sufficiency of evidence claims rejected on appeal.

To the extent Petitioner's actual innocence claims are free standing claims based on the ***state*** record, they fail for the reasons ***stated*** in claims 1 and 3. To the extent these claims are free standing claims based on alleged newly discovered evidence, the claims not cognizable (see Herrera, 506 U.S. at 400) (the Supreme ***Court*** held that free standing claims of "actual innocence based on newly discovered evidence have never been held to ***state*** a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying ***state*** criminal proceeding.").

The actual innocence claims also fail as gateway claims because it is not likely any reasonable juror would have reasonable doubt that the essential elements of the criminal counts could have been found beyond a reasonable doubt. Petitioner's statements to jailhouse informant Hernandez, Detective Stratton and reporter Trihey, and the physical evidence in the Bocanegra home all are substantial evidence of his guilt.

Hernandez's testimony at both preliminary ***hearing*** and penalty phase that the altercation between Mr. Bocanegra and Joey started in the hallway and moved to the kitchen is consistent with the bloodstain evidence. (CT 355-383; 479, 487-488, 500-501; RT 2843-2845) and other crime scene evidence. (CT 355-380.) His preliminary ***hearing*** testimony that Petitioner ***heard*** Joey and Mr. Bocanegra arguing, "walked into the house, tried to break 'em up" (CT 479) and that he (Petitioner) hit Mr. Bocanegra with the bar is not materially inconsistent with Hernandez's penalty phase testimony that Petitioner grabbed and held Mr. Bocanegra until Joey got the knife and that Petitioner beat Mr. Bocanegra with a bar.

Hernandez testimony at the preliminary ***hearing*** and the penalty phase was consistent that during Joey's struggles with Mr. Bocanegra, Petitioner struck Mr. Bocanegra with a bar (CT

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479-482, 500-501, RT 2843-2844, 2854), and that he grabbed or "rushed" Mrs. Bocanegra and told Joey to "shut her up" during his struggles with Mrs. Bocanegra (CT 483, 504; RT 2844). Petitioner saw Joey wield a knife during these assaults. (CT 483, 487-489, 504; SPet. Ex. 419, 5, 17; RT 121-122.) Mr. Bocanegra and Mrs. Bocanegra succumbed to the multiple stab wounds. (CT 112-119.)

As to the Tatman homicide, Hernandez's preliminary ***hearing*** testimony that Petitioner and Joey "hit a black guy in an alley" (CT 488, 497-99) is not, as Petitioner alleges, inconsistent with penalty phase testimony that Petitioner and two other men entered Mr. Tatman's room at the Bakersfield Inn, and beat him, and the other two stabbed Mr. Tatman with a screwdriver, and that they took Mr. Tatman's money. There is no evidence Hernandez's testimony at the

preliminary ***hearing*** related to the same incident he testified to at the penalty phase. Petitioner's assertion that there were actually 3 non-victim shoeprints in the kitchen where Mr. Bocanegra was murdered, so as to implicate Reyes in the Bocanegra murders is not

sufficiently supported in the record. As discussed in claims 8 and 10, post, the ***state court*** could reasonably have found that the bloodstain evidence and testimony of Hernandez contradicts jailhouse informant Seeley's account that Petitioner observed Mr. Bocanegra's murder from the hallway.

No facts or discrepancies between the testimony and the physical evidence establish or

compel the conclusion that Hernandez, by virtue of his alleged substance addiction, his ***plea*** deal, or otherwise, was motivated to and did testify falsely or inaccurately. (See claim 7, ante.) Petitioner has not demonstrated Hernandez received undisclosed sentence concession(s). (SPet.

Ex. 900, pp. 4, 11; SResp. Ex. B.)

In contrast, the testimony of jailhouse informant Seeley inculpating Reyes in the murders, is inconsistent with the physical evidence. Seeley's testimony that the altercation with Mr. Bocanegra started and ended in the kitchen (SPet. Ex. 419, pp.5-6, 17-20) is not reasonably consistent with the blood stain patterns that suggest the assault on Mr. Bocanegra began in the hallway. (CT 355-383.)

Case 1:97-cv-06134-AWI-SAB Document 163 Filed 07/23/15 Page 24 of 213

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The physical evidence, Petitioner's statements to Detective Stratton, and Petitioner's statements to Reporter Trihey are not persuasive of actual innocence for the reasons discussed in claims 10, 12, 15 and 27, post.

Petitioner alleges his severe neurological and psychiatric impairments precluded him from planning the murder and carrying out the plan. But as explained in claim 6, there is no sufficient evidence that Petitioner suffered from neurological or psychiatric impairment

precluding, as an aider and abettor, his knowingly and intentionally assisting Joey in the Bocanegra murders.

Finally, Petitioner's assertion that he merely restrained Mrs. Bocanegra is nonetheless sufficient to support a first degree murder conviction as an aider and abettor, especially given that Petitioner had just observed Joey stab his father to death. (CT 483; RT 2843-2854.) It could reasonably be concluded that Petitioner's restraining Mrs. Bocanegra just after Mr. Bocanegra's murder satisfied the requirement that an aider or abettor knows the full extent of the perpetrator's criminal purpose and gives ***aid*** to facilitate the commission of the crime. Beeman, 35 Cal. 3d at 560.

For the reasons ***stated***, a fair-minded jurist could conclude it unlikely any reasonable juror would have reasonable doubt that the essential elements of the criminal counts against Petitioner could have been found beyond a reasonable doubt.

The California Supreme ***Court***'s denial of these claims was not contrary to, or an unreasonable application of, clearly established federal law, or based on an unreasonable determination of the facts in light of the evidence presented in the ***state court*** proceeding. See 28 U.S.C. § 2254(d).

Claims 2 and 4 are denied.

3. ***State*** Appellate Error - Claim 5

In this claim Petitioner alleges that the California Supreme ***Court*** committed appellate review error by making an unconstitutional change in the definition of first degree murder (Cal. Pen. Code 189) violating the Fifth, Sixth, Eighth and Fourteenth Amendments.

Case 1:97-cv-06134-AWI-SAB Document 163 Filed 07/23/15 Page 25 of 213

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a. Clearly Established Law

A defendant has a due process right to fair notice of the elements of the crime for which he was convicted. Bouie v. City of Columbia, 378 U.S. 347, 352 (1964).

A ***state***'s capital punishment scheme must "minimize the risk of wholly arbitrary and capricious action." Gregg v. Georgia, 428 U.S. 153, 189 (1976).
Absent specific constitutional error, federal habeas review is limited to determining

whether the ***state*** supreme ***court***'s statutory review was "so arbitrary and capricious as to constitute an independent due process or Eighth Amendment violation." Lewis v. Jeffers, 497 U.S. 764, 780 (1990), citing Donnelly v. DeChristoforo, 416 U.S. 637, 642-43 (1974) (absent a specific constitutional violation, federal habeas review of trial error is limited to whether the error "so infected the trial with unfairness as to make the resulting conviction a denial of due

process). The essential function of ***state*** appellate ***court*** jurisdiction is to ensure "evenhanded, rational, and consistent imposition of death sentences under law." Campbell v. Blodgett, 997 F.2d 512, 522 at n.12 (9th Cir. 1992), citing Pulley v. Harris, 465 U.S. 37, 45 (1984).

b. Review of Claim 5

Petitioner contends that the ***state*** supreme ***court*** retroactively eliminated the distinction between intentional first and second degree murders. He reasons this is so because, prior to his appeal, California law required that premeditated and deliberated first degree murder be shown to be the "result of careful thought and weighing of considerations," and that conversely "a sudden killing in the course of an argument and struggle" would not be premeditated and deliberated murder. See People v. Lasko, 23 Cal.4th 101, 104 (2000); see Anderson, 70 Cal. 2d

at 26-27 (***stating*** types of evidence which might support a finding of premeditation and

deliberation). Yet here, he claims, the trial ***court*** found the murder of Mr. Bocanegra satisfied the premeditation and deliberation standard even though the killer formed the intent to kill during the fatal altercation and killed with a weapon found at hand. Petitioner alleges there was no evidence of planning activity, no evidence of a preexisting motive, and that multiple stab wounds alone are insufficient to prove premeditation and deliberation. See People v. Caldwell, 43 Cal.


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2d 864, 869 (1955).

The ***state*** supreme ***court*** denied this claim when raised in "supplement to existing habeas corpus petition" (claim ZZ), In re Sanchez, S049502, (DD), because that ***court*** found substantial evidence that Joey intended to kill his parents and that Petitioner could be found vicariously liable for these murders as an aider and abettor, as follows:

> Joey's actions, according to defendant's statements to prosecution witnesses, indicated that Joey deliberated over his father's killing. Joey initially struck Juan in the hallway and then, in the kitchen, obtained a knife that he used to stab Juan. In our view, Joey formed a clear intent to kill, at the latest, during the altercation with his father, and obtained a kitchen knife to carry out that plan. Our cases hold that planning activity occurring over a short period of time is sufficient to find premeditation. "The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold,

calculated judgment may be arrived at quickly . . . .” [Citation]
There was also ample evidence of motive. The evidence supports a strong inference that Joey entered his parents' house to rob them. When his father resisted the robbery, Joey was motivated to murder him in order to gain access to both money and tangible goods, including a television set. Substantial evidence supports a finding that Joey believed Juan stood in the way of his plan.

Finally, the trial ***court*** could infer from the evidence that the manner of killing tended to demonstrate Joey acted with premeditation and deliberation. The attack occurred in a series of rooms, indicating that Juan's repeated attempts to break away from his murderers were consistently thwarted by the attackers' relentless pursuit of him, even after he was gravely wounded. A rational finder of fact could infer that the manner of killing, when combined with Joey's retrieval of the knife in the kitchen, and defendant's retrieval of a metal bar used in clubbing a defenseless Juan, is sufficient to support the trier of fact's implied finding that Joey formed the plan to kill his parents during the altercation, located the murder weapon, and along with defendant, deliberately murdered his father. [Citation]

The same evidence supports the trial ***court***'s finding that defendant shared Joey's intent and plan to kill Juan, and thus was liable, as an aider and abettor, for Juan's murder. [Citation] The killing of Juan ended after a prolonged knife attack and beating from which Juan attempted to defend himself. Defendant's personal involvement in the murder was substantial. Far from merely acting as a lookout, or beating Juan after he was already dead, defendant was actively involved in assisting Joey in Juan's murder. Defendant's admitted act of arming himself with a curved metal bar before joining the altercation between Joey and Juan indicates he shared Joey's plan. [Citation] From this evidence, the trier of fact could reasonably infer defendant knowingly engaged or assisted in Juan's murder as an aider and abettor.
Sanchez, 12 Cal.4th at 33-34.

The ***Court*** finds that, contrary to Petitioner assertion, and for the reasons discussed in

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claims 1-4, the ***state court***'s analysis could reasonably rely upon evidence before it of a preexisting motive to obtain money from Mr. Bocanegra, involving a joint criminal design of

multiple and prolonged stab wounds, ***aided*** and abetted by Petitioner's participation with the metal bar, sufficient to find premeditation and deliberation both by Joey and Petitioner. Id.

Given the ***state court***'s analysis and the record, there appears to be no risk of arbitrary and capricious verdict.

This ***Court*** does not find the ***state court*** rejection of the claim was contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme

***Court***, or that the ***state court***'s ruling was based on an unreasonable determination of the facts in

light of the evidence presented in the ***state court*** proceeding, viewed most favoring the prosecution, Jackson, 443 U.S. at 319. See 28 U.S.C. § 2254(d); Lewis, 497 U.S. at 780 (absent

a specific constitutional error, federal habeas review is limited to determining whether the ***state***

Supreme ***Court***'s performance of its statutory review was "so arbitrary and capricious as to constitute an independent due process or Eighth Amendment violation.")

Claim 5 is denied.

4. Ineffective Assistance of Counsel in Guilt And Special Circumstance Phase - Claims 6 through 18

In claims 6 through 18, Petitioner alleges various instances during the guilt and special circumstance phase where defense counsel provided ineffective assistance.

Eugene Toton ("Toton") was appointed as lead defense counsel. Gary Frank ("Frank") was appointed as defense co-counsel. By their agreement, Toton was responsible for the guilt

and special circumstance phase and Frank was responsible for the penalty phase. (SHCP Exhs.

113, ¶ 4; 137, ¶ 3.) The record before the ***state court*** does not demonstrate that defense attorney Frank performed any substantial defense function during the guilty and special circumstance phase.

a. Clearly Established Law

The Sixth Amendment right to effective assistance of counsel, applicable to the ***states***

Case 1:97-cv-06134-AWI-SAB Document 163 Filed 07/23/15 Page 28 of 213

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through the Due Process Clause of the Fourteenth Amendment, applies through the sentencing phase of a trial. See Murray, 745 F.3d at 1010-11: U.S. Const. amend. VI; U.S. Const. amend. XIV, § 1; Gideon v. Wainwright, 372 U.S. 335, 343–45 (1963); Silva v. Woodford, 279 F.3d 825, 836 (9th Cir. 2002).

The Supreme ***Court*** explained the legal standard for assessing a claim of ineffective

assistance of counsel in Strickland v. Washington, 466 U.S. 668, 685–87 (1984). Strickland propounded a two prong test for analysis of claims of ineffective assistance of counsel. First, the petitioner must show that counsel's performance was deficient, requiring a showing that counsel made errors so serious that he or she was not functioning as the “counsel” guaranteed by the Sixth Amendment. Strickland, 466 U.S. at 687. The petitioner must show that “counsel's representation fell below an objective standard of reasonableness,” and must identify counsel’s alleged acts or omissions that were not the result of reasonable professional judgment considering the circumstances. Richter, 562 U.S. at 104 (citing Strickland, 466 U.S. at 688);

United ***States*** v. Quintero-Barraza, 78 F.3d 1344, 1348 (9th Cir. 1995).
Petitioner must show that counsel's errors were so egregious as to deprive defendant of a fair trial, one whose result is reliable. Strickland, 466 U.S. at 688. Judicial scrutiny of counsel's

performance is highly deferential, and the habeas ***court*** must guard against the temptation “to second-guess counsel’s assistance after conviction or adverse sentence.” Id. at 689. Instead, the

habeas ***court*** must make every effort “to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from

counsel’s perspective at the time.” Id.; see also Richter, 562 U.S. at 107. A ***court*** indulges a “‘strong presumption’ that counsel's representation was within the ‘wide range’ of reasonable professional assistance.” Richter, 562 U.S. at 104 (quoting Strickland, 466 U.S. at 687); Sanders v. Ratelle, 21 F.3d 1446, 1456 (9th Cir. 1994). This presumption of reasonableness means that not only do we “give the attorneys the benefit of the doubt,” we must also “affirmatively entertain the range of possible reasons [defense] counsel may have had for proceeding as they did.” Pinholster, 131 S. Ct. at 1407.
Case 1:97-cv-06134-AWI-SAB Document 163 Filed 07/23/15 Page 29 of 213

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The Supreme ***Court*** has "declined to articulate specific guidelines for appropriate attorney conduct and instead ha[s] emphasized that '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" Wiggins v. Smith, 539 U.S. 510, 521 (2003) (quoting Strickland, 466 U.S. at 688). However, "general

principles have emerged regarding the duties of criminal defense attorneys that inform [a ***court***'s]

view as to the 'objective standard of reasonableness' by which [a ***court*** must] assess attorney performance, particularly with respect to the duty to investigate." Summerlin v. Schriro, 427 F.3d 623, 629 (9th Cir. 2005). "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." Strickland, 466 U.S. at 690. However, strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, 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 the circumstances, applying a heavy measure of deference to counsel's judgment. Wiggins, 539 U.S. at 521 (quoting Strickland, 466 U.S. at 690–91); see also Thomas v. Chappell, 678 F.3d 1086, 1104 (9th Cir. 2012) (counsel's decision not to call a witness can only be considered tactical if he had "sufficient information with which to make an informed decision"); Reynoso v. Giurbino, 462 F.3d 1099, 1112–1115 (9th Cir. 2006) (counsel's failure to cross-examine witnesses about their knowledge of reward money cannot be considered strategic where counsel did not investigate this avenue of impeachment); Jennings v. Woodford, 290 F.3d 1006, 1016 (9th Cir. 2002) (counsel's choice of alibi defense and rejection of mental health defense not reasonable strategy where counsel failed to investigate possible mental defenses).
Second, the petitioner must demonstrate prejudice, that is, he must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result . . . would have been different." Strickland, 466 U.S. at 694. "It is not enough 'to show that the errors had some conceivable effect on the outcome of the proceeding.'" Richter, 562 U.S. at 104 (quoting

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Strickland, 466 U.S. at 693). "Counsel's errors must be 'so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.'" Id. (quoting Strickland, 466 U.S. at 687). Under this standard, we ask "whether it is 'reasonably likely' the result would have been different." Richter, 562 U.S. at 111 (quoting Strickland, 466 U.S. at 696).

That is, only when "[t]he likelihood of a different result [is] substantial, not just conceivable," id., has the defendant met Strickland's demand that defense errors were "so serious as to deprive the defendant of a fair trial." Id., at 104 (quoting Strickland, 466 U.S. at 687). A

***court*** need not determine whether counsel's performance was deficient before examining the prejudice suffered by the petitioner as a result of the alleged deficiencies. Strickland, 466 U.S. at 697. Since the defendant must affirmatively prove prejudice, any deficiency that does not result in prejudice must necessarily fail.

Under the AEDPA, the ***Court*** does not apply Strickland de novo. Rather, the ***Court*** must

determine whether the ***state court***'s application of Strickland was unreasonable. Richter, 562

U.S. at 99-100. Establishing that a ***state court***'s application of Strickland was unreasonable under 28 U.S.C. § 2254(d) is very difficult. Richter, 562 U.S. at 100. Since the standards created by Strickland and § 2254(d) are both "highly deferential" when the two are applied in tandem, review is "doubly" so. Richter, 562 U.S. at 105 (quoting Knowles v. Mirzayance, 556

U.S. 111, 123 (2009)). Further, because the Strickland rule is a "general" one, ***courts*** have "more leeway . . . in reaching outcomes in case-by-case determinations" and the "range of reasonable applications is substantial." Id. at 101; Premo v. Moore, 562 U.S. 115, 127 (2011).
If the petitioner makes an insufficient showing as to either one of the two Strickland

components, the reviewing ***court*** need not address the other component. Strickland, 466 U.S. at 697.
b. Review of Claim 6
In this claim, Petitioner alleges ineffective assistance of counsel by failure to investigate

and present evidence of mental ***state*** defenses, violating his Fifth, Sixth, Eighth and Fourteenth Amendment rights.
Case 1:97-cv-06134-AWI-SAB Document 163 Filed 07/23/15 Page 31 of 213
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Petitioner raised this claim in his ***state*** petition for habeas corpus. (SPet. claim C.) The California Supreme ***Court*** summarily denied the claim in a decision unaccompanied by explanation. In re Sanchez, S049502 (DD.) In such a case where the ***state court*** denied Petitioner's ***state*** petition for habeas corpus without an explanation, "the habeas petitioner's burden still must be met by showing there was no reasonable basis for the ***state court*** to deny relief," Richter, 562 U.S. at 98, and this ***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 fair-minded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this ***Court***." Id. (emphasis added).

Petitioner contends that a reasonable investigation would have revealed his organic brain difficulties and psychiatric impairments relating to childhood abuse and trauma and deprivations and his long history of substance abuse. During the week prior to the homicides, Petitioner alleges he drank alcohol and smoked PCP continually and in large amounts, triggering a posttraumatic stress reaction, precluding his forming an intent to kill and premeditation and deliberation during the Bocanegra homicides. He claims his substance abuse led to long-term brain dysfunction. (SHCP Ex. 114, ¶¶ 67-70.)

The evidence proffered by Petitioner suggests chronic substance abuse beginning as early as 1977. (SPet. Exhs. 105, pp. 64-65, 74-75; 110, p. 1; 119, p. 8; 123, p. 1; and 128,at pp. 1-2.) Petitioner offers evidence that he engaged in substance abuse during the weeks prior to the murders. (SPet. Ex. 105, pp. 85-87.) However, Respondent correctly notes the absence of competent evidence that Petitioner ingested and/or was under the influence of phencyclidine, marijuana, or alcohol on the days the Bocanegra and Tatman murders occurred. Based on the record before it, the ***state court*** could reasonably have found that Petitioner was not under the influence of phencyclidine (PCP), marijuana, or alcohol at the time of the Bocanegra and Tatman murders.

The ***state court*** could have reasonably concluded that Petitioner' statements to jailhouse informant Hernandez (CT 479-484, 487-489, 495, 500-505), detective Stratton (CT 77-78), and



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reporter Trihey (RT 16-20; 175-181; SPet. Exhs. 700-701) demonstrated Petitioner's intentional and deliberate ***aiding*** and abetting of Joey in the Bocanegra murders. This being the case, a tactical decision not to investigate and present such a defense could be reasonable where evidence is lacking, or it could go toward aggravation. See Strickland, 466 U.S. at 690-91. Post-offenses jail records and medications Petitioner allegedly was given while incarcerated (SHCP Exhs. 601, 602) do not show his emotional and mental ***state*** at the time of the crimes.

Defense psychologist Donaldson, who evaluated Petitioner in May 1987, found that although there were indications of organic difficulties in perceptual motor integration, Petitioner was of average intelligence. Specifically, Donaldson ***stated*** that:

> There were no indications through the testing of deficits in reality testing, nor of a thought disorder of any kind. There were no indications of significant anxiety or depression. In spite of his socially and educationally deprived background . . . Mr. Petitioner is a highly sociopathic individual.

(SPet. Ex. 106, pp. 1-2.)

Petitioner claims effective counsel would have been aware of the evidence showing serious mental problems and would have investigated this evidence. He points to a 1995 neuropsychological evaluation by psychologist Froming finding severe diffuse organic brain damage and localized brain dysfunction. (SHCP Ex. 114, ¶¶ 39-60.) He points to post-offense

jail records which showed continuing mental problems including paranoia, depression, stress, insomnia, inability to eat and a suicide attempt, and that he was given medication for these conditions. He also notes his 1995 evaluation by defense psychiatrist, Dr. Foster, finding depression, mental impairment and post-traumatic stress disorders from childhood trauma and deprivation of basic necessities, exacerbated by substance abuse, all possibly extending back to the time of the instant homicides. (SHCP Ex. 111, ¶¶ 16-17, 20-23, 79-95.) He alleges defense counsel missed this opportunity to show lack of premeditation and deliberation, and also mistakenly believed voluntary intoxication would be no defense to felony murder. He further alleges that his impairments made him more likely to follow counsel's advice to waive a full



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defense and also affected his ability to understand the consequences of doing so.

Respondent views these allegations as speculation. Respondent contends that Petitioner's statements to reporter Trihey did not necessarily imply that Petitioner believed his dead mother

was alive. Respondent contends that Hernandez's observation that Petitioner was suicidal is mere conjecture. Respondent contends that the 1995 opinions of psychiatrist Foster and psychologist Froming of a high probability of mental disorders and impairments at the time of the crimes and subsequent trial are likewise speculation and surmise.

This ***Court*** agrees that Petitioner's proffer is not sufficient evidence of mental impairment at the time of the murders and subsequent trial. As discussed in claims 1-4, ante, the substantial evidence shows Petitioner knowingly and intentionally assisted Joey in the Bocanegra murders and confessed the same to reporter Trihey. Significantly, Petitioner told detective Boggs of his involvement in the Tatman murder (CT 288-320) and acknowledged that "he was going to prison for the rest of his life anyway" for his role in the Bocanegra murders. (CT 314.)

The ***Court*** does not find post-custody psychological and psychiatric reports sufficient evidence that, at the time of the crimes and trial thereon, Petitioner suffered neurological or psychological impairments. Significantly, there is no evidence defense psychiatrist Donaldson recommended to Toton that a neuropsychological evaluation be performed. Psychiatrist

Matychowiak, following his November 1987 ***court***-ordered examination, found that Petitioner was not suicidal or delusional or suffering memory gaps (SPet. Ex. 520, p. 5); that Petitioner planned to tell the judge he was guilty (id. at 2); and that Petitioner understood the proceedings and could cooperate with counsel. (Id. at 6.) Petitioner told Matychowiak that he planned to tell the jury he was guilty and "get it over with." (SPet. Ex. 520, p. 2.) Dr. Matychowiak found Petitioner competent to stand trial.

Additionally, Petitioner cannot establish prejudice from defense counsel's alleged ineffectiveness because a change in the outcome had mental defenses been further investigated and presented is not reasonably likely given the substantial evidence against him and his

expressed desire to plead guilty. That is, mental ***state*** defenses would not have been sufficient to

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undermine confidence in the trial outcome. See U.S. v. Lewis, 786 F.2d 1278, 1283 (5th Cir. 1986). Defense psychologist Donaldson found Petitioner to be of average intelligence and though there were indications in perceptual motor integration, no deficits in reality testing or thought disorder was detected. (SPet. Ex. 106, p.2.) ***Court*** appointed psychiatrist Matychowiak came to essentially the same conclusions. (SPet. Ex. 520, p.1; CT 646.) Toton could reasonably have believed Donaldson's negative findings were not relevant at the guilt and special circumstance phase. (SPet. Ex. 137, p. 2.)

Petitioner never alleged during trial proceedings that he was mentally impaired or that he did not knowingly participate in the homicides. Rather he admitted his knowing participation to reporter Trihey (RT 181; see SPet. Exhs. 700-701), detective Stratton (CT 77-78) and informant Hernandez (CT 479-484, 487-489). Such a defense was contrary to Petitioner's ***stated*** desire to plead guilty to the Bocanegra murders (SPet. Ex. 520, pp. 2-4) and "dying for his crimes but dying with a clear conscience" (SPet. Ex. 700). In fact, Petitioner proceeded to waive jury trial on the guilt and special circumstances phase and submit on the preliminary ***hearing*** transcript and testimony of additional prosecution witnesses. (See Sanchez, 12 Cal.4th at 23-30.) The evidence does not suggest a reasonable probability that Petitioner would have agreed to go forward on a mental defense, or that if he had, it would have been successful given his incriminating statements.

For the reasons ***stated***, a fair-minded jurist could have found that Petitioner failed to establish that defense counsel's performance fell below an objective standard of reasonableness and that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland, 466 U.S., at 687-694.

It does not appear that the ***state court*** rejection of the claim was contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme ***Court***, or that the ***state court***'s ruling was based on an unreasonable determination of the facts in

light of the evidence presented in the ***state court*** proceeding. See 28 U.S.C. § 2254(d).

Claim 6 is denied.

Case 1:97-cv-06134-AWI-SAB Document 163 Filed 07/23/15 Page 35 of 213

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c. Review of Claim 7

Petitioner alleges ineffective assistance of counsel by failure to investigate and impeach informant Hernandez, the principal witness against him, violating his Fifth, Sixth, Eighth and Fourteenth Amendment rights.

The California Supreme ***Court*** summarily denied this claim (SPet. Claim D) raised in

Petitioner's ***state*** petition for habeas corpus. In re Sanchez, S049502 (DD.) As noted, in such a case "the habeas petitioner's burden still must be met by showing there was no reasonable basis

for the ***state court*** to deny relief," Richter, 562 U.S. at 98, and this ***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 fair-minded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this ***Court***." Id. (emphasis added).

Petitioner claims that, though Hernandez's history of drug abuse and heroin addiction was available to defense counsel, counsel deficiently failed to investigate these matters or interview Hernandez. (SHCP Exhs. 137, ¶ 12; 113, ¶ 11.) This even though Hernandez's allegedly inconsistent testimony may have been related to drug use and the ***plea*** deal he received in exchange for his testimony. Petitioner claims additional evidence discovered might have motivated Toton to put on a full defense. (SHCP Ex. 137, ¶ 18.)

This ***Court*** is unconvinced. For the reasons and upon consideration of the evidence discussed in claims 1 through 4, ante, the ***state court*** could reasonably have determined there was no basis upon which Petitioner could have effectively impeached Hernandez. Petitioner has not shown that Hernandez gave materially contradictory, inconsistent or false testimony, or that Hernandez was motivated by an undisclosed ***plea*** bargain. No facts or discrepancies between the testimony and the physical evidence establish or compel the conclusion that Hernandez, by virtue of his alleged substance addiction, his ***plea*** deal, or otherwise, was motivated to and did testify falsely or inaccurately. (SPet. Ex. 900, pp. 4, 11; SResp. Ex. B.)

Defense counsel Toton could have made a reasoned tactical decision not to interview

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Hernandez. Having cross-examined Hernandez at the preliminary ***hearing***, Toton determined on that basis not to interview him. (SPet. Ex. 137, pp. 3-4.) Moreover, Toton did ask Hernandez

about any undisclosed ***plea*** deal during cross-examination in the guilt and special circumstances phase. Hernandez's testimony was consistent with Petitioner's statements and the physical evidence, that he had not been offered any disposition of then pending criminal matters prior to agreeing to testify at the Petitioner prosecution. (CT 576-577.) Toton later cross-examined Hernandez during the penalty phase. Hernandez admitted a deal on a then pending charge in

exchange for his testimony in Petitioner's proceeding. (RT 2850-2851.) The ***Court*** does not find that Hernandez's testimony was false or misleading in this regard.
Defense counsel Frank was not responsible for the guilt and special circumstance phase.
It was not unreasonable that Frank did not interview Hernandez relative to his statements therein. (SPet. Ex. 113, p. 4.)
Additionally, given the speculative nature of impeachment, Petitioner's desire to plead guilty, and the incriminating evidence, all as discussed in claims 1-4, ante, Petitioner was not prejudiced from any allegedly deficient performance. There was not a reasonable probability of a different outcome from further attempted impeachment of Hernandez.

Also, such a defense was contrary to Petitioner's ***stated*** desire to plead guilty to the Bocanegra murders (SPet. Ex. 520, p. 2) and "dying for his crimes but dying with a clear conscience" (SPet. Ex. 700). Petitioner waived jury trial and submitted the guilt and special

circumstances phase on the preliminary ***hearing*** transcript and on the testimony of additional prosecution witnesses. See Sanchez, 12 Cal.4th at 23-30. The evidence does not suggest a reasonable probability impeachment would have been successful given his incriminating statements to detective Stratton and reporter Trihey and the crime scene evidence corroborated by Hernandez's testimony. (See claims 1-4, ante.)

For the reasons ***stated***, it is clear that a fair-minded jurist could have found that Petitioner failed to establish that defense counsel's performance fell below an objective standard of reasonableness and that, but for counsel's unprofessional errors, the result of the proceeding

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would have been different. Strickland, 466 U.S., at 687-694.

It does not appear that the ***state court*** rejection of the claim was contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme

***Court***, or that the ***state court***'s ruling was based on an unreasonable determination of the facts in

light of the evidence presented in the ***state court*** proceeding. See 28 U.S.C. § 2254(d).
Claim 7 is denied.
d. Review of Claim 8
Petitioner claims ineffective assistance of counsel by failure to investigate and present testimony of jailhouse informant Seeley, violating his Sixth, Eighth and Fourteenth Amendment rights.

The California Supreme ***Court*** summarily denied this claim (SPet. Claim E) raised in

Petitioner's ***state*** petition for habeas corpus. In re Sanchez, S049502 (DD.) As noted, in such a case "the habeas petitioner's burden still must be met by showing there was no reasonable basis

for the ***state court*** to deny relief," Richter, 562 U.S. at 98, and this ***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 fair-minded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this ***Court***." Id. (emphasis added).

Petitioner claims that Seeley had conversations both with him and Reyes and would have testified that: Reyes was in the Bocanegra home at the time of the their murders; it was Reyes, not Petitioner, who struck Mr. Bocanegra; that the assault on Mrs. Bocanegra by Petitioner and Reyes was unconnected to Joey's subsequent killing of her; that Petitioner and Reyes did not intend to rob the Bocanegras; that Petitioner and Reyes had no plan to kill the Bocanegras; and that their deaths resulted from the sudden quarrel between Joey and Mr. Bocanegra. (SHCP Ex. 419.) Toton, Petitioner claims, was aware of Seeley's statement, (SCHP Ex. 420), but did not interview him or investigate. (SHCP Ex. 137, ¶ 12.) This even though counsel for Reyes in his separate proceedings did attempt to investigate and interview Seeley (SHCP Ex. 136, ¶¶ 7, 8),

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consistent with the local professional practice of interviewing informants. (SHCP Ex. 127 ¶ 6.)

This ***Court*** finds that the record could reasonably support a tactical decision by Toton not to investigate Seeley's possibly exculpating testimony. Toton, who had experience with Seeley on at least one other case, did not believe Seeley had actually spoken with Petitioner (SPet. Ex. 137, ¶ 4), did not believe Seeley was credible, and doubted the prosecution would call Seeley. (SPet. Ex. 137, p. 4.) Moreover, Seeley's version of events could have been viewed as contrary to the physical evidence at the Bocanegra crime scene. (SPet. Ex. 419, pp. 5-6, 17; CT 355-382.) See e.g., Denham v. Deeds, 954 F.2d 1501, 1505-06 (9th Cir. 1992) (defense counsel not ineffective where decision not to call witness based on inconsistencies in witness's testimony). Seeley's testimony was in some ways more inculpating of Petitioner than were Hernandez's statements. Under Seeley's version of events, Petitioner actively participated in attempts to subdue Mrs. Bocanegra. Seeley apparently would have testified that Petitioner struck several blows to Mrs. Bocanegra's head with a piece of rebar whereupon Joey stabbed her to death. (SPet. Ex. 419, pp. 6-8, 18-19.) Furthermore, testimony by Seeley likely would have been subject to rebuttal by significant contrary evidence from Hernandez, Stratton, Trihey, as well as by the bloodstain evidence and Petitioner's professed desire to plead guilty. All this likely obviating any prejudice to Petitioner for not investigating and presenting Seeley. Evidence of Petitioner's shoeprint in the kitchen undermines Seeley's July 27, 1987 statements to district attorney investigator Pendleton that Petitioner watched the assault on Mr. Bocanegra from the hallway. (SPet. Ex. 419.) Seeley's version also could be viewed as inconsistent with Petitioner's above noted statements to Hernandez and detective Stratton and to reporter Trihey, where Petitioner omits any mention of Reyes's involvement in the assault by Joey on Mr. Bocanegra.

In addition to these considerations of credibility and corroboration, the record reflects that Seeley refused to speak with counsel for Reyes, (SPet. Ex. 136, pp.1-3), who characterized Seeley as "a professional jailhouse snitch." (SPet. Ex. 139, p. 2.) It is uncertain that he would have agreed to speak with Toton. Even if, as Petitioner alleges, Toton had an unusual practice of



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not talking to jailhouse informants except on the witness stand, Toton's alleged failure in this case to investigate and present evidence from Seeley could nonetheless have been a reasonable trial tactic. Strickland permits counsel to "make a reasonable decision that makes particular investigations unnecessary." Richter, 562 U.S. at 106 (citing Strickland, 466 U.S. at 691). Accordingly, it was at least arguable that a reasonable attorney could decide to forego investigation into Seeley's testimony in similar circumstances. Toton was allowed to formulate a strategy, reasonable at the time, and to balance limited resources consistent with effective trial tactics and strategies. See Richter, 562 U.S. at 107. Toton was not required to pursue an investigation that would have been fruitless, or worse, harmful to the defense. Id. at 108.

As to defense counsel Frank, he could reasonably have decided not to interview Seeley to the extent any evidence to be provided by Seeley related only to the guilt and special circumstances phase, handled by Toton. (See SPet. Ex. 113, p. 4.)

This claim, to the extent based on insufficiency of the evidence and actual innocence, is unpersuasive for reasons discussed in claims 1 through 4, ante. For the reasons discussed therein, Petitioner has not established that Hernandez's testimony was materially unreliable or inconsistent with the testimony of Stratton and Trihey and the physical evidence found at the Bocanegra crime scene, or that Hernandez testimony was given in exchange for an undisclosed favorable (to Hernandez) ***plea*** deal.

Nor has Petitioner made an evidentiary showing of prejudice. For the reasons discussed above, the ***state court*** could have determined there was no reasonable probability of a different outcome from investigating Seeley and presenting him as a witness. Fundamentally, such a defense was contrary to Petitioner's ***stated*** desire to plead guilty to the Bocanegra murders, (SPet. Ex. 520, p. 2), and "dying for his crimes but dying with a clear conscience." (SPet. Ex. 700.) Based on that desire, Petitioner waived jury trial and submitted guilt and special

circumstances phase on the preliminary ***hearing*** transcript and the testimony of additional prosecution witnesses. See Sanchez, 12 Cal.4th at 23-30; CT 891-892; RT 108a-115a.) The evidence does not suggest a reasonable probability that impeachment would have been



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successful given Petitioner's incriminating statements to detective Stratton and reporter Trihey and the crime scene evidence corroborated by Hernandez's testimony. (See claims 1-4, ante.)

The ***Court*** concludes that a fair-minded jurist could have found that Petitioner failed to establish that defense counsel's performance fell below an objective standard of reasonableness and that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland, 466 U.S., at 687-694.

It does not appear that the ***state court*** rejection of the claim was contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme

***Court***, or that the ***state court***'s ruling was based on an unreasonable determination of the facts in light of the evidence presented in the ***state court*** proceeding. See 28 U.S.C. § 2254(d).

Claim 8 is denied.

e. Review of Claim 9

In this claim, Petitioner alleges ineffective assistance of counsel by failure to investigate and present evidence about Joey, violating his Sixth, Eighth and Fourteenth Amendment rights.

The California Supreme ***Court*** summarily denied this claim (SPet. Claim F) raised in Petitioner's ***state*** petition for habeas corpus. In re Sanchez, S049502 (DD.) As noted, in such a case "the habeas petitioner's burden still must be met by showing there was no reasonable basis for the ***state court*** to deny relief," Richter, 562 U.S. at 98, and this ***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 fair-minded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this ***Court***." Id. (emphasis added).

Petitioner, citing to the declaration of defense investigator Peninger, faults defense counsel for not investigating and presenting evidence of Joey's violent temper, threats and assaults against his parents, and smoking PCP the night before the Bocanegra murders. (SHCP 127, ¶ 5.) Petitioner claims such evidence would have shown that a sudden quarrel and a fear of Joey precipitated the killings rather than premeditation, deliberation and an intent to commit

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robbery. He bases this claim upon facts allege in claims 1 through 4.

The ***Court*** is not persuaded. In June, 1988, prior to trial, defense investigator Peninger interviewed Joey. (SHCP Ex. 127, ¶ 5.) Though Toton conceded he could have investigated Joey further, and would have done so if a full defense had been mounted, (SHCP Ex. 137, ¶¶ 18, 21, 22), Petitioner waived a full defense.

Proffer of evidence that there was no robbery motive would not have changed the outcome. The trial ***court***'s found Petitioner was not guilty of robbery, and found not true the robbery-murder special circumstance. (CT 906; RT 236-237.) Therefore no prejudice arose from any failure to investigate and present evidence of Joey's temper and prior assaultive behavior relating to robbery-murder theory.

As discussed in claims 1-8, ante, there was sufficient evidence to convict Petitioner of ***aiding*** and abetting first degree murder based upon a finding of premeditation and deliberation.

The ***state court*** could reasonably have concluded that, in the face of such substantial evidence of guilt, it was not reasonably likely that a showing of Joey's temper and prior assaultive conduct would have raised a reasonable doubt that Petitioner ***aided*** and abetted the premeditated and deliberate murders of Mr. Bocanegra and Mrs. Bocanegra.

Petitioner points out that counsel for Reyes, in Reyes's separate proceeding, did investigate Joey and subpoenaed trial witnesses based thereon. However, this alone does not suggest that, on the record in this proceeding, Toton's decision not to do so was an unreasonable trial tactic. Especially so given the above noted substantial evidence of Petitioner's guilt and Reyes's decision to plead guilty to three counts of first degree murder.

Petitioner has not made an evidentiary showing of prejudice, that there is a reasonable probability of a different outcome from investigating and presenting evidence about Joey. The ***state court*** could reasonably have found that, considering the record before it, evidence about Joey would not have changed the result. Petitioner gave incriminating statements to detective Stratton and reporter Trihey, corroborated by the crime scene evidence and Hernandez's testimony. (See claims 1-4, ante.) Here again, such a defense was contrary to Petitioner's ***stated***



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desire to plead guilty to the Bocanegra murders, (SPet. Ex. 520, p. 2), and "dying for his crimes but dying with a clear conscience." (SPet. Ex. 700.) Petitioner waived jury trial and submitted guilt and special circumstances phase on the preliminary ***hearing*** transcript and the testimony of additional prosecution witnesses. See Sanchez, 12 Cal.4th at 23-30.

Accordingly, a fair-minded jurist could have found that Petitioner failed to establish that defense counsel's performance fell below an objective standard of reasonableness and that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland, 466 U.S., at 687-694.

It does not appear that the ***state court*** rejection of the claim was contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme ***Court***, or that the ***state court***'s ruling was based on an unreasonable determination of the facts in light of the evidence presented in the ***state court*** proceeding. See 28 U.S.C. § 2254(d).

Claim 9 is denied.

f. Review of Claim 10

Petitioner next claims ineffective assistance of counsel by failure to investigate and present physical evidence of Bocanegra murders, violating his Fifth, Sixth, Eighth and Fourteenth Amendment rights.

The California Supreme ***Court*** summarily denied this claim (SPet. Claim G) raised in

Petitioner's ***state*** petition for habeas corpus. In re Sanchez, S049502 (DD.) As noted, in such a case "the habeas petitioner's burden still must be met by showing there was no reasonable basis

for the ***state court*** to deny relief," Richter, 562 U.S. at 98, and this ***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 fair-minded jurists could disagree that those arguments or

theories are inconsistent with the holding in a prior decision of this ***Court***." Id. (emphasis added).

Petitioner alleges that supplemental evidence from criminologist Laskowski and coroner Holloway would have shown three people, Reyes, Petitioner and Joey, were in the Bocanegra

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house at the time of the murders and that the victims' scalp wounds could have been inflicted by different assailants using different implements. (SHCP Exhs. 417, pp.1-2; 120, ¶¶ 6-7.)
Petitioner reasons this supplemental evidence would have rebutted the prosecution theory that only Petitioner and Joey were present in the Bocanegra home at the time of the murders, and would have caused defense counsel to take the matter to full trial on guilt, (SHCP Ex. 137, pp. 6-7) and thereby increased possibility of a negotiated ***plea*** more favorable than the conviction and sentence handed down.

The ***Court*** finds this claim unavailing. The evidence in the ***state*** record is consistent with Reyes, at some point, entering the Bocanegra home. Evidence of Reyes's bloody hand print on the front doorknob was admitted at Petitioner's preliminary ***hearing***. (CT 202-203.)

Petitioner is correct that criminologist Laskowski testified at preliminary ***hearing*** to only two shoe tread patterns found at the Bocanegra crime scene, and that Laskowski (during his subsequent preparation for the separate Reyes trial) identified a third shoe tread pattern in the kitchen of the Bocanegra residence. However, Reyes admitted in this subsequent proceeding that he served as lookout during the murders and entered the residence only afterwards to assist Petitioner and Joey. (SResp. Ex. A., p. 3:1-11.)
Petitioner is also correct in noting that, while Dr. Holloway testified at the preliminary ***hearing*** that the same type of implement inflicted consistent scalp wounds on both Mr. Bocanegra and Mrs. Bocanegra, (CT 118-119), Holloway at the penalty phase ***stated*** that Mr. Bocanegra's scalp wounds were only "partially", rather than "entirely" consistent with Mrs. Bocanegra's scalp wounds; and that it appeared different objects were used to inflict these scalp wounds. (RT 2712-13, 2720-21, 2725.) However, Holloway qualified his preliminary ***hearing*** testimony by noting that the scalp wounds on Mr. Bocanegra and Mrs. Bocanegra were not necessarily inflicted by the same instrument. (CT 131-134.)
Holloway's testimony, as qualified, did not then preclude the possibility that more than one weapon and more than one perpetrator inflicted the wounds. Defense counsel Toton argued as much, that different individuals, using different weapons, could have inflicted the scalp


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wounds on Mr. Bocanegra and Mrs. Bocanegra. (RT 189-191.)

The ***Court*** finds that, for the reasons discussed in claims 1-9, the ***state court*** could

reasonably have found that there was sufficient evidence to convict Petitioner of ***aiding*** and abetting first degree murder based upon a finding of premeditation and deliberation. In the face of such substantial evidence, a further showing regarding physical evidence, that Reyes left a bloody shoe print, and that two different weapons may have inflicted the scalp wounds, would

not have raised a reasonable doubt that Petitioner ***aided*** and abetted the premeditated and deliberate murders of Mr. Bocanegra and Mrs. Bocanegra. Additionally, evidence of Petitioner's shoeprint in the kitchen undermines Seeley's testimony that Petitioner watched the assault on Mr. Bocanegra from the hallway. (SHCP, Ex. 419, pp. 6, 7, 22-23.)

For the reasons ***stated***, Petitioner has not made an evidentiary showing of prejudice, i.e., that there is a reasonable probability of a different outcome from investigating physical evidence

of the Bocanegra murder scene. As noted, such a defense was contrary to Petitioner's ***stated*** desire to plead guilty to the Bocanegra murders (SPet. Ex. 520, p.2) and "dying for his crimes but dying with a clear conscience." (SPet. Ex. 700.) Petitioner waived jury trial and submitted

guilt and special circumstances phase on the preliminary ***hearing*** transcript and the testimony of additional prosecution witnesses. See Sanchez, 12 Cal.4th at 23-30.

Accordingly, the ***Court*** is not convinced of a reasonable probability that supplemental crime scene evidence would have prompted defense counsel to put on a further defense or would have resulted in a more favorable disposition for Petitioner given his incriminating statements to detective Stratton and reporter Trihey and the crime scene evidence corroborated by Hernandez's testimony. (See discussion of claims 1-9, ante.)

For the reasons ***stated***, a fair-minded jurist could have found that Petitioner failed to establish that defense counsel's performance fell below an objective standard of reasonableness and that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland, 466 U.S., at 687-694.

It does not appear that the ***state court*** rejection of the claim was contrary to, or an



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unreasonable application of, clearly established federal law, as determined by the Supreme

***Court***, or that the ***state court***'s ruling was based on an unreasonable determination of the facts in light of the evidence presented in the ***state court*** proceeding. See 28 U.S.C. § 2254(d).
Claim 10 is denied.
g. Review of Claim 11

Petitioner next claims ineffective assistance of counsel by failure to pursue ***plea*** negotiations, violating his Sixth, Eighth and Fourteenth Amendment rights.

The California Supreme ***Court*** summarily denied this claim (SPet. Claim H) raised in Petitioner's ***state*** petition for habeas corpus. In re Sanchez, S049502 (DD). As noted, in such a case "the habeas petitioner's burden still must be met by showing there was no reasonable basis for the ***state court*** to deny relief," Richter, 562 U.S. at 98, and this ***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 fair-minded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this ***Court***." Id. (emphasis added).

Petitioner alleges that defense counsel was deficient in failing to pursue ***plea*** negotiations given that the evidence supported the prosecution's theory that Joey was the actual killer of his parents. (RT 122, 155-156.) Petitioner points out that Reyes, whom the prosecution viewed to be of equal culpability, consummated a ***plea*** deal in his separate proceeding and avoided the death penalty. (Id.)

This claim fails. The ***state court*** could reasonably have found defense counsel Toton was not deficient in failing to pursue continuing ***plea*** negotiations. The record reflects that Toton attempted to obtain a ***plea*** deal for Petitioner on May 10, 1988. But the prosecutor rejected the ***plea*** deal when Petitioner refused to provide information of Joey's involvement in the Bocanegra murders, even though Petitioner had proposed to do just that in his ***plea*** bid. (SResp. Ex. B.) Toton also made a pre-penalty phase overture for Petitioner to provide information regarding Joey's involvement in the Bocanegra murders in return for life without parole. Here

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again, Petitioner ultimately refused to provide such information, ending any possible deal. Id. Nothing reasonably suggests that persistence of counsel alone could have resulted in a ***plea*** deal without Petitioner's cooperation.

Prosecutor Ryals, who prosecuted both Petitioner and, in a separate proceeding, Reyes, based her "decisions regarding ***plea*** bargain agreements . . . on [her] evaluations of the evidence, the facts, and the circumstances of each case" and that "[t]he persistence and/or insistence of defense counsel in seeking a ***plea*** bargain agreement on behalf of their client [was] not a factor . . . ." (Id.) The ***Court*** notes that "[s]trict adherence to the Strickland standard" is "all the more essential when reviewing the choices an attorney made at the ***plea*** bargain stage." Premo, 562 U.S. at 124. "***Plea*** bargains are the result of complex negotiations suffused with uncertainty, and defense attorneys must make careful strategic choices in balancing opportunities and risks." Id. Additionally, for the reasons discussed in claims 1 through 4, ante, the evidence against Petitioner was substantial. In the face of such evidence and Petitioner's failure to support his negotiated ***plea*** offers, it is not reasonably probable that continuing attempts by defense counsel toward a negotiated ***plea*** would have been successful. See Burger v. Kemp, 483 U.S. 776, 785-86 (1987) (no ineffective assistance claim where prosecutor refuses to engage in ***plea*** bargaining).

Petitioner has not made an evidentiary showing of prejudice given the improbability of a

***plea*** deal without his cooperation. Petitioner expressly ***stated*** his desire to plead guilty to the Bocanegra murders (SPet. Ex. 520, p. 2) and "dying for his crimes but dying with a clear conscience." (SPet. Ex. 700; see Jones, 114 F.3d at 1012 (denying factual development where improbable petitioner would have accepted ***plea*** offer). As noted, Petitioner waived jury trial and submitted the guilt and special circumstances phase on the preliminary ***hearing*** transcript and the testimony of additional prosecution witnesses. See Sanchez, 12 Cal.4th at 23-30. The evidence does not suggest a reasonable probability that further ***plea*** negotiation would have resulted in a more favorable disposition for Petitioner given his incriminating statements to detective Stratton and reporter Trihey and the crime scene evidence corroborated by Hernandez's testimony.

Case 1:97-cv-06134-AWI-SAB Document 163 Filed 07/23/15 Page 47 of 213

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For the reasons ***stated***, a fair-minded jurist could have found that Petitioner failed to

establish that defense counsel's performance fell below an objective standard of reasonableness and that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland, 466 U.S., at 687-694.

It does not appear that the ***state court*** rejection of the claim was contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme

***Court***, or that the ***state court***'s ruling was based on an unreasonable determination of the facts in

light of the evidence presented in the ***state court*** proceeding. See 28 U.S.C. § 2254(d).
Claim 11 is denied.
h. Review of Claim 12
Petitioner claims ineffective assistance of counsel by counsel's failure to move to exclude jailhouse statements by Petitioner to the police implicating him in the Bocanegra homicides, violating his Fifth, Sixth, Eighth and Fourteenth Amendment rights.

The California Supreme ***Court*** summarily denied this claim (SPet. Claim I) raised in

Petitioner's ***state*** petition for habeas corpus. In re Sanchez, S049502 (DD). As noted, in such a case "the habeas petitioner's burden still must be met by showing there was no reasonable basis

for the ***state court*** to deny relief," Richter, 562 U.S. at 98, and this ***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 fair-minded jurists could disagree that those arguments or

theories are inconsistent with the holding in a prior decision of this ***Court***." Id. (emphasis added).
Petitioner supports this claim with facts alleged in claim 6, ante. He alleges that he suffered organic brain damage, psychiatric disorders (post-traumatic stress disorder, depression, and paranoia), and that he expected favorable treatment when, at the request of his then attorney, Mr. Huffman, Petitioner waived Miranda rights and gave incriminating statements to detective Stratton, (CT 75-78) (Bocanegra murders), and detective Boggs (CT 308-319) (Tatman murder). Petitioner claims that his Miranda waiver was not intelligent and voluntary.
Case 1:97-cv-06134-AWI-SAB Document 163 Filed 07/23/15 Page 48 of 213
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In Miranda v. Arizona, 384 U.S. 436, 444 (1966), the Supreme ***Court*** held that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." As to the procedural safeguards to be employed, "[p]rior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." Id. Nevertheless, "'[t]he defendant may waive effectuation' of the rights conveyed in the warnings 'provided the waiver is made voluntarily, knowingly and intelligently.'" Moran v. Burbine, 475 U.S. 412, 421 (1986) (quoting Miranda, 384 U.S. at 444, 475).

This claim fails for the same reasons discussed in claim 6. The ***state court*** could reasonably have found that the evidence did not show that prior to, during, or after the murders Petitioner suffered any material neurological and/or psychiatric impairment. The report of courtappointed

psychiatrist Matychowiak ***states*** that on November 13, 1987, [Petitioner] was "able to discuss himself, his decisions and his reasoning for his decisions" and was "presently able to understand the nature and purpose of the proceedings taken against him" and "to cooperate in a rational manner with counsel in presenting a defense." (SPet. Ex. 520, pp.5-6.)
Under Miranda, if a suspect indicates "at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." Miranda, 384 U.S. at 473-74 (emphasis added). Petitioner does not point to evidence supporting coercive tactics by Stratton and Boggs or showing Petitioner was promised any concession in his then pending charge of burglarizing Joey's residence. See Colorado v. Connelly, 479 U.S. 157, 167 (1986) (confession not involuntary absent coercive police activity). Petitioner apparently did not attempt to make any

evidentiary showing of police coercion. The ***state court*** could have reasonably concluded Petitioner's Miranda waiver was not involuntary.

Additionally, it was Petitioner who initiated contact with the police, offering testimony on the Bocanegra murders in exchange for "some type of consideration" in the burglary charge

Case 1:97-cv-06134-AWI-SAB Document 163 Filed 07/23/15 Page 49 of 213

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against him. (SPet. Ex. 412; CT 76.)

The ***Court*** finds that, in the face of such lack of evidence, it is not reasonably probable that a motion to exclude jailhouse statements based upon invalid waiver would have been successful. See Kimmelman v. Morrison, 477 U.S. 365, 381 (1986) (counsel's failure to make a futile motion is not ineffective assistance). Even assuming impaired mental status, such alone is not sufficient reason to suppress a confession. See Connelly, 479 U.S. at 167 (coercive police conduct necessary to find confession involuntary under Due Process Clause).

Petitioner has not made an evidentiary showing of prejudice, that there is a reasonable

probability of a different outcome had defense counsel moved to exclude jailhouse statements based on invalid waiver. As discussed, such a defense was contrary to Petitioner's ***stated*** desire to plead guilty to the Bocanegra murders (SPet. Ex. 520, p.2) and "dying for his crimes but dying with a clear conscience." (SPet. Ex. 700.) Petitioner waived jury trial and submitted the guilt and special circumstances phase on the preliminary ***hearing*** transcript and the testimony of additional prosecution witnesses. See Sanchez, 12 Cal.4th at 23-30. The evidence does not suggest a reasonable probability that a motion to exclude jailhouse statements would have resulted in a more favorable disposition for Petitioner given his incriminating statements to reporter Trihey and the crime scene evidence corroborated by Hernandez's testimony. (See claims 1-4, ante.)

For the reasons ***stated***, a fair-minded jurist could have found that Petitioner failed to establish that defense counsel's performance fell below an objective standard of reasonableness and that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland, 466 U.S., at 687-694.

It does not appear that the ***state court*** rejection of the claim was contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme ***Court***, or that the ***state court***'s ruling was based on an unreasonable determination of the facts in light of the evidence presented in the ***state court*** proceeding. See 28 U.S.C. § 2254(d).
Claim 12 is denied.
Case 1:97-cv-06134-AWI-SAB Document 163 Filed 07/23/15 Page 50 of 213
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i. Review of Claim 13

In this next claim, Petitioner alleges ineffective assistance of counsel by failure to seek sufficient continuance to adequately prepare for trial, violating his Sixth, Eighth and Fourteenth Amendment rights.

The California Supreme ***Court*** summarily denied this claim (SPet. Claim J) raised in

Petitioner's ***state*** petition for habeas corpus. In re Sanchez, S049502 (DD.) As noted, in such a case "the habeas petitioner's burden still must be met by showing there was no reasonable basis

for the ***state court*** to deny relief," Richter, 562 U.S. at 98, and this ***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 fair-minded jurists could disagree that those arguments or

theories are inconsistent with the holding in a prior decision of this ***Court***." Id. (emphasis added).

Petitioner supports this claim with facts alleged in claims 2, 4, and 6 through 10. He alleges that, as of May 16, 1988, when a three-week pre-trail continuance was requested and granted through June 27, 1988, defense counsel had done no guilt investigation, except for consulting a serologist and obtaining a sanity evaluation, (SHCP, Ex. 127, ¶ 4), and had not done any investigation for the penalty phase. (SHCP, Ex. 127, ¶¶ 4, 11.) He claims competent counsel would have begun trial preparations sooner. (Id., ¶ 12.)

Petitioner's trial began on July 7, 1988. He alleges that had defense counsel requested, consistent with local practice, required a continuance longer than the three weeks, there is a

reasonable probability that a ***plea*** bargain could have been negotiated, or a full trial on guilt and special circumstances would have been sought.

For the reasons discussed in claims 1-12, the evidence does not support a reasonable possibility that Petitioner would have received a more favorable disposition even with a longer continuance. Petitioner relies on defense investigator Peninger's declaration regarding the extent to which she was aware of the defense investigation and her view that further investigation should have been done. (SPet. Ex. 127, pp. 1-2.) Even if evidence, the Peninger declaration



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does not demonstrate the actual extent and tactical appropriateness of defense counsel's trial preparations.

The record suggests that defense counsel timely began trial preparations, retaining defense expert(s) as early as November 1987. (RT [5/16/88] 3-4.) Petitioner concedes defense counsel retained serology and psychological experts prior to the request for continuance. The continuance request was partially opposed by the prosecution, (RT [5/16/88] 5-6; CT 713-714), suggesting a further continuance was unlikely.

There ***state court*** could reasonably have determined that Petitioner did not want or need a continuance. Petitioner initially refused to waive time for beginning trial, ***stating*** his intention to enter a guilty ***plea***. (RT [5/16//88] 7.) Petitioner agreed to waive time only after discussions with counsel. (RT [5/16/88] 7-8.) Petitioner continued to express his desire to plead guilty to the Bocanegra murders. (SPet. Exhs. 520, p.2; 700.)

On July 11, 1988, Toton requested submission of guilt and special circumstance phase on the preliminary ***hearing*** transcript. Defense counsel Frank had no expressed need for a further

continuance to prepare his penalty phase case. Frank ***stated*** his preparations would be complete by July 25, 1988. (RT [5/16/88] 6.) The penalty phase did not start until September 21, 1988, almost two month later. (CT 949; RT 2583.) It does not reasonably appear the defense needed and would have been granted further pre-trial continuance. “A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight . . . and to evaluate the conduct from counsel's perspective at the time.” Strickland, 466 U.S. at 689.

For the reasons ***stated***, a fair-minded jurist could have reasonably have determined that, based on the evidence, a longer continuance would not have resulted in a more favorable disposition for Petitioner. His incriminating statements to detective Stratton and reporter Trihey and the crime scene evidence that was corroborated by Hernandez’s testimony reasonably suggest otherwise. (See claims 1-12, ante.)

Petitioner has failed to establish that defense counsel’s performance fell below an objective standard of reasonableness and that, but for counsel’s unprofessional errors, the result

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of the proceeding would have been different. Strickland, 466 U.S., at 687-694.

It does not appear that the ***state*** ***court*** rejection of the claim was contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme

***Court***, or that the ***state*** ***court***'s ruling was based on an unreasonable determination of the facts in

light of the evidence presented in the ***state*** ***court*** proceeding. See 28 U.S.C. § 2254(d).
Claim 13 is denied.
j. Review of Claim 14
Petitioner next claims ineffective assistance of counsel by the decision to waive jury trial, confrontation and presentation of a defense, violating his Fifth, Sixth, Eighth and Fourteenth Amendment rights.

The California Supreme ***Court*** summarily denied this claim (SPet. Claim K) raised in

Petitioner's ***state*** petition for habeas corpus. In re Sanchez, S049502 (DD.)

The ***state*** supreme ***court***, on direct appeal, addressed the merits of the validity of

submission on the Preliminary ***Hearing*** Transcript as follow:

[Petitioner's] chief guilt phase trial counsel, Toton, informed the ***court*** that the submission proposal was a compromise made by defendant at Toton's request. Defendant originally had wanted to plead guilty to the capital charges, but Toton

would not consent to such a ***plea***, believing that a guilty ***plea*** would amount to ineffective assistance of counsel . . . . [Citation]
Sanchez, 12 Cal.4th at 24.
Defendant repeatedly acknowledged that he was waiving his constitutional rights and that his decision was entered "freely and voluntarily." Id., at 25. Once the waivers were taken, the

following exchange occurred between the trial ***court*** and Petitioner:

"The ***Court***: I take it that . . . Mr. Frank and Mr. Toton have talked to you at some length about the waivers?
"The Defendant: Yes, sir.

"The ***Court***: Do you feel you understood them?
"The Defendant: Yes, sir, I believe I do.

"The ***Court***: And you have had some time to think about it, at least since about 10:30 this morning, and they talked to you later, I take it?
"The Defendant: Yes, sir.

"The ***Court***: And you have thought about it?

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"The Defendant: Yes, sir.

"The ***Court***: So far as you are losing your right to confront witnesses, those witnesses whose testimony will be presented to the ***court*** through the preliminary examination, you ***won't*** get a chance to cross-examine them in this ***court***. You understand that?
"Defendant: Yes sir.

"The ***Court***: And you are giving that right up then?
"The Defendant: Yes, sir.

"The ***Court***: Now, so far as the witnesses called . . . to augment the People's case and/or in your behalf, the live witnesses called in this case, you will have the right to confrontation and you understand that?
"The Defendant: Yes, sir.

"The ***Court***: I have to tell you that some of the cases in the ***state*** of California say

that when you present a case to the judge to determine the guilt or innocence on the basis of the preliminary ***hearing*** transcript, that's sometimes called a slow guilty ***plea***.
"The Defendant: Yes, sir.

"The ***Court***: I don't know whether you have ***heard*** that language before, but it's used in the cases.
"The Defendant: Yes, sir.

"The ***Court***: And I want you to be aware of that. I am not telling you how I am going to decide this case, but there is an aura of that in the cases and you should be aware of that fact.
"The Defendant: Yes, sir.

"The ***Court***: And do you understand that?
"The Defendant: Yes, sir.

"The ***Court***: And you are willing to give up your right to a trial by jury both as to the guilt of the two homicides alleged and of the other enhancements and the special circumstances; is that right?
"The Defendant: Yes.

"The ***Court***: And you know you have the right, and we are ready to give you a jury on all those issues.
"The Defendant: Yes, your Honor, I understand all that.

"The ***Court***: And you nonetheless give it up?
"The Defendant: Yes, sir."
Id., at 25-26.

The trial ***court*** later confirmed the waivers:

"The ***Court***: Are you satisfied with your decision?
"The Defendant: Yes, sir, I am very confident.

"The ***Court***: Because you know we have got a record of everything here. It's going to be kind of hard to tell somebody else, gee, I didn't think about it. The judge coerced me. The [d]istrict [a]ttorney growled at me. My lawyers kicked me around. You know, it's going to be kind of hard to say that after you have been very candid with us here. Are you satisfied with that?
"The Defendant: Yes, sir, I am very satisfied.

"The ***Court***: You seem satisfied. I believe you are satisfied. I will make that kind of a finding."

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Id., at 27.

Petitioner confirmed his intent to waive his jury trial and confrontation rights the following morning, but no mention was made by the ***court*** or counsel of defendant's right against self-incrimination. Even so, the California Supreme ***Court*** went on to find Petitioner's submission on the preliminary ***hearing*** transcripts was not a "slow (guilty) ***plea***" that would have required an on the record waiver of the right against self-incrimination, as follows:

Defense counsel Toton conducted substantial cross-examination of the prosecution witnesses during the preliminary ***hearing***. Toton also called prosecution witnesses Hernandez and Detective Stratton to testify for the defense, and questioned Hernandez about whether he had agreed to testify against defendant with the intent of making a deal in his own case.

In addition, following the close of the prosecution's guilt phase presentation, Toton renewed his motions to strike portions of the trial testimony of Maria

Rodriguez, Detective Boggs, and William Freeman (the patrolman who seized two screwdrivers from defendant that had been stolen from the Bocanegra residence), and then moved for a judgment of acquittal of all the charges.
In arguing the motion for acquittal, Toton asserted there was insufficient evidence of defendant's guilt of the robbery and murder charges, and that the People failed to charge properly the special circumstance allegations. In addition, Toton asserted that no physical evidence linked defendant to the Bocanegra murders. He argued that the prosecution presented no evidence of premeditation in those murders, and that defendant's hypothetical questions to Detective Stratton should not be used as evidence of murder. Toton also pointed out that defendant's incriminating statements to newsman Trihey implied knowledge of the crime, but not intent to kill, that there was no evidence that defendant robbed the Bocanegras or that defendant had the specific intent to kill either the Bocanegras or Tatman.
Toton's closing argument following the guilt phase was equally extensive. He asserted there was insufficient evidence, as a matter of law, to prove beyond a reasonable doubt that defendant committed the charged robberies and the Bocanegra murders because the testimony of Hernandez and Trihey was not credible. At best, he argued, the evidence in the Bocanegra murders supported a verdict of voluntary manslaughter. He also asserted that the prosecution had failed to prove the specific intent to kill necessary to support the special circumstance allegations.
It therefore appears that defense counsel's cross-examination was substantial, and

that he argued constantly that the facts as presented at the preliminary ***hearing*** should be viewed as not supporting first degree murder convictions. These facts support the People's assertion that defendant's submission on the preliminary

***hearing*** transcripts for the guilt and special circumstance phases of the trial was

not tantamount to a guilty ***plea***. [Citation]

For submissions not tantamount to a guilty ***plea***, a trial ***court***'s failure to advise the defendant of his right against self-incrimination is implicated only to the extent
Case 1:97-cv-06134-AWI-SAB Document 163 Filed 07/23/15 Page 55 of 213
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defendant surrendered the right. [Citation] Through the submission stipulated to here, defendant never surrendered his self-incrimination privilege because he chose not to testify during the guilt phase proceedings. Because defendant never surrendered his right against self-incrimination, there was no requirement of a personal, on-the-record waiver. [Citation]

Id., at 29-30.

The ***state*** supreme ***court*** also concluded there was no requirement that Petitioner be advised of ramifications of submission and waiver and the probability of conviction in light of defendant's reservation of his right to present additional evidence and to contest his alleged guilt in argument to the ***court***. That is, a defendant must be advised of the probability that his submission will result in a conviction of the offenses only "[i]f a defendant does not reserve the right to present additional evidence and does not advise the ***court*** that he will contest his guilt in argument to the ***court*** . . . ." Bunnell, 13 Cal.3d 592, 605 (1975).

Petitioner contends that reasonably competent counsel defending a capital case would not have submitted without a full trial. He supports this claim with facts alleged in claims 2, 4 and 6 through 10. He reiterates his above claims that Toton and Frank did not conduct sufficient trial investigation and preparation. He claims Toton's agreement to allow additional evidence upon submission negated Toton's theory that submission on the preliminary ***hearing*** would limit damaging evidence. (See SHCP Ex. 137, ¶¶ 14-16.) He claims that Frank had reservations about waiving full defense, but did not express them to the trial ***court***. (SHCP Ex. 113, ¶ ¶ 13-

19.) However, this ***Court*** finds that, for the reasons and based on the evidence discussed in

claims 1-13, ante, the ***state court*** could reasonably have found that defense counsel were not deficient in preparing for trial and that the trial waiver was not necessarily inform on this basis.. Petitioner alleges mental impairments prevented him from knowingly, voluntarily, and intelligently entering the waiver with complete knowledge of the relevant circumstances and

likely consequences. See Brady v. United ***States***, 397 U.S. 742, 747–48 and n.4 (1970). However, the mental defense claim is unavailing for reasons discussed in claim 6. Petitioner agreed to submit the case following “several long discussions” with Toton, (SPet. Ex. 137, p.5) and in compromise of Petitioner’s expressed desire to plead guilty (RT [5/16/88] 7), and Toton’s
Case 1:97-cv-06134-AWI-SAB Document 163 Filed 07/23/15 Page 56 of 213
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refusal to consent to a guilty ***plea***. The trial judge discussed the submission with Petitioner in some detail, including how it might impact his case (CT 889, 891-892; RT – 65a-71a, 85a-89a,

98a-115a.) and the waiver of any conflict of interest Toton might have had relating to his debarment proceedings. (RT [7/27/88] 6.) Petitioner waived his trial rights on the record. (RT 107a-111a.) The prosecution also examined him regarding the waivers. (RT 108a-114a.) It was not unreasonable for the ***state court*** to conclude that Petitioner understood and freely entered the waivers.

Petitioner also fails to make an evidentiary showing of prejudice. He had expressed his intention to enter a guilty ***plea*** (RT [5/16/88] 7) and waive jury trial. (RT [7/27/88] 6.) Defense counsel Frank's preparation of penalty phase defense was nearly complete at time of the trial waiver and was not adversely affected. (SPet. Ex. 113, pp. 5-7.) Defense counsel could have reasonably believed that, as a matter of trial strategy, submission on the preliminary ***hearing*** transcripts would limit damaging evidence, (SPet. Exhs. 137, pp. 4-5; 113, pp.4-5), keeping "some of the blood and gore of the homicides away from the penalty jury." (SPet. Ex. 113, ¶ 16.) Especially so given Toton's concern that Reyes might testify against Petitioner, and Toton's belief the aider and abettor theory might be more favorably decided by the ***court*** rather than a jury. (SPet. Ex. 137, p. 5.)

In sum, the evidentiary record does not support a reasonable possibility that Petitioner would have received a more favorable disposition had the matter gone to jury trial at the guilt and special circumstance phase. Had Petitioner testified before a jury as to lack of knowledge and intent in ***aiding*** and abetting the murders, he likely would have been impeached for reasons discussed in claims 1-13.

For the reasons ***stated***, Petitioner has not established that defense counsel's performance fell below an objective standard of reasonableness and that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland, 466 U.S., at 687-694.

It does not appear that the ***state court*** rejection of the claim was contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme

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***Court***, or that the ***state court***'s ruling was based on an unreasonable determination of the facts in

light of the evidence presented in the ***state court*** proceeding. See 28 U.S.C. § 2254(d).
Claim 14 is denied.
k. Review of Claim 15
Petitioner next claims ineffective assistance of counsel by failing to cross-examine newspaper report Trihey, violating Petitioner's Fifth, Sixth, Eighth and Fourteenth Amendment rights.

The California Supreme ***Court*** summarily denied this claim (SPet. Claim L) as it was

raised in Petitioner's ***state*** petition for habeas corpus. In re Sanchez, S049502 (DD.) That ***court*** also rejected on appeal Petitioner's contention that Toton's failure to cross-examine Trihey before closing argument denied him the effective assistance of counsel, finding that:

Toton convinced the ***court*** during his closing argument that Trihey's testimony should not be given substantial weight; his decision not to cross-examine Trihey as to the contents of the published material was sound strategy, given the nature of defendant's alleged contradictory statements. Defendant does not establish that cross-examination would have revealed any new information, or that any

additional information about the interviews would have influenced the ***court***'s judgment. Hence, we cannot find counsel's failure to cross-examination Trihey to

be deficient. In any event, given the fact that the ***court*** dismissed the robbery charges against defendant, and found not true the robbery-murder specialcircumstance allegation, we discern no prejudice to defendant based on counsel's performance. [Citation]
Sanchez, 12 Cal.4th 59.

Petitioner supports this claim with facts alleged in claims 2 and 4. He alleges that had Toton cross-examined Trihey on the published newspaper articles he could have called into question the version of events offered by Trihey and Hernandez, and supported Petitioner's mental defenses. (Pet. ¶ 306-314.)

Strickland provides that "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." Strickland, 466 U.S. at 690-91. "[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." Id.

Case 1:97-cv-06134-AWI-SAB Document 163 Filed 07/23/15 Page 58 of 213

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Petitioner argues cross-examination regarding the contents of the newspaper articles,

cross-examination Toton refused under conditions imposed by the ***Court*** (limiting such to the printed articles – see RT 57-59) would have been beneficial, but he does not demonstrate how or why this is so given his contradictory statements of the crimes and his involvement.

Trihey testified at the guilt and special circumstance phase that during the course of five interviews, Petitioner ***stated*** he was "a triple murderer" and that the victims were killed for their "Social Security checks." (RT 17-18). These statements were included in the published articles. (Id.) Based on the record before it, the ***state court*** could reasonably have found that any claimed advantage that would have resulted from cross-examination of Trihey was speculative. It follows that the decision of defense counsel not to cross-examine Trihey could be seen as neither unreasonable nor prejudicial.

The trial judge limited any cross-examination to the confession and information published by Trihey in the newspaper. Unable to impeach Trihey, defense counsel could reasonably have concluded that cross-examination might highlight inconsistencies in Petitioner's versions of how the murders occurred, bolstering both the direct examination and the damaging testimony of Hernandez. Moreover, defense counsel Toton, during closing argument, argued effectively to limit the impact of Trihey's testimony regarding robbery, (RT 175-183), and the robbery-murder special circumstance. Petitioner cannot show prejudice where he fails to ***state*** with specificity the nature of the proposed testimony. Alcala v. Woodford, 334 F.3d 862, 872-73 (9th Cir. 2003); see also Bragg v. Galaza, 242 F.3d 1082, 1088 (9th Cir. 2001) (mere speculation of possible helpful information from potential witnesses is not sufficient to show ineffective assistance of counsel).

Additionally, for the reasons discussed in claims 1 through 4 and 6, the evidence does not support a reasonable possibility that Petitioner would have received a more favorable disposition on sufficiency of the evidence, actual innocence and mental ***states*** defenses by cross-examining Trihey. Instead, defense counsel could have reasonably believed that cross-examining Trihey as to mental ***state*** defenses, unsupported in the record, might serve only to reinforce the published

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confession.

Petitioner was not prejudiced by failing to Toton's failure to cross-examine Trihey. The trial ***court***'s guilt phase verdicts, rejecting robbery and robbery special circumstance counts in the Bocanegra homicides, reflect its acceptance of Toton's argument that Trihey's testimony should not be given substantial weight. (RT 235-236.) Trihey's testimony likely would not have changed the outcome.

Accordingly, the ***Court*** finds the ***state court*** rejection of the claim was neither contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme ***Court***, nor based on an unreasonable determination of the facts in light of the evidence presented in the ***state court*** proceeding, viewed most favoring the prosecution. See 28 U.S.C. § 2254(d). Claim 15 is denied.

l. Review of Claim 16

In his next claim, Petitioner alleges ineffective assistance of counsel by failure to argue for second degree Murder in Bocanegra homicides, violating his Fifth, Sixth, Eighth and Fourteenth Amendment rights.

The California Supreme ***Court*** summarily denied this claim (SPet. Claim M) raised in Petitioner's ***state*** petition for habeas corpus. In re Sanchez, S049502 (DD). As noted, in such a case "the habeas petitioner's burden still must be met by showing there was no reasonable basis for the ***state court*** to deny relief," Richter, 562 U.S. at 98, and this ***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 fair-minded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this ***Court***." Id. (emphasis added).

Petitioner claims that Toton should have argued for lesser included second degree murder because evidence he premeditated the murders was insufficient. (RT 168-196.) He supports this

claim with facts alleged in claims 2 and 4, ante. However, Petitioner has not established actual innocence, or that the evidence was insufficient to support the premeditated and deliberate



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murder of the Bocanegras. (See claims 1 through 4, ante.) Second degree murder was in any event a lesser included option, necessarily rejected by the trial ***court*** in its finding of first degree murder. (RT 235-236.)

The ***Court*** finds it was not unreasonable for Toton to argue voluntary manslaughter (RT 168-196), foregoing argument of second degree murder, given his theory that a sudden heated argument between Mr. Bocanegra and Joey led to the killings. (CT 77-78, 479, 487, 500, 590; RT 97, 132-33, 188-193, 195-96.) Given the support in the evidentiary record for the manslaughter argument, the ***state court*** could reasonably have determined Toton's failure to argue for second degree murder was not ineffective assistance.

The ***state court*** could reasonably have determined that Petitioner was not prejudiced by Toton's failure to argue for second degree murder. Though Petitioner contends in this claim that he was willing to accept any non-capital conviction, this position is not consistent with his ***stated*** desire to plead guilty to the Bocanegra murders. (SPet. Ex. 520, p. 2; 700.) Petitioner waived jury trial and submitted guilt and special circumstances phase on the preliminary ***hearing*** transcript and the testimony of additional prosecution witnesses. See Sanchez, 12 Cal.4th at 23-30. The evidence does not suggest a reasonable probability that argument for second degree murder would have resulted in a more favorable disposition for Petitioner given the substantial evidence against him, his incriminating statements to detective Stratton and reporter Trihey and the crime scene evidence corroborated by Hernandez's testimony. (See claims 1-10.)

The ***Court*** notes that Toton's motion for acquittal based upon sufficiency of the evidence was denied by the trial ***court***. (RT 140-141.) Toton's argument in closing, revisiting insufficiency of the evidence, was also unsuccessful.

Accordingly, a fair-minded jurist could have found that Petitioner failed to establish that defense counsel's performance fell below an objective standard of reasonableness and that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland, 466 U.S., at 687-694.

It does not appear that the ***state court*** rejection of the claim was contrary to, or an

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unreasonable application of, clearly established federal law, as determined by the Supreme

***Court***, or that the ***state court***'s ruling was based on an unreasonable determination of the facts in

light of the evidence presented in the ***state court*** proceeding. See 28 U.S.C. § 2254(d).
Claim 16 is denied.
m. Review of Claim 17
Petitioner next claims ineffective assistance of counsel by failure to object to improper prosecution closing at the guilt and special circumstances phase, violating his Fifth, Sixth, Eighth and Fourteenth Amendment rights.

The California Supreme ***Court*** summarily denied this claim (SPet. Claim N) raised in

Petitioner's ***state*** petition for habeas corpus. In re Sanchez, S049502 (DD.) As noted, in such a case "the habeas petitioner's burden still must be met by showing there was no reasonable basis

for the ***state court*** to deny relief," Richter, 562 U.S. at 98, and this ***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 fair-minded jurists could disagree that those arguments or

theories are inconsistent with the holding in a prior decision of this ***Court***." Id. (emphasis added).
Petitioner alleges that the prosecutor's argument, that there were only two people, other than the Bocanegras, present at the time of the killings, was false and misleading. Petitioner

***states*** that the prosecution presented evidence of Reyes's bloody palm print on the door knob inside the Bocanegra home. (CT 202-203.) Yet Toton failed to object because he wrongly assessed the evidence. (SHCP Ex. 137, ¶ 30.) Defense counsel Frank did not object because he was responsible only for the penalty phase. (SHCP Ex. 113, ¶ 27.)

This ***Court*** is not convinced. Physical evidence that Reyes was in the Bocanegra home is not inconsistent with the evidence that Reyes served as a lookout and entered the Bocanegra home after the homicides to assist Joey and Petitioner. (SResp. Ex. A, pp.3-4; see claim 10.) The prosecution's argument then was not inconsistent with the evidence. Toton could reasonably have concluded that the prosecution's "two person" argument was not objectionable

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as false or misleading based on the record. (SPet. Ex. 137, pp. 9-10.)

Moreover, Petitioner did not challenge the evidence that he struck Mr. Bocanegra with a bar (CT 481-82; RT 169, 184-85, 188, 196, 207), and that he grabbed Mrs. Bocanegra and told Joey to “shut her up”. (CT 482-483, 504; RT 190-91.) Counsel is not ineffective for failing to make an objection that would be overruled. See United ***States*** v. Steele, 785 F.2d 743, 750 (9th Cir. 1986). “In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.” Strickland, at 691.

Petitioner does not demonstrate by evidence in the record that Toton failed to reasonably investigate these matters. “[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable.” Strickland, 466 U.S at 690-91. Even if he had, “strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.” Id. Toton could reasonably have concluded further investigation would have been futile given the weight of the evidence against Petitioner.

Toton could have considered the prosecution argument, that there was no evidence anyone other than Joey and Petitioner committed the Bocanegra homicides, to be consistent with the evidence and not unreasonable. Moreover, Toton did argue an inference from the evidence, that Mrs. Bocanegra's scalp wounds were inflicted by someone other than Petitioner, (RT 191), and that there was insufficient evidence to show Petitioner inflicted the wounds.
There is no sufficient showing that Petitioner was prejudiced by Toton's alleged failure to object to the prosecutor's guilt and special circumstance closing argument that there were only two perpetrators in the Bocanegra homicides. The evidentiary record contains substantial evidence against Petitioner, his incriminating statements to detective Stratton and reporter Trihey and the crime scene evidence corroborated by Hernandez's testimony. (See claims 1-10.)

For the reasons ***stated***, a fair-minded jurist could have found that Petitioner failed to establish that defense counsel's performance fell below an objective standard of reasonableness
Case 1:97-cv-06134-AWI-SAB Document 163 Filed 07/23/15 Page 63 of 213
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and that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland, 466 U.S., at 687-694.

It does not appear that the ***state*** ***court*** rejection of the claim was contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme

***Court***, or that the ***state*** ***court***'s ruling was based on an unreasonable determination of the facts in

light of the evidence presented in the ***state*** ***court*** proceeding. See 28 U.S.C. § 2254(d).
Claim 17 is denied.
n. Review of Claim 18
Petitioner next claims ineffective assistance of counsel by cumulative ineffectiveness during the guilt phase violating his Fifth, Sixth, Eighth and Fourteenth Amendment rights.

The California Supreme ***Court*** summarily denied this claim (SPet. Claim O) raised in

Petitioner's ***state*** petition for habeas corpus. In re Sanchez, S049502 (DD). As noted, in such a case "the habeas petitioner's burden still must be met by showing there was no reasonable basis

for the ***state*** ***court*** to deny relief," Richter, 562 U.S. at 98, and this ***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 fair-minded jurists could disagree that those arguments or

theories are inconsistent with the holding in a prior decision of this ***Court***." Id. (emphasis added).
Petitioner claims that Toton's failure to seek a continuance to conduct guilt phase

investigation, and failure to present complete defenses based on physical evidence, mental ***state***, and testimony from Joey, Seeley, and Hernandez had the cumulative effect of denying Petitioner

a full trial at the guilt and special circumstance phase and possibility of a ***plea*** bargain. Petitioner bases this claim on facts alleged in claims 2, 4, and 6 through 17, ante.

"The Supreme ***Court*** has clearly established that the combined effect of multiple trial errors may give rise to a due process violation if it renders a trial fundamentally unfair, even where each error considered individually would not require reversal." Parle v. Runnels, 505 F.3d 922, 928 (9th Cir. 2007) (citing Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974)).
Case 1:97-cv-06134-AWI-SAB Document 163 Filed 07/23/15 Page 64 of 213
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The cumulative effect of trial ***court*** errors can be a basis for habeas relief in certain circumstances:

Although individual errors looked at separately may not rise to the level of reversible error, their cumulative effect may nevertheless be so prejudicial as to require reversal. United ***States*** v. Necoechea, 986 F.2d 1273, 1282 (9th Cir. 1993). However, the fact that errors have been committed during a trial does not mean that reversal is required. [W]hile a defendant is entitled to a fair trial, [she] is not entitled to a perfect trial, for there are no perfect trials. United ***States*** v. Payne, 944 F.2d 1458, 1477 (9th Cir. 1991).

U.S. v. de Cruz, 82, F.3d 856, 868 (9th Cir. 1996).

Here, there is not a need to employ cumulative error analysis because review has detected no error, for the reasons discussed in claims 2, 4 and 6-17. Petitioner has not established that the evidence before the trial ***court*** showed defense counsel Toton was ineffective. These claims are insubstantial whether considered singlely or cumulatively. See United ***States*** v. Karterman, 60 F.3d 576, 580 (9th Cir.1995) ("Because each error is, at best, marginal, we cannot conclude that their cumulative effect was 'so prejudicial' to [defendant] that reversal is warranted."); see also Rupe v. Wood, 93 F.3d 1434, 1445 (9th Cir. 1995); Detrich v. Ryan, 740 F.3d 1237, 1273 (9th Cir. 2013). Cumulative error analysis applies where there are two or more actual errors. It does not apply . . . to the cumulative effect of non-errors." Moore v. Gibson, 195 F.3d 1152, 1175 (10th Cir. 1999) (quoting Castro v. Ward, 138 F.3d 810, 832 (10th Cir. 1998)).

Accordingly, Petitioner has not established that defense counsel's cumulative performance fell below an objective standard of reasonableness and that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland, 466 U.S., at 687-694. Petitioner's reliance on Cargle v. Mullin, 317 F.3d 1196, 1210 (10th Cir. 2003), a case readily distinguished on the facts of ineffective assistance, is misplaced. Respondent contends this claim is not cognizable because it creates and retroactively applies a "new rule" of constitutional law within Teague v. Lane, 489 U.S. 288. However, the

***Court*** finds the claim fails not because Petitioner seeks to apply a new rule of criminal procedure

under Teague, but rather on grounds the claim lacks merit for the reasons ***stated***.

Case 1:97-cv-06134-AWI-SAB Document 163 Filed 07/23/15 Page 65 of 213

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Claim 18 is denied.

5. Denial Of Effective Assistance Of Counsel – Claims 19-27

In claims 19 through 27, Petitioner alleges that during the guilt and special circumstance phase he was denied effective assistance of defense counsel.

a. Clearly Established Law

A breakdown in the attorney-client relationship can result in a denial of the right to effective assistance of counsel. Frazer v. United ***States***, 18 F.3d 778, 782-83, 785 (9th Cir. 1994); see also Brown v. Craven, 424 F.2d. 1166, 1169-70 (9th Cir. 1970) (trial ***court***'s failure to conduct inquiry into irreconcilable conflict arising from the client's refusal to communicate or cooperate with counsel resulted in denial of effective assistance of counsel).

The Sixth Amendment requires an appropriate, on the record, inquiry into the grounds for such a motion, and that the matter be resolved on the merits before the case goes forward. Schell v. Witek, 218 F.3d 1017, 1025, citing Smith v. Lockhart, 923 F.2d 1314, 1320 (8th Cir. 1991)). The overarching constitutional question is whether the attorney-client conflict has become so great that "it resulted in a total lack of communication or other significant impediment that resulted in turn in an attorney-client relationship that fell short of that required by the Sixth Amendment." Id., at 1026.

b. Review of Claim 19

Petitioner claims trial ***court*** error by denial, without adequate investigation, of defense counsel's motions to withdraw depriving him of effective assistance of counsel, violating his Sixth, Eighth and Fourteenth Amendment rights.

The ***state*** supreme ***court*** considered this claim on appeal and found that the trial ***court*** did not abuse its discretion in denying defense counsel's two motions to withdraw, as follows:

[I]mplicit in the ***court***'s denial of the motions is the finding that defendant's discussion of his case with the media was not an indication of his distrust or dissatisfaction with counsel. Rather, the conduct was merely indicative of his unwavering desire to admit culpability and to atone for his crimes. Indeed, allowing counsel to withdraw would not have alleviated any prejudice to defendant caused by his contact with the press, nor does the record indicate that denying the motion to withdraw influenced defendant's desire to submit the guilt

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issue on the basis of the preliminary ***hearing*** transcripts. Even though counsel were dissatisfied with defendant's failure to heed their advice and not discuss the case with the media, the record shows defendant's right to counsel was not jeopardized by counsel's continuing representation. Thus, because defendant does not show that any disagreement with counsel resulted in a complete breakdown in the attorney-client relationship that jeopardized his right to a fair trial, we

conclude the trial ***court*** did not abuse its discretion in denying counsels' motions to withdraw. [Citation] In reviewing denial of motion to substitute attorneys, the

***court*** “focuses on the ruling itself and the record on which it is made. It does not look to subsequent matters . . . .”]
Sanchez, 12 Cal.4th at 37.

Petitioner alleges that his out-of-***court*** actions revealed a complete breakdown in his relationship with counsel and that his lack of trust and confidence was not unfounded as counsel ignored his serious mental disturbances which should have been obvious. Petitioner notified defense counsel of his intent to speak to the media on February 2, 1988. Later that day counsel met with Petitioner and advised against contacting the media. After the meeting, counsel discovered Petitioner had given an interview to Michael Trihey, reporter for the Bakersfield Californian newspaper, earlier that day. That interview led to a front-page story published on February 12, 1988.
On February 16, 1988, defense counsel filed a motion to withdraw, asserting Petitioner had indicated he did not trust counsel and actively mislead them by failing to inform them he had already given an interview to Trihey, Petitioner’s refusal to cooperate rendered his representation

virtually impossible, and their attorney-client relationship was so tainted counsel's efforts would be of no assistance. However, the ***Court*** denied the motion because it found no breakdown in the attorney-client relationship and that any prejudice created by Petitioner's contacting the press against counsel's advice would not be ameliorated by counsel's withdrawal. On March 7, 1988 the trial ***court***, before denying the initial motion to withdraw, questioned Petitioner about whether he trusted defense counsel. Petitioner responded that "[he was] willing to stay with them." (CT 690, 707-708; RT [3/7/88] 4-5.)

On April 25, 1988, another article by Trihey was published in the Bakersfield Californian that asserted that Petitioner said he was a triple killer who deserved to die and described Petitioner's legal predicament of not being able to plead guilty and accept the death penalty



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without his counsel's consent.

On May 2, 1988, counsel again moved to withdraw, asserting continued representation would require unethical conduct by counsel. The trial judge met with defense counsel and Petitioner regarding counsel's renewed motions to withdraw. The ***court*** denied Toton's motion on the merits on that day. (CT 707; RT [5/6/88] 3.) Four days later the ***Court*** denied Frank's motion due to "nearness of the trial date." (CT 708; RT [5/10/88] 5.) The trial ***court*** had previously noted that substitution of counsel would not alleviate any prejudice to the case already resulting from Petitioner's discussions with report Trihey. (RT [3/7/88] 5.) On June 22, 1988, the ***Court*** of Appeal of the ***State*** of California, Fifth Appellate District, denied Petitioner's petition for writ of mandate and/or prohibition, seeking an order directing the trial ***court*** to grant counsel's motions to withdraw. (CT 768.)

Here, the ***state court*** could reasonably have found that any disagreement with counsel was not so great that it resulted in a complete breakdown in the attorney-client relationship jeopardizing his right to effective representation and a fair trial. (CT 690; RT [3/7/88] 4-5.) The contention of defense counsel in their initial (February 1988) motion that the newspaper article reflected a lack of trust and cooperation (RT March 7, 1988 at pp. 3-4; CT 685-686) was countered by Petitioner during his colloquy with the trial ***court***. Petitioner ***stated*** to the trial judge that, "[t]here is a little bit of mistrust there, but you know, I'm willing to stay with them, if they want out, you know, I ***won't*** stop them." (RT March 7, 1988 at pp. 4-5; CT 685-686.)

Petitioner's assertion that the trial ***court*** erred by treating the newspaper interview as the sole issue, failing to investigate and address the more pervasive problem of mistrust, is unavailing. Toton's February 1988 withdrawal motion, which raised a lack of trust and confidence as a result of the newspaper article, was denied by the trial ***court*** on the merits (CT 707; RT May 6, 10, and June 24, 1988 at p. 3) following the trial ***court***'s above noted discussion of these very issues with Petitioner. (RT March 7, 1988 at pp. 4-5; CT 685-686.)

Petitioner also contends that the second motion to withdraw, brought by Frank in May 1988 and joined in by Toton, was improperly denied. He points out that this motion was

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unopposed and that the trial ***court*** delayed reaching the motion and ultimately did not reach the merits. Frank's May 1988 withdrawal motion, brought on ethical grounds relating to possibly perjurous testimony, (CT 694-696; URT6
(Frank) [5/6/88] 2-8), joined in by Toton, was denied

by the trial ***court*** following ex parte in camera ***hearing*** because it was too close to trial. (CT 708-710; RT May 6, 10, and June 24, 1988, at p. 5.) However, the request was devoid of facts showing the nature and basis for relief requested. (RT May 10, 1988, pp. 4-5, 7-8.) Any ethical dilemma involving perjurous testimony would not likely have been resolved by appointing

replacement counsel, and the trial ***court*** recognized as much. (URT (Frank) [5/6//88] 4-6.) Petitioner does not allege or support an ethical violation. Even if he had, a lawyer's violation of ethical norms does not make the lawyer per se ineffective. Burt v. Titlow, 134 S. Ct. 10, 18 (2013).
Moreover, as with the earlier motion to withdraw, Petitioner was ambivalent, neither seeking nor objecting to withdrawal. (URT (Frank) [5/6/88] 9; RT [5/6/88] 2.) Petitioner's contention his defense waiver was a product of ineffective assistance (Pet. ¶¶ 377-380) is refuted by his expressed desire to plead guilty. (RT [7/27/88] 6-7; URT (Toton) [5/6/88] 2.) Petitioner's suggestion that he lacked confidence in counsel because they ignored his

mental disturbance was not communicated by him to the ***court*** and counsel and is not supported by any proffer in the evidentiary record. Petitioner neither sought nor objected to withdrawal of defense counsel Toton and Frank, (RT [5/6/88]2), and had expressed his desire to enter a guilty

***plea***. (RT [5/16/88] 7.) In accordance therewith, trial was waived on the guilt and special

circumstances phase. (RT [7/27/88] 6-7.) The ***state court*** could reasonably have determined that withdrawal would not have ameliorated any prejudice from Petitioner's contacting the press, or affected Petitioner's submission on the preliminary ***hearing***. Sanchez, 12 Cal.4th at 36-37. On this basis Petitioner's right to counsel was not placed by jeopardy by the continued representation of defense counsel.

Respondent contends this claim is not cognizable because it creates and retroactively applies a "new rule" of constitutional law within Teague v. Lane, 489 U.S. 288. However, the ***Court*** finds the claim fails not because Petitioner seeks to apply a new rule of criminal procedure under Teague, but rather on grounds the claim lacks merit for the reasons ***stated***.

6 The term "URT" is a reference to Unsealed Reporter's Transcripts of ex parte in camera proceedings.

For the reasons ***stated***, the ***state*** ***court*** rejection of the claim was neither contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme

***Court***, nor an unreasonable determination of the facts in light of the evidence presented in the

***state*** ***court*** proceeding. See 28 U.S.C. § 2254(d).

Claim 19 is denied.

c. Review of Claim 20

In claim 20, Petitioner alleges ineffective assistance of counsel by complete breakdown in the attorney/client relationship violating his Sixth, Eighth and Fourteenth Amendment rights.

The California Supreme ***Court*** summarily denied this claim (SPet. Claim Q) raised in

Petitioner's ***state*** petition for habeas corpus. In re Sanchez, S049502 (DD). The ***state*** supreme

***court***, in its decision on direct appeal, considered Toton's disciplinary proceedings and noted the

following trial ***court*** discussion:

"The ***Court***: One of the things that concerns me about this incident is the fact of the date of August 25th and the fact that a jury trial was waived in this case, and now we're at that stage of the case where a [Penal Code section] 1118.1 is under submission. And I suppose somebody reviewing this case could say one of the reasons maybe that Mr. Toton suggested that the jury trial be waived was the fact that the trial could be completed prior to the time that the Californian suggests that there's going to be some kind of a ruling in his case. As-and clearly if we had had a jury, we would still have been going at that time, and I really seriously doubt whether we would have been in a position even to have begun to take evidence as of the 25th day of August. That situation worried me a little bit.

"And I wonder if you have discussed this with your client.

"Mr. Frank: Yes, your Honor. I advised [defendant] that the article certainly did imply that Mr. Toton's motivation for pursuing the presentation of the case in the manner in which he has, at least indicated, that perhaps he did that because of his own personal problems, plans or agenda.

"I advised [defendant] that he had the right to be represented by an attorney who was completely and absolutely free from any sort of conflict, that [defendant] had the right to have an attorney whose decision-making process was unfettered by any of his own personal plans or problems, and that he had the right to have an attorney whose representation and whose decision-making process was based not on any of the attorney's considerations but on the best interests of [defendant], the



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client in this case."

Sanchez, 12 Cal.4th at 38.

Petitioner revisits allegations in claim 19 regarding Toton's disciplinary issues, and proffers an unsigned declaration of defense expert Isabel Wright that defense counsel disbelieved and disregarded Petitioner. (SHCP Ex. 131, Att. B, ¶ 6-9.) However, even if competent evidence, Wright's testimony is controverted by that of defense counsel Toton (SHCP Ex. 137, p. 8) and Frank (SHCP Ex. 113, ¶ 6), that apart from the media interview issue, the attorneyclient relationship was a cooperative one. Moreover, the record shows that the trial ***court*** questioned Petitioner to verify that he had spoken to Frank about the disciplinary proceedings, that he had read the Bakersfield Californian article, and that he was unaware of any disciplinary action against Toton prior to the date of the article. The ***court*** asked Petitioner if he believed the article implied that "one reason Mr. Toton was pushing this case forward was because of his own personal time considerations." Petitioner replied: "Not really sir, because we had discussed-you know, this was part- I wanted to go this way in the beginning anyway. So there was really-I never really felt that he was doing it for his own incidences [sic]." Sanchez, 12 Cal.4th at 39.

The trial ***court*** discussed with Petitioner his earlier position that it was his idea alone to

"waive the jury under any circumstances." Petitioner told the trial ***court*** that he wanted to waive jury trial on the guilty and special circumstances phase and that the idea started with him and not defense counsel. (RT [7/27/88] 6-7.)

The trial ***court*** discussed with Petitioner whether he wanted to make a motion for mistrial "and for certain other motions in view of the publicity that this has gotten?" The following colloquy took place:

"The ***Court***: What I'm concerned [about] is that something will happen down the line and then you will say, gee, I didn't know what I was doing; I should have asked for a mistrial at that point in time. That would probably be too late, because I'm probably getting an indication that you want to waive any problems that Mr. Toton's difficulties might have in this case. Is that right?
"The Defendant: Yes.

"The ***Court***: I didn't make that very clear.
"The Defendant: Yeah.

"The ***Court***: What I'm saying is, I don't want you to go down the line and then all

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of a sudden say, gee, I've changed my mind.
“The Defendant: Yeah.

“The ***Court***: Probably you can't do that. You understand that?
“The Defendant: Yes, I understand that.

“The ***Court***: Are you satisfied with the ***state*** of the record at this point?
“The Defendant: Yes sir. I'm very satisfied.

“The ***Court***: Nobody threatened you to get you to say this?
“The Defendant: No, sir ....

“The ***Court***: Are you satisfied, sir, that Mr. Toton's dilemma with the ***State*** Bar had nothing to do with the waiver of the jury trial?
“Mr. Frank: I am, yes.

“The ***Court***: And are you, Mr. Sanchez?
“The Defendant: I am too.”
Sanchez, 12 Cal.4th at 39-40.

Based on the foregoing, and for the reasons discussed in claim 19, the ***state court*** could reasonably have determined Petitioner did not established ineffective assistance of counsel through complete breakdown of the attorney/client relationship. As noted by the ***state*** supreme ***court***, “[i]n order to establish a violation of the right to effective assistance of counsel, a defendant must show that counsel's performance was inadequate when measured against the standard of a reasonably competent attorney, and that counsel's performance prejudiced defendant's case in such a manner that his representation “so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” Strickland, 466 U.S. at 686. The record above does not support such a finding.

Moreover, “a ***court*** need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies.” Strickland, 466 U.S. at p. 697. Prejudice is shown when there is a “reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” In re Sixto (1989) 48 Cal.3d 1247, 1257; Strickland, 466 U.S. at p. 694. If defendant fails to show that he was prejudiced by counsel's performance, the ineffective assistance claim may be rejected without determining whether counsel's performance was inadequate. Strickland, 466 U.S. at p. 697.)”
Petitioner has not established prejudice. Toton was licensed to practice law until his

disbarment on March 31, 1989, after Petitioner's trial was completed. In rejecting this claim on appeal, the ***state*** supreme ***court*** pointed out that:

> [Petitioner] does not assert that Toton's pending discipline prejudiced his case. The record would not support such an argument. Toton vigorously crossexamined prosecution witnesses at the preliminary ***hearing*** and during the guilt phase, made several defense motions, including one for appointed assistant counsel, which was granted, and motions for pretrial discovery, severance and additional motions that indicated he was vigorously representing his client. In addition, Toton made a comprehensive closing argument at the guilt phase. Thus, there is no indication on the record that counsel's representation was anything less than competent, and defendant fails to persuade us that counsel's representation

was ineffective solely on the basis of the disciplinary action pending against him .

. . Toton was a member of the ***State*** Bar at all times during his representation of defendant. " 'Erring morally or by a breach of professional ethics does not necessarily indicate a lack of knowledge of the law.'" [Citation] We simply are not persuaded that Toton's unrelated disciplinary problems in any way influenced his representation of defendant or otherwise rendered him unfit as a matter of law. [Citation]

Sanchez, 12 Cal.4th at 43-45.

Petitioner's contention that defense counsel found him uncooperative is refuted by Mr. Frank's declaration where he said that, except for the media interviews, Petitioner was cooperative with defense counsel. (SPet. Ex. 113, p. 3.) As to the alleged ethical dilemma, as noted a lawyer's violation of ethical norms does not make the lawyer per se ineffective. Burt, 134 S. Ct. at 18.

Respondent contends this claim is not cognizable because it creates and retroactively applies a "new rule" of constitutional law within Teague v. Lane, 489 U.S. 288. However, the ***Court*** finds the claim fails not because Petitioner seeks to apply a new rule of criminal procedure under Teague, but rather on grounds the claim lacks merit for the reasons ***stated***.

The ***Court*** finds that, the reasons discussed, the ***state court*** rejection of the claim was neither contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme ***Court***, nor an unreasonable determination of the facts in light of the evidence presented in the ***state court*** proceeding. See 28 U.S.C. § 2254(d).

Claim 20 is denied.

d. Analysis - Claims 21-24

Case 1:97-cv-06134-AWI-SAB Document 163 Filed 07/23/15 Page 73 of 213

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Petitioner claims denial of effective assistance of counsel through the appointment of Toton as lead counsel and the failure to replace him notwithstanding his conflicts of interest and Petitioner's insufficient waiver thereof, violating his Sixth, Eighth, and Fourteenth Amendment rights.

The California Supreme ***Court*** summarily denied claims 21, 23 and 24 (SPet. Claims P, R and S respectively) raised in Petitioner's ***state*** petition for habeas corpus. In re Sanchez, S049502 (DD). As noted, in such a case "the habeas petitioner's burden still must be met by showing there was no reasonable basis for the ***state court*** to deny relief," Richter, 562 U.S. at 98, and this ***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 fair-minded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this ***Court***." Id. (emphasis added).

The ***state*** supreme ***court***, in reviewing these issues on direct appeal, noted that:

> Defendant's claim that Toton's disciplinary proceedings rendered him incompetent is no more persuasive if considered under the rubric of conflict of interest. A criminal defendant's right to effective assistance of counsel, guaranteed by both the ***state*** and federal Constitutions, includes the right to representation free from conflicts of interest. [Citation] To establish a violation of the right to unconflicted counsel under the federal Constitution, 'a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance.' [Citation] To establish a violation of the same right under our ***state*** Constitution, a defendant need only show that the record supports an 'informed speculation' that counsel's representation of the defendant was adversely affected by the claimed conflict of interest. [Citation]

[W]e also observed that “[c]onflicts of interest may arise in various factual settings. Broadly, they 'embrace all situations in which an attorney's loyalty to, or efforts on behalf of, a client are threatened by his responsibilities to another client or a third person or by his own interests.'” [Citation]

Defendant contends that the alleged conflict of interest between himself and Toton was caused by Toton's “own interest” in expediting the trial prior to his disbarment, to the defendant's prejudice. Defendant asserts that the fact of the pending disciplinary action gave Toton a strong incentive to finish defendant's case as quickly as possible, implying that Toton's desire to end the case led to a constitutionally deficient performance.

Based on the appellate record, we are not persuaded by defendant's arguments. As we have observed, the record shows that Toton was not disbarred until eight

months after the ***court*** and defendant learned of the proceedings against him, and

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one month after completion of the penalty phase of defendant's trial. There is no indication that the disciplinary proceedings influenced the pace of Toton's representation, and, indeed, there is substantial evidence on record that would support the opposite conclusion.

First and foremost, it was Toton who advised defendant not to plead guilty and instead to submit the guilt and special circumstance issues on the basis of the preliminary ***hearing*** transcripts. This alternative to a guilty ***plea*** allowed counsel to contest the People's case, present various defense motions to the ***court***, and generally make a stronger case for defendant than would have been available following a guilty ***plea***. Thus, counsel Toton actually prolonged the trial notwithstanding defendant's desire to proceed directly to the penalty phase. Moreover, even if we were to perceive either an actual conflict of interest, as required by federal law, or to conclude the record supports an "informed speculation" of a conflict as required under our ***state*** Constitution, defendant intentionally and knowingly waived any conflict on the record. [Citation]

In addition, defense counsel Frank informed the ***court*** he was satisfied that Toton's pending discipline "had nothing to do with the waiver of the jury trial."

At a later in camera ***hearing*** attended by defense counsel Frank, defendant admitted that, in partially submitting his case, it was his desire to waive jury trial "under any circumstances," that he had had a "lengthy discussion" regarding his rights with defense counsel Frank, and that he wanted to maintain the status quo. The fact that defendant did not discuss Toton's pending discipline with him does not assist defendant's conflict claim. Here, defendant asserts that his "discussion with Frank could not substitute for a discussion with Toton. By his own admission, Frank knew nothing about his co-counsel's impending [discipline] until the news appeared on the front page of the Bakersfield newspaper . . . . Toton hid this important fact from his own assistant counsel until the news became public. Nothing in the record indicates that Frank knew any more about the [discipline] than did the readers of the Bakersfield Californian. Frank simply was not able to speak for Toton in discussing the impact of the [disciplinary proceedings] on the future conduct of the defense [nor was] Frank in [a] position to discuss with [defendant] how the [disciplinary] proceedings already might have affected Toton's guilt phase strategy." Defendant fails to show, however, how Toton's assurances or perspective would have assisted him in determining whether he wanted to waive the conflict, or how Toton would have provided him with a better explanation than that given by the ***court*** about the potential drawbacks of Toton's continued representation.

Defendant next asserts that the trial ***court*** failed in its duty to ensure that he

knowingly and intelligently waived any conflict with counsel. “When a trial

***court*** knows or should know that defense counsel has a possible conflict of interest with his client, it must inquire into the matter [citations] and act in

response to what its inquiry discovers [Citation].” If the ***court*** determines that a waiver of a conflict is necessary, it must satisfy itself that “ '(1) the defendant has discussed the potential drawbacks of [potentially conflicted] representation with his attorney, or if he wishes, outside counsel, (2) that he has been made aware of the dangers and possible consequences of [such] representation in his case, (3) that he knows of his right to conflict-free representation, and (4) that he

voluntarily wishes to waive that right.'” [Citation] A trial ***court***'s failure to inquire into the conflict or to adequately respond to its inquiry amounts to reversible error if the defendant can show “that an actual conflict of interest existed and that

76

that conflict adversely affected counsel's performance." [Citation]

Defendant asserts that the trial ***court*** "never asked [defendant] in clear, unambiguous language whether he was willing to waive his right to unimpaired

counsel." He also complains of the ***court***'s failure to "determine whether [Toton's] alleged misuse of client funds might indicate that Toton had financial difficulties which might affect his work or handling of funds in [defendant's]

case, [nor did the ***court***] ask Toton about the timetable of ***state*** bar proceedings [or ask] how the bar proceeding might affect, or might have affected, Toton's conduct of [defendant's] case."
In deciding whether a defendant understands the nature of a possible conflict of

interest with counsel, the trial ***court*** need not explore each foreseeable conflict and consequence. [Citation] Nor does a defendant's waiver of conflict-free counsel extend merely to matters discussed on the record. [Citation] As we observed in [Citation] "[r]ules that are that strict seem neither necessary nor workable." [Citation] (waiver found adequate even though all conceivable ramifications of conflict not explained). Thus, looking at the whole record, we must determine whether defendant was aware of the potential drawbacks and possible consequences of retaining Toton, and whether he understood his right to conflict-free counsel and knowingly waived that right.

It is clear that the record belies defendant's argument. The ***court***'s response to the asserted conflict of interest was appropriate under the circumstances; it was immediate and informed petitioner of his rights under the facts. As the record

indicates, the ***court*** discussed the conflict with the parties, was careful to ensure defendant was aware that a conflict existed, and confirmed that his waiver of the conflict was voluntary and knowing. [Citation] Defendant even declined the

***court***'s invitation to make a motion for mistrial, emphasizing that he was satisfied

with the ***state*** of the record. Thus, in light of all the circumstances, we conclude

the ***court*** gave defendant an opportunity to declare a mistrial, to relieve counsel,

and to voice his objections on the record. In our view, the trial ***court*** conducted an adequate inquiry into the conflict, and we are satisfied that defendant's waiver was knowing and voluntary. [Citation]
Sanchez, 12 Cal.4th at 45-48.
The Sixth Amendment provides that a criminal defendant shall have the right to "the Assistance of Counsel for his defense." As a general matter, a defendant alleging a Sixth Amendment violation must demonstrate "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.

An exception exists for cases in which counsel actively represents conflicting interests. Mickens v. Taylor, 535 U.S. 162, 166 (2002); Cuyler v. Sullivan, 446 U.S. 335, 345-50 (1980). In such a case, prejudice is presumed. Id. However, Petitioner must establish that "an actual



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conflict of interest actually affected the adequacy of [defense counsel's] representation." Sullivan, 446 U.S. at 348-49. Thus, "until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance." Id. at 350 (emphasis in original).

Petitioner supports these claims in part with facts alleged in claims 5 and 6. He contends that Toton, who had ***state*** bar disciplinary proceedings pending against him at the time he was appointed to Petitioner's case. He contends Toton obtained his bar license by fraud. He contends that Toton had conflicts of interest relating to disbarment proceedings which should have resulted in replacement lead counsel and a jury trial at the guilt and special circumstance

phase. However, there is no competent evidence Toton obtained his law license by fraud (SHCP Ex. 133, Att. A), or that he engaged in the practice of law prior to his admission to the bar. (SHCP Exhs. 514; 516-18.) Toton was not disbarred until March 31, 1989, five months after the penalty phase verdict. (SHCP Ex. 519.)

Petitioner faults the trial ***court*** for failure to conduct an adequate inquiry into Toton's possible conflict of interest, noting Toton was never questioned. (Sealed RT July 26, 1988, at pp. 80-84.) However, the trial judge did look into the pending disciplinary proceedings against Toton and discussed such with the parties and Petitioner. See Sanchez, 12 Cal.4th at 47. The

***Court*** provided Petitioner the opportunity to "declare a mistrial, to relieve counsel, and to voice his objections to the record." Id. In response Petitioner voluntarily, knowingly and intentionally waived any conflict of interest on the record following a discussion with co-counsel Frank and

the trial ***court*** as to his rights to conflict free representation and potential drawbacks and consequences of staying with Toton (RT [7/27/88] 3, 4-10), as reflected by his statement he

wanted to maintain the status quo. (RT [7/27/88] 8.) He refused the ***court***'s invitation for mistrial, to relieve counsel, and to object to the record. Sanchez, 12 Cal.4th at 47. The evidentiary record does not reflect that Toton's litigation of the case was influenced by an actual conflict arising from the disciplinary proceedings. See Burger, 483 U.S. at 783.

Petitioner's argument that, had the trial ***court*** pressed the inquiry, Toton would have withdrawn

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or been replaced and a full defense then mounted, is based upon speculation. The trial ***court***

could reasonably have found that there was no actual unwaived conflict of interest. The ***state***

***court*** could have concluded that Petitioner understood what he was waiving, was "very satisfied" with the record and acting voluntarily, (RT [7/27/88] 8), and that Toton's situation had "nothing to do with his waiver of the jury trial." (RT [7/27/88] 9-10.)
Petitioner's contention that he should have been allowed to discuss Toton's alleged conflict with Toton himself or outside counsel is unaccompanied by any evidentiary proffer how

that would have resulted in a more favorable outcome. The ***state*** supreme ***court*** found that "the fact disciplinary proceedings were pending against counsel Toton did not automatically render Toton's performance inadequate or prejudice [Petitioner's] right to effective counsel." Sanchez,

12 Cal.4th at 44. The ***court*** further found that Toton engaged in vigorous witness examination and cross-examination (CT 518-625; RT 2664-2670), pre-trial discovery (CT 649-663, 769), preemptory challenges (CT 836-840) evidentiary motions (CT 841-45, 846-53, 854-58, RT 80, 97-113), and closing argument. (RT 169-96.) All this supported the conclusion that Toton's

representation was adequate. The ***state*** supreme ***court*** also found "no indication that the disciplinary proceedings influenced the pace of Toton's representation." Sanchez 12 Cal.4th at

45:2). Nothing in the ***state*** record suggests otherwise.
For the reasons discussed in claims 19 and 20, ante, Petitioner has not established denial of effective assistance of counsel through denial of defense counsel motions to withdraw, breakdown of the attorney-client relationship by virtue of Toton's debarment proceedings, or waiver of jury trial at the guilt and special circumstance phase. The assertion in claims 21-24,

that the trial ***court*** did not sufficiently investigate defense counsel's alleged conflict of interest similarly fails for the same reasons.
Petitioner expressed his desire to plead guilty, to stay with Toton following discussion

with the ***court*** and defense counsel. Toton, assisted by co-counsel Frank, vigorously crossexamined witnesses and made a variety of pretrial and trial motions and made a detailed guilt phase closing argument, thereby distinguishing this matter from Petitioner's cited People v.

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Williams, 93 Ill.2d 309 (1982) and People v. Rainge, 112 Ill.App.3d 396 (1983). Petitioner was aware of the possible problems with Toton's continued representation and his right to conflict free representation, having discussed these matters with co-counsel Frank for approximately an hour, and Petitioner thereafter expressly waived any such conflict. (RT [7/27/88] 4-10.) Petitioner argues that defense counsel Frank lacked sufficient information about Toton's disciplinary proceedings to discuss the matter with Petitioner, (SHCP Ex. 137, ¶ 16), but makes no proffer of how and why this was so and cause him prejudice. Frank believed that Toton's disciplinary issues did not affect the proceedings. (Sealed RT July 27, 1988, at p. 9-10.) Petitioner's re-argument that neuropsychological deficits (organic impairments) and neurological and psychiatric disorders (psychiatric impairments) prevented him from

competently waiving the conflict fails substantively for the reasons ***stated*** in claims 1-4 and 6.

As discussed in those claims, Dr. Foster's 1995 opinion of Petitioner's mental ***state***, that there is a high probability Petitioner suffered neuropsychological and psychiatric disorders and

impairments during the pretrial and trial period, does not demonstrate the trial ***court*** decision to

allow Toton to continue as lead counsel was unreasonable.

At bottom, Petitioner has not demonstrated Toton had an actual conflict of interest. See Garcia v. Bunnell 33 F.3d 1193, 1198 (9th Cir. 1994) (no actual conflict where record discloses no active representation of competing interest); see also Burger, 483 U.S.at 783; Mickens, 535 U.S. at 171 (“[A]n actual conflict of interest [means] precisely a conflict that affected counsel's performance—as opposed to a mere theoretical division of loyalties.”). To meet this standard, he must show “that the attorney's behavior seems to have been influenced by the conflict,” which, though not a showing of actual prejudice, “remains a substantial hurdle.” Lockhart v. Terhune, 250 F.3d 1223, 1231 (9th Cir. 2001). Even if he had demonstrated actual conflict, Petitioner has not demonstrated that his waiver the conflict was invalid. Garcia, 33 F3d at 1195 (9th Cir. 1994);

Respondent contends claims 21, 22 and 24 are not cognizable because each creates and retroactively applies a “new rule” of constitutional law within Teague v. Lane, 489 U.S. 288.

Case 1:97-cv-06134-AWI-SAB Document 163 Filed 07/23/15 Page 79 of 213

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However, the ***Court*** finds the claims fail not because Petitioner seeks to apply a new rule of criminal procedure under Teague, but rather on grounds the claims lack merit for the reasons

***stated***.

A fair-minded jurist could have found that rejection of these claims was neither contrary to, or an unreasonable application of, clearly established federal law, as determined by the

Supreme ***Court***, nor an unreasonable determination of the facts in light of the evidence presented

in the ***state court*** proceeding. See 28 U.S.C. § 2254(d).

Claims 21-24 are denied.

e. Review of Claims 25-26

Petitioner next claims that he was not competent to waive trial by jury and confrontation and cross-examination of witnesses and presentation of a defense, and that he was not competent to stand trial, violating his Sixth, Eighth, and Fourteenth Amendment rights. He supports these claims with facts alleged in denied claims 6 through 10 and 14.

The California Supreme ***Court*** summarily denied claims 25 and 26 (SPet. Claims W and

T respectively) raised in Petitioner's ***state*** petition for habeas corpus. In re Sanchez, S049502 (DD). As noted, in such a case "the habeas petitioner's burden still must be met by showing

there was no reasonable basis for the ***state court*** to deny relief," Richter, 562 U.S. at 98, and this

***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 fair-minded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of

this ***Court***." Id. (emphasis added).

i. Trial Waivers

The ***state*** supreme ***court*** found Petitioner knowingly, voluntarily and intelligently waived

rights when it considered the matter on direct appeal. This ***Court*** agrees, for the reasons

discussed in claims 6, 14 and 21-24. The trial ***court*** allowed Toton to inform Petitioner of his constitutional rights, which Petitioner acknowledged he was waiving "freely and voluntarily." Sanchez, 12 Cal.4th at 24-25. Petitioner's suggestion he did not receive a sufficient narrative



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explanation of rights waived is refuted by the evidentiary record. Toton informed the trial ***court*** he had discussed the guilt and special circumstance submission and waiver with Petitioner, who agreed to the procedure. (RT-10a.) Petitioner expressly declined the offer of more time to

consider the waiver decision, ***stating*** that he was "very confident" of his decision. See Sanchez, 12 Cal.4th at 26; CT 889-892; RT-10a, 98a-100a.). Petitioner then entered jury trial, compulsory process, confrontation and cross-examination and presentation of evidence waivers on the record. (CT 891; RT- 108a-114a.) Petitioner confirmed the waivers the next day, July 14, 1988. (CT 892; RT-115a.) Petitioner's argument that medication he received during his incarceration impacted the waivers (SHCP Exhs. 111, ¶ 64; 601) is not sufficiently supported in the evidentiary record.

ii. Slow Guilty ***Plea***

The ***State*** Supreme ***Court*** also considered on direct appeal Petitioner's argument that the

submission for ***court*** trial was a "slow ***plea***" unaccompanied by waivers sufficient under BoykinTahl.

That ***court*** found no "slow ***plea***" because defense counsel called and cross-examined witnesses, retained the right to present additional evidence, attempted to impeach Hernandez, moved to strike testimony, moved for judgment of acquittal on insufficiency of the evidence, argued against first degree murder, and made an extensive closing argument. Sanchez, 12 Cal.4th

at 28-30. That ***court*** also ruled there was no surrender of the rights against self-incrimination

(because Petitioner chose not to testify at the guilt phase) and no prejudicial error from any failure to advise Petitioner of the consequences of conviction, noting that:

Defendant had been thoroughly advised by counsel of the consequences of pleading guilty and of the consequences of waiving his constitutional rights. He was well aware that he faced a possible death sentence, and, according to reporter Trihey, even asked for his own death. It is clear from the record that defendant would have waived his right to a jury trial and insisted on the submission of the guilt phase on the preliminary ***hearing*** transcripts even if he was specifically told by the ***court*** that he faced a possible death sentence.

Sanchez, 12 Cal.4th at 30-31.

Case 1:97-cv-06134-AWI-SAB Document 163 Filed 07/23/15 Page 81 of 213

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At trial, Petitioner was questioned about the charges pending and consequences of

conviction:
"Mr. Toton: And you also understand the nature of the charges against you in this proceeding; is that correct?
"The Defendant: Yes, sir.
Mr. Toton: All right, and that there are three counts of homicide alleged with special circumstances.
The Defendant: Yes.
Mr. Toton: Thank you, your Honor.

The ***Court***: And I take it, sir, that you have done all this freely and voluntarily?
The Defendant: Yes, sir.

The ***Court***: No one has threatened you?
The Defendant: No, sir.

The ***Court***: And you have done this after consultation with both of your lawyers?
The Defendant: Yes, sir.

The ***Court***: Thank you.
(CT 889; RT- 65a-68a.)
Petitioner was given time to consider the waiver which did not become final until the following day, when he confirmed the waiver and that it was made freely and voluntarily. (CT 891-892; RT-115a.)

The ***Court*** finds the "slow ***plea***" claim is not adequately supported by the ***state*** record.

Petitioner consulted with defense counsel prior to the waivers and submission to ***court*** trial;

repeatedly ***stated*** his desire to plead guilty; and acquiesced to counsel's urging to allow crossexamination

and argument in his defense. The California Supreme ***Court***'s determination of facts was not unreasonable in light of the evidence above and Petitioner's desire to plead guilty. (RT –

87a.) That ***court***'s rejection of Petitioner's claims neither contrary to, nor an unreasonable

application of, United ***States*** Supreme ***Court*** precedent.
iii. Competency for trial
Petitioner maintains Dr. Matychowiak, who conducted his psychiatric evaluation in November 1987, erred in finding him competent to stand trial because: (1) the opinion was based on a single, inefficient interview, (2) the conclusion relies almost exclusively on Petitioner's statements and are not corroborated by independent evidence, (3) insufficient information was obtained about several important factors, including Petitioner's history of severe

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childhood trauma and extreme neurological deficits, (4) the effect of signs of potential brain damage, including history of head injury, paint sniffing and PCP use, as well findings of poor "theoretical and general judgment" were not considered, (5) the effect of signs of depression, suicidal intentions, and self-mutilation were not considered, (6) no questions were asked about Petitioner's understanding of the nature of the proceedings or his ability to consult with or assist counsel, and (7) the diagnosis of borderline personality disorder with a past history of substance abuse did not follow logically from findings of head injury, severe drug abuse, depression, suicidal tendencies and poor theoretical and general judgment.

A defendant is not competent to stand trial if he lacks "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding–and a rational as well as factual understanding of the proceedings against him." Dusky v. United Sates, 362 U.S. 402 (1960). A ***state*** may legislate the presumption that defendants are competent to stand trial and require defendants to bear the burden of proving that they are not. Medina v. California, 505 U.S. 437, 449 (1992).

Petitioner has not made a sufficient showing that he was erroneously deemed mentally competent. Petitioner's contention his neuropsychological deficits (organic impairments) and neurological and psychiatric disorders (psychiatric impairments) prevented him from competently standing trial and making the above waivers fails substantively for the reasons

***stated*** in claim 6. Petitioner did not suffer hallucinations or delusions memory lapse at this time.

(SPet. Ex. 520, p. 5.) He wanted to enter a guilty ***plea***, though his attorneys had not allowed him to do so. (Id. at p. 2-4.) Dr. Matychowiak found that Petitioner

[Q]uite clearly understand(s) his situation and has the comprehension of the ***court*** processes. He is able to discuss himself, his decisions and his reasoning for his decisions . . . At the present time he shows evidence of a basic personality

disorder. However, this does not make him unable to understand ***court*** procedures or his need for his own defense. It does not appear to significantly interfere with his capacity to cooperate with his attorney."

Id., at 5-6. Dr. Matychowiak found Petitioner "presently able to understand the nature and purpose of proceedings taken against him" and "to cooperate in a rational manner with counsel

in presenting a defense." (SPet. Ex. 520, p.6.)
As discussed above, defense psychologist Donaldson, who examined Petitioner prior to

the preliminary ***hearing***, found Petitioner to be of average intelligence with no deficits in reality testing or thought disorder. (SPet. Ex. 106, p. 2.) Defense counsel were entitled to rely on the expert's opinions, and were not obligated, without a request for information from the expert, to investigate further in these regards. Hendricks v. Calderon, 70 F.3d 1032, 1038 (9th Cir. 1995); cf., Silva v. Woodford, 279 F.3d 825, 842-43 (9th Cir. 2002) (trial counsel deficient if inadequate investigation into background and mental health: at guilt if expert requests information; and at penalty if the information is mitigating).

Petitioner points to declarations included with the ***state*** habeas petition by psychologists Doane and Froming (SHCP Exhs. 105 and 114 respectively) and psychiatrist Foster (SHCP Ex. 111). These experts opine that Petitioner had a history of heavy paint sniffing and PCP abuse (SHCP, Ex. 111, ¶ 90), and suffered significant organic brain damage and neuropsychological deficits and post-traumatic stress disorder at the time of his trial waivers. (SHCP Exhs. 105, ¶¶ 153-165; 111, ¶¶ 60-69). Petitioner contends that, as of December 1987, he was considered a "mentally unstable inmate' based on his bizarre behavior, overwhelming guilt and depression, instability, possible hallucinations and a suicide attempt. (SCHP Ex. 601.)
However, to the extent that these declarations can be considered evidence, they were not

presented to the California Supreme ***Court*** in his appeal. As to claims adjudicated in the appeal,

the ***Court*** cannot consider these declarations here. Pinholster, 131 S. Ct. at 1398. Even if they could be considered, they are not sufficient evidence in support of the claims for the reasons

***stated***. Petitioner was mentally competent for reasons discussed in claims 6, and knowingly and voluntarily made the waivers for reasons discussed in claims 14 and 21through 24.

Due process requires a ***state*** to provide access to competent psychiatric assistance when a defendant demonstrates that his sanity at the time of the offense will be a significant factor at trial. Ake v. Oklahoma, 470 U.S. 68, 83 (1985). However, an indigent defendant does not have a constitutional right to hire the psychiatrist of his choice. Id. Petitioner's claim that the courtCase 1:97-cv-06134-AWI-SAB Document 163 Filed 07/23/15 Page 84 of 213
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hired psychiatrist, Dr. Matychowiak, was incompetent is foreclosed by Harris v. Vasquez, 949 F.2d 1497, 1517 (9th Cir. 1990), which refused to expand Ake to encompass a "battle of experts." Id., at 1517-18 (citing Silagy v. Peters, 905 F.2d 986, 1013 (7th Cir. 1990)). "Allowing such battles of psychiatric opinions during successive collateral challenges to a death sentence would place federal ***courts*** in a psycho-legal quagmire resulting in the total abuse of the habeas process." Id. at 1518.

Dr. Matychowiak was aware of Petitioner's history of substance abuse (SPet. Ex. 520, pp. 3-4), and found Petitioner competent to stand trial. (SPet. Ex. 520, pp. 2-6.) Dr. Matychowiak found that Petitioner understood his situation and the ***court*** process, had the capacity to cooperate with his attorney and wanted to plead guilty and "get it over with." (SPet. Ex. 520, pp. 2-6.)

Moreover, Petitioner's coherent interaction with the trial ***court*** and counsel, and defense counsel's failure to raise any competency concern, are some evidence Petitioner was then competent. See United ***States*** v. Lewis, 991 F.2d 524, 528 (9th Cir. 1993). Petitioner's alleged facts are not sufficient to create real and substantial doubt as to his competency. See Boag v. Raines, 769 F.2d 1341, 1343, (9th Cir. 1985).

For the reasons ***stated***, a fair-minded jurist could have found that the ***state court*** rejection of these claims was neither contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme ***Court***, nor an unreasonable determination of the facts in light of the evidence presented in the ***state court*** proceeding. See 28 U.S.C. § 2254(d).

Claims 25-26 are denied.

f. Review of Claim 277

In his next claim, Petitioner alleges the trial ***court*** misapplied the California Shield Law

to reporter Trihey's testimony, violating Petitioner's rights to confrontation, due process, a fair trial and compulsory process under the Sixth, Eighth, and Fourteenth Amendments.

The California Supreme ***Court*** rejected this claim on direct appeal. Sanchez, 12 Cal.4th at 52-58.

7 The legal basis of the Eighth Amendment was stricken as unexhausted. ECF No. 60 at 9:4.

Case 1:97-cv-06134-AWI-SAB Document 163 Filed 07/23/15 Page 85 of 213

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The California Shield Law8

***states*** in pertinent part that:

A publisher, editor, reporter, or other person connected with or employed upon a newspaper, magazine, or other periodical publication, or by a press association or wire service, or any person who has been so connected or employed, shall not be adjudged in contempt by a judicial, legislative, or administrative body, or any

other body having the power to issue subpoenas, for refusing to disclose the source of any information procured while so connected or employed for publication in a newspaper, magazine or other periodical publication, or for refusing to disclose any unpublished information obtained or prepared in gathering, receiving or processing of information for communication to the public. “As used in this subdivision, 'unpublished information' includes information not disseminated to the public by the person from whom disclosure is sought, whether or not related information has been disseminated and includes, but is not limited to, all notes, outtakes, photographs, tapes or other data of whatever sort not itself disseminated to the public through a medium of communication, whether or not published information based upon or related to such material has been disseminated.”

The ***state*** supreme ***court*** considered this claim and noted the burden on Petitioner:
Faced with a claim of privilege, the burden is on the party seeking to avoid the privilege competently to demonstrate not only that the evidence sought is relevant and necessary to his case, but that it is not available from a source less intrusive upon the privilege. Moreover, as with any attempt to discover evidence subject to a claim of privilege, a defendant must show a reasonable possibility that the evidence sought might result in his exoneration.” [Citation]
Sanchez, 12 Cal.4th at 52.
Trihey testified during the guilt phase subject to invocation of the newsperson’s shield law. He testified that during interviews that Petitioner had told him he was “triple murderer” and that “all three were killed for their Social Security checks.” (RT 18.) These statements were published in the Bakersfield Californian on April 25, 1988. (RT 17-18.)
Toton objected to use of the newsperson’s shield law to protect unpublished information

in Trihey’s possession. The trial ***court*** ruled for such protection, limiting Toton’s crossexamination to only published information and finding that impeachment of Trihey was not at issue. (RT 57-59.) Toton then decline further cross-examination of Trihey. (RT 65.)

Petitioner alleges that the trial ***court***’s misapplication of California Shield Law to reporter Trihey’s testimony caused defense counsel Toton to decline any cross-examination of Trihey, denying Petitioner an effective defense.

8 California Constitution, article I, section 2, subdivision (b); Cal. Evid. Code §1070 contains substantially similar

language. See Delaney v. Superior ***Court***, 50 Cal.3d 785, 796 (1990).
Case 1:97-cv-06134-AWI-SAB Document 163 Filed 07/23/15 Page 86 of 213
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The ***state*** ***court*** found Petitioner failed to carry his burden:
In attempting to meet his burden, defendant attacks his own credibility by claiming he made inconsistent statements during the course of the interviews that

would have exposed his confused ***state*** of mind at the time the interviews took place. He asserts his alleged unpublished statements also could have been used to impeach Trihey's testimony that defendant had told him he was a “triple murderer” and that “all three were killed for their social security checks.” But defendant never shows how the information he sought would materially assist his defense, or how it differed in content from the testimony and published information available for cross-examination, including defendant's statements that he was scared, that he had taken phencyclidine (PCP), and that he had not murdered anyone. Defendant simply asserts that he “needed discovery of, and cross-examination about, the unpublished records of the interviews to impeach Trihey's testimony. Unlike other statements attributed to [defendant] in the April 25th article, Trihey's 'triple murderer' assertion was not a direct quotation. Rather, it was a conclusion drawn by Trihey. Trihey's unpublished material might have shown that his 'triple murder' testimony was his own interpretation of [defendant's] account, not an actual admission. Moreover, discovery and crossexamination

might have proven that Trihey's conclusion was not supported by the interviews. The tapes might have shown that [defendant] never said he was a 'triple murderer' or a 'triple killer'; that he did not hit either Juan or Juanita; that he

did nothing to ***aid*** or abet Joey; that he did not intend that either Juan or Juanita be killed; that he tried to stop Joey from killing his parents; or that he feels guilty because he failed to prevent the homicides. Any of these possibilities would have bolstered [defendant's] insufficiency of the evidence argument."
The alleged evidence defendant claims would have materially assisted his defense

consists of nothing more than self-serving statements that a ***court*** could reasonably conclude were either too speculative to assist defendant or would harm, rather than materially assist, the defense. Indeed, this case is similar to

[Citation], in which the ***court*** rejected the defendant's attempt to attack his own credibility by subpoenaing a reporter's unpublished interview notes. Based on this record, and under the more recent [citation] threshold test, we find that defendant has failed to make the threshold showing that publication of alleged unpublished interview information possessed by Trihey would have materially assisted the defense and defeated Trihey's claim of immunity under the shield law.
In addition, for the same reasons noted above, we reject defendant's claim that he was denied his right to confront and cross-examine Trihey and to discover and present evidence under the Sixth and Fourteenth Amendments. The record shows

the ***court*** rejected Trihey's statements as proof that defendant killed the victims for

their Social Security checks. Moreover, the ***court*** found untrue the special circumstance allegations that the murders of Juan and Juanita Bocanegra were committed during a robbery and found defendant not guilty of the robbery in

connection with that crime. Thus, it appears the ***court*** afforded little weight to Trihey's testimony, and defendant was not denied his federal constitutional right

to a fair trial simply because the ***court*** allowed the testimony to be introduced.
Sanchez, 12 Cal.4th at 56-58.

The ***state*** supreme ***court*** also rejected Petitioner's assertion that counsel's failure to crossCase 1:97-cv-06134-AWI-SAB Document 163 Filed 07/23/15 Page 87 of 213
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examine Trihey before closing argument denied him the effective assistance of counsel under article I, section 15 of the California Constitution, and the Sixth and Fourteenth Amendments to the federal Constitution, noting that:

In order to succeed in his claim, “defendant must show (1) deficient performance under an objective standard of professional reasonableness and (2) prejudice under a test of reasonable probability of an adverse effect on the outcome.” [Citation] Defendant does not satisfy either prong of the foregoing test.

As discussed, Toton convinced the ***court*** during his closing argument that Trihey's testimony should not be given substantial weight; his decision not to crossexamine Trihey as to the contents of the published material was sound strategy, given the nature of defendant's alleged contradictory statements. Defendant does not establish that cross-examination would have revealed any new information, or that any additional information about the interviews would have influenced the

***court***'s judgment. Hence, we cannot find counsel's failure to cross-examination

Trihey to be deficient. In any event, given the fact that the ***court*** dismissed the robbery charges against defendant, and found not true the robbery-murder specialcircumstance allegation, we discern no prejudice to defendant based on counsel's performance. [Citation]

Sanchez, 12 Cal.4th at 58-59.

The ***state court*** was not unreasonable in rejecting the claim. Petitioner does not make an

evidentiary showing identifying how and why unpublished interview information sought from Trihey differed from that in the record and would likely change the result in his proceeding. The

***state court***, having found that impeachment of Trihey was not in issue, Sanchez, 12 Cal.4th 52, and giving only minimal weight to Trihey's testimony of a robbery motive, could reasonably have rejected Petitioner's speculation and desire to impeach himself by arguing that the interviews did not support the articles.

"[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Strickland, 466 U.S. at 691. "In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." Id. at 691.

Petitioners claim fails under this standard. The trial judge was able to evaluate Trihey's credibility and motivations in testifying, expressly found that impeachment of Trihey was not in

89

issue. (RT 59.) Toton was afforded the opportunity to cross-examine Trihey, both about Petitioner's statements and any inconsistency therein (RT 51, 54-57), as well published statements by Hernandez and by Seeley which alleged were attributed to Petitioner. (RT 51-53.) The record does not support claimed denial of confrontation and fair trial. Any confrontation clause error was harmless, for reasons discussed in claims 1-4 there was substantial evidence of guilt even without Trihey's testimony.

The trial ***court*** verdict accorded only slight evidentiary value to Trihey's testimony. Defense counsel Toton successfully argued to minimize the significance of Trihey's testimony regarding robbery motive. (RT 175-183, 235-236.) Any claim of due process and compulsory process error fails because it is not reasonable to believe any evidence suppressed might have affected the outcome of trial for reasons discussed in claims 1-26.

Accordingly, the ***Court*** finds that the California Supreme ***Court***'s determination of facts was not unreasonable in light of the evidence, and its rejection of this claim was neither contrary

to, nor an unreasonable application of, United ***States*** Supreme ***Court*** precedent. Claim 27 is denied.

6. Prosecutorial Misconduct in Guilt and Special Circumstances Phase - Claims 28-33

In claims 28 through 33, Petitioner alleges instances of prosecutorial misconduct during the guilt and special circumstance phase

a. Clearly Established Law

i. Brady

The Supreme ***Court*** held that if the ***state*** fails to disclose exculpatory evidence in violation of Brady v. Maryland, 373 U.S 83 (1963), the conviction cannot stand if there is a reasonable probability that the evidence, considered cumulatively, would have produced a different result at trial. Kyles v. Whitley, 514 U.S. 419, 441 (1995). There are three components of a Brady violation: (1) the evidence at issue must be favorable to the accused either because it is exculpatory or because it is impeaching; (2) the evidence must have been suppressed by the



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***State*** either willfully or inadvertently; and (3) prejudice must have ensued. Banks v. Dretke, 540 U.S. 668, 691 (2004); Strickler v. Greene, 527 U.S. 263, 281–82 (1999). "Such evidence is material if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Strickler, 527 U.S. at 280, quoting

United ***States*** v. Bagley, 473 U.S. 667, 682 (1985)). "[T]here is never a real Brady violation unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict." Strickler, 527 U.S. at 281.

The Supreme ***Court*** has held that a federal ***court*** can grant habeas relief on a constitutional trial error claim only if the error had a "substantial or injurious effect" on the verdict. Brecht, 507 U.S. at 637. A new trial is warranted only if prosecutorial misconduct resulted in a fundamental denial of due process. Darden v. Wainwright, 477 U.S. 168, 181 (1986). Where the issue is evenly balanced and the judge has doubts about whether the error had a "substantial and injurious effect" on the jury's verdict, then the judge must treat the error as if it were not harmless. O'Neal v. McAninch, 513 U.S. 432, 435 (1995). In California v. Roy, 519

U.S. 2 (1996), the Supreme ***Court*** ruled that the Ninth Circuit's application of a modified O'Neal harmless error standard ("the omission is harmless only if review of the facts found by the jury establishes that the jury necessarily found the omitted element") was too strict and remanded the case for further consideration in light of Brecht and O'Neal.

The ***Court*** in Kyles also held that once a habeas petitioner establishes the "reasonable probability" of a different result, the error cannot subsequently be found harmless under Brecht. Kyles, 514 U.S. at 436.

ii. Due Process

A petitioner is entitled to habeas corpus relief if the prosecutor's misconduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Donnelly, 416 U.S. at 643. To constitute a due process violation, the prosecutorial misconduct must be "of sufficient significance to result in the denial of the defendant's right to a fair trial." Greer v.

Miller, 483 U.S. 756, 765 (1987) (quoting Bagley, 473 U.S. at 667). "'Before a federal ***court***
Case 1:97-cv-06134-AWI-SAB Document 163 Filed 07/23/15 Page 90 of 213
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may overturn a conviction resulting from a ***state*** trial . . . it must be established not merely that

the [***State***'s action] is undesirable, erroneous, or even 'universally condemned,' but that it violated some right which was guaranteed to the defendant by the Fourteenth Amendment." Smith v. Phillips, 455 U.S. 209, 221 (1982) (quoting Cupp v. Naughten, 414 U.S. 141, 146 (1973)).

Any claim of prosecutorial misconduct must be reviewed within the context of the entire

trial. Greer, 485 U.S. at 765-66; United ***States*** v. Weitzenhoff, 35 F.3d 1275, 1291 (9th Cir. 1994). The ***court*** must keep in mind that "[t]he touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor" and "the aim of due process is not punishment of society for the misdeeds of the prosecutor but avoidance of an unfair trial to the accused." Phillips, 455 U.S. at 219. "Improper argument does not, per se, violate a defendant's constitutional rights." Thompson v. Borg, 74 F.3d 1571, 1576 (9th Cir. 1996) (quoting Jeffries v. Blodgett, 5 F.3d 1180, 1191 (9th Cir. 1993)). Furthermore, the Supreme ***Court*** has ***stated***:

> [A]rguments of counsel generally carry less weight with a jury than do instructions from the ***court***. The former are usually billed in advance to the jury as matters of argument, not evidence . . . and are likely viewed as the statements of advocates; the latter, we have often recognized, are viewed as definitive and binding statements of the law. Arguments of counsel which misstate the law are subject to objection and to correction by the ***court***. This is not to say that prosecutorial misrepresentations may never have a decisive effect on the jury, but only that they are not to be judged as having the same force as an instruction from the ***court***. And the arguments of counsel, like the instructions of the ***court***, must be judged in the context in which they are made.

Boyde v. California, 494 U.S. 370, 384-85 (1990).

If prosecutorial misconduct is established, and it was constitutional error, the error must be evaluated pursuant to the harmless error test set forth in Brecht. See Thompson, 74 F.3d at 1577 ("Only if the argument were constitutional error would we have to decide whether the constitutional error was harmless.").

b. Review of Claim 28

In this claim, Petitioner alleges that information tending to undermine the credibility of

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jailhouse informant Hernandez, that Hernandez was a heroin addict who gave testimony motivated by Detective Stratton's offer of a deal over pending heroin and probation violation charges and to avoid being suspected in the Bocanegra murders, was withheld by the prosecution.

The California Supreme ***Court*** summarily denied claim 28 (SPet. Claims U) raised in

Petitioner's ***state*** petition for habeas corpus. In re Sanchez, S049502 (DD). As noted, in such a case "the habeas petitioner's burden still must be met by showing there was no reasonable basis

for the ***state court*** to deny relief," Richter, 562 U.S. at 98, and this ***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 fair-minded jurists could disagree that those arguments or

theories are inconsistent with the holding in a prior decision of this ***Court***." Id. (emphasis added).

Here the ***state court*** could reasonably have found that Petitioner was not prejudiced by alleged prosecution failure to disclose information about jailhouse informant Hernandez. The record in this matter shows that the defense had the benefit of Hernandez's arrest report and presumptively was aware of his criminal record including any matters relating to substance

abuse. (SPet. Ex. 409, pp. 1-2.) The defense was aware of Hernandez ***plea*** deal and crossexamined Hernandez regarding it. (CT 576-577; RT 2850-51.) Facts surrounding Hernandez alleged heroin addiction were equally available to defense counsel through discovery. (CT 654-676.) See U.S. v. Pelullo, 399 F.3d 197, 202 (3d. Cir. 2005) (Brady challenge fails where information equally available). For the same reason, any alleged omission of Hernandez's

probation status regarding charges ***plea*** bargained is unavailing.
Petitioner has not made any sufficient showing in the evidentiary record that Hernandez

testified falsely by omitting charges covered by ***plea*** bargain. These "omitted" charges were resolved outside the ***plea*** bargain under which Hernandez testified. (SPet. Ex. 508, p. 6.) Contrary to Petitioner's assertion, the record reflects that it was Hernandez who initiated contact with the authorities. (RT 2857; CT 576-77; SResp. Ex. C, pp. 1-2.) Petitioner's allegation that

Case 1:97-cv-06134-AWI-SAB Document 163 Filed 07/23/15 Page 92 of 213

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Hernandez's testimony was coerced by detective Stratton, and false, fails substantively for reasons discussed in claims 1-4, ante. As discussed in those claims, Hernandez testimony was not inconsistent with the physical evidence. (CT 355, 378-80.) See United ***States*** v. Cooper, 173 F.3d 1192, 1202 (9th Cir. 1999) (***stating*** that to show Brady error, the petitioner must show that the evidence (1) was exculpatory, (2) should have been but was not produced, and (3) was material to guilt or innocence). Hernandez's unsigned declaration (SPet. Ex. 101, Att. A) is not evidence otherwise. 28 U.S.C. § 1746.

Given the foregoing and the extended cross-examination of Hernandez by Toton and the consistent physical evidence, the ***state court*** could reasonably have found it unlikely that allegedly undisclosed evidence would have affected assessment of witness' credibility and, given Petitioner desire to plead guilty, the result of the proceedings.

Respondent contends claim 28 is not cognizable because it creates and retroactively applies a "new rule" of constitutional law within Teague v. Lane, 489 U.S. 288. However, the ***Court*** finds the claim fails not because Petitioner seeks to apply a new rule of criminal procedure under Teague, but rather on grounds the claim lacks merit for the reasons ***stated***.

For the reasons ***stated***, a fair-minded jurist could have found that the ***state court*** rejection of the claim was neither contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme ***Court***, nor an unreasonable determination of the facts in light of the evidence presented in the ***state court*** proceeding. See 28 U.S.C. § 2254(d).

Claim 28 is denied.

c. Review of Claim 29

In this next claim, Petitioner alleges that Hernandez's notes of conversation with Petitioner, which might have provided a basis to impeach Hernandez, were not safeguarded by police and the prosecution and were lost.

The California Supreme ***Court*** summarily denied claim 29 (SPet. Claims V) raised in Petitioner's ***state*** petition for habeas corpus. In re Sanchez, S049502 (DD). In such a case, "the habeas petitioner's burden still must be met by showing there was no reasonable basis for the

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***state*** ***court*** to deny relief," Richter, 562 U.S. at 98, and this ***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 fair-minded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this ***Court***." Id. (emphasis added).

According to the ***court*** in Arizona v. Youngblood, 488 U.S. 51, 57 (1988) the failure of a ***state*** to preserve evidence "of which no more can be said than it could have been subjected to tests, the results of which might have exonerated the defendant," is not a denial of due process of the law "unless a criminal defendant can show bad faith on the part of the police."
The Ninth Circuit used the Youngblood standard for a claim of bad faith destruction of evidence in U.S. v. Hernandez, 109 F.3d 1450, 1455 (9th Cir. 1997), ***stating*** "[t]he mere failure to preserve evidence which could have been subjected to tests which might have exonerated the defendant does not constitute a due process violation", citing Mitchell v. Goldsmith, 878 F.2d 319, 322 (9th Cir. 1989).
Where the government fails to preserve evidence that is only potentially exculpatory, the right to due process is violated only if [the evidence] possesses "an exculpatory value that was apparent before the evidence was destroyed, and [is] of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." California v. Trombetta, 467 U.S. 479, 489 (1984).

The ***state*** ***court*** could reasonably have found there was no bad faith failure to preserve potentially useful evidence. The record does not readily suggest Hernandez made the notes for the prosecution or as their agent, (CT 74, 477-499, 503, 575-577; SResp. Ex. C, pp. 1, 3), or prosecutorial bad faith in failing to take custody of and preserve potentially material evidence. Youngblood, 488 U.S. at 58. Additionally, Petitioner has not demonstrated that the materiality and exculpatory value of such notes was anything more than speculative. (CT 484-487, 503; SResp. Ex. C, p. 3.)
Respondent contends claim 29 is not cognizable because it creates and retroactively

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applies a “new rule” of constitutional law within Teague v. Lane, 489 U.S. 288. However, the ***Court*** finds the claim fails not because Petitioner seeks to apply a new rule of criminal procedure under Teague, but rather on grounds the claim lacks merit for the reasons ***stated***.

For the reasons ***stated***, a fair-minded jurist could have found that the ***state court*** rejection of the claim was neither contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme ***Court***, nor an unreasonable determination of the facts in light of the evidence presented in the ***state court*** proceeding. See 28 U.S.C. § 2254(d).

Claim 29 is denied

d. Review of Claim 30

Petitioner next claims that criminalist Laskowski, who testified to two different sets of footprints during Petitioner’s proceeding, subsequently identified a third set during Reyes’s

separate trial for his role in the Bocanegra murders, undermining the prosecution's argument at Petitioner's trial that Petitioner and Joey were the only two who struck blows to the victims.

The ***State*** Supreme ***Court*** reviewed this claim in Petitioner ***state*** petition for habeas corpus (SPet. Claim X) and summarily denied it. In re Sanchez, S049502 (DD). In such a case, "the habeas petitioner's burden still must be met by showing there was no reasonable basis for the ***state court*** to deny relief," Richter, 562 U.S. at 98, and this ***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 fair-minded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this ***Court***." Id. (emphasis added).

The knowing use of false or perjured testimony against a defendant to obtain a conviction is unconstitutional. Napue v. Illinois, 360 U.S. 264 (1959). In Napue, the Supreme ***Court*** held that the knowing use of false testimony to obtain a conviction violates due process regardless of whether the prosecutor solicited the false testimony or merely allowed it to go uncorrected when it appeared. Id. at 269. The ***Court*** explained that the principle that a ***State*** may not knowingly use false testimony to obtain a conviction - even false testimony that goes only to the credibility

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of the witness - is "implicit in any concept of ordered liberty." Id.

A conviction obtained by the knowing use of perjured testimony "must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." Bagley, 473 U.S. at 678. Nevertheless, simple inconsistencies in testimony are insufficient to establish that a prosecutor knowingly permitted the admission of false testimony.

United ***States*** v. Zuno-Arce, 44 F.3d 1420, 1423 (9th Cir. 1995). "Discrepancies in . . . testimony . . . could as easily flow from errors in recollection as from lies." Id.

To warrant habeas relief, Petitioner must establish that: 1) The testimony was actually false; 2) The prosecution knew or should have known it to be false; and 3) There is a reasonable likelihood that the false testimony could have affected the jury's verdict. Tayborn v. Scott, 251 F.3d 1125, 1130 (7th Cir. 2001).

There is no sufficient showing Petitioner was prejudiced by presenting the testimony of criminologist Laskowski regarding the shoe tread pattern photographs taken at the Bocanegra crime scene. The ***state court*** could reasonably have found that, during Petitioner's trial, Laskowski and prosecutor Ryals were unaware of a third set of different footprints in the Bocanegra home. (CT 376; SResp. Ex. B.) Moreover, there is not a reasonable possibility that testimony of a third set of footprints would have affected the outcome of Petitioner's trial. See U.S. v. Agurs, 427 U.S. 97, 103 (1976). Reyes admitted he served as lookout and entered the home after the murders to assist Joey and Petitioner. (SResp. Ex. A, pp.3-4; see claim 10, ante.) His bloody palm print was in evidence. (CT 202-203.)

Any attempt by defense counsel to argue that Reyes rather than Petitioner struck blows to the victims is rebutted by the record (CT 77-78, 479-84, 487-89, 495, 500-05; RT 181; SPet. Exhs. 700-701) and Petitioner's express desire to plead guilty. (SPet. Ex. 520, p. 2; see CT 891-92; RT [5/16/88] 7; RT-108a-155a.) Petitioner's statements that he assisted Joey in murdering Mr. Bocanegra and Mrs. Bocanegra combined with Petitioner's desire to plead guilty suggests no reasonable likelihood of a different result had evidence of a third footprint been presented. The ***state*** record in this matter does not demonstrate that Reyes guilty ***plea*** was prompted by



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discovery of the third shoe print. (SPet. Ex. 139, p. 2.)

Petitioner fails to demonstrate that no reasonable jurist could have found that he failed to make a prima facie case that the prosecution knowingly used false or perjured evidence with respect to Laskowski's testimony.

Respondent contends claim 30 is not cognizable because it creates and retroactively applies a "new rule" of constitutional law within Teague v. Lane, 489 U.S. 288. However, the ***Court*** finds the claim fails not because Petitioner seeks to apply a new rule of criminal procedure under Teague, but rather on grounds the claim lacks merit for the reasons ***stated***.

For the reasons ***stated***, a fair-minded jurist could have found that the ***state court*** rejection of these claims was neither contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme ***Court***, nor an unreasonable determination of the facts in light of the evidence presented in the ***state court*** proceeding. See 28 U.S.C. § 2254(d).

Claim 30 is denied.

e. Review of Claim 31

Petitioner alleges in this claim that pathologist Holloway's testimony was untruthful because Dr. Holloway ***stated*** at the preliminary ***hearing*** that victims' scalp wounds were "entirely" consistent with one weapon wielded by one person, but later ***stated*** at the penalty

phase he found only “partial” consistency in these matters.

The ***State*** Supreme ***Court*** reviewed this claim in Petitioner ***state*** petition for habeas corpus and alternatively denied it on the merits and as procedurally barred. In re Sanchez, S049502 (DD). In such a case, “the habeas petitioner’s burden still must be met by showing there was no reasonable basis for the ***state court*** to deny relief,” Richter, 562 U.S. at 98, and this ***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 fair-minded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this ***Court***.” Id. (emphasis added).

Petitioner cites to facts alleged in claim 10, ante. He argues that had Holloway testified

truthfully at the preliminary ***hearing***, a three assailant theory might have discredited Hernandez's testimony that only two assailants struck blows to the victims. However, the ***Court*** is not convinced that Dr. Holloway's erroneous testimony precluded a theory that more than one perpetrator and more than one weapon inflicted the scalp wounds on Mr. Bocanegra and Mrs. Bocanegra; Toton argued as much. (RT 187-191.)

Dr. Holloway testified at the preliminary ***hearing*** that Mr. Bocanegra's head wounds were entirely consistent with being inflicted by one person (CT 118-119, 134), similar to Mrs. Bocanegra's head wounds (CT 118, 155-156, 159), and were consistent with being inflicted by the same type of instrument (CT 118-119), though not necessarily the identical instrument. (CT 131-134.)

Dr. Holloway later testified at the penalty phase that he had erred, that Mr. Bocanegra's head wounds were not entirely consistent with Mrs. Bocanegra's (RT 2704-2706, 2720-2721, 2725), that is they were only partially consistent (RT 2721-2722, 2725), and that he could not conclude from the autopsy evidence how many assailants were involved in the attack on Mr. Bocanegra and Mrs. Bocanegra. (SPet. Ex. 120, p.3.)

Even so, the ***state court*** could reasonably have found that Holloway and prosecutor Ryals were not aware of the error at the preliminary ***hearing***. (SResp. Ex. B.)

There is no sufficient showing Petitioner was prejudiced by pathologist Holloway's erroneous interpretation of scalp wounds of Mr. Bocanegra and Mrs. Bocanegra. The ***state court*** could reasonably have found that Holloway's erroneous testimony that Mr. Bocanegra's scalp wounds were "entirely" consistent with Mrs. Bocanegra's did not affect the outcome of Petitioner's trial. See Agurs, 427 U.S. at 103. Holloway's preliminary ***hearing*** opinion qualified that the scalp wounds were not necessarily caused by the "the identical instrument" (CT 132) and were consistent with being inflicted by one person (CT 134). Holloway's testimony did not reasonably preclude Toton from arguing use of more than one weapon by more than one perpetrator. (RT 189-191). Moreover, had Dr. Holloway's modified testimony been presented at the preliminary ***hearing*** the outcome would not likely have changed for reasons ***stated*** in

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claims 1, 3, and 10.

Any attempt by defense counsel to argue Reyes rather than Petitioner struck blows to the victims is rebutted by the record (CT 77-78, 479-84, 487-89, 495, 500-505; RT 181; SPet. Exhs. 700-701) and Petitioner's expressed desire to plead guilty. (SPet. Ex. 520, p. 2; CT 891-92; RT [5/16/88] 7; RT- 108a-155a.) A mere inconsistency in testimony does not establish that a prosecutor knowingly permitted the admission of false testimony. Zuno-Arce, 44 F.3d at 1423.

Holloway's erroneous preliminary ***hearing*** testimony was corrected at the penalty phase. (SPet. Ex. 120, p. 3.)

Respondent contends claim 31 is not cognizable because it creates and retroactively applies a "new rule" of constitutional law within Teague v. Lane, 489 U.S. 288. However, the ***Court*** finds the claim fails not because Petitioner seeks to apply a new rule of criminal procedure under Teague, but rather on grounds the claim lacks merit for the reasons ***stated***.

For the reasons ***stated***, a fair-minded jurist could have found that the ***state court*** rejection of the claim was neither contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme ***Court***, nor an unreasonable determination of the facts in light of the evidence presented in the ***state court*** proceeding. See 28 U.S.C. § 2254(d).

Claim 31 is denied.

f. Review of Claim 32

Petitioner claims here that prosecutor Ryals' falsely argued the two assailant theory when the evidence (i.e., the third set of footprints and a bloody palm print on the doorknob and information from Seeley) supported Reyes's presence in the Bocanegra home.

This claim was reached and summarily denied in Petitioner's ***state*** petition for habeas corpus (SPet. Claim Z). In re Sanchez, S049502 (DD). In such a case, "the habeas petitioner's burden still must be met by showing there was no reasonable basis for the ***state court*** to deny relief," Richter, 562 U.S. at 98, and this ***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 fair-minded jurists could disagree that those arguments or theories are inconsistent



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with the holding in a prior decision of this ***Court***." Id. (emphasis added).

The California Supreme ***Court*** declined to reach the claim that Prosecutor Ryals committed such prejudicial misconduct in her guilt phase closing argument because the asserted evidence of misconduct, allegedly contrary statements by prosecutor Ryals to the ***court*** during

subsequent, separate pretrial hearings in the prosecution of Reyes, were not within the appellate record or matters judicially noticed. This ***Court*** cannot consider evidence outside the ***state*** record. Pinholster, 131 S. Ct. at 1398. Even if it could, evidence proffered in the Reyes proceeding was not necessarily inconsistent with the prosecution's two assailant theory in this action. See People v. Robert Gabriel Reyes, Kern County Superior ***Court*** case number 34638, RT [10/3/91] 2-3, SResp. Ex. A.

The ***state court*** could reasonably have determined that Petitioner was not prejudiced by the prosecution's two assailant argument for reasons discussed in claims 1-4 and 28-31. The prosecution could rely upon inference from trial ***court*** evidence that supported the two person theory, i.e., that only Joey and Petitioner were in the Bocanegra home at the time of the murders. Notably, Petitioner did not challenge the evidence demonstrating that he struck Mr. Bocanegra (CT 481-82; RT 169, 184-185, 188, 196; RT 207) and that he grabbed Mrs. Bocanegra and told Joey to "shut her up" (CT 482-83, 504; RT 190-191). Evidence that, at some point, Reyes was present in the house does not necessarily establish his participation in the murders. (See CT 202-203.)

Additionally, no theory inconsistent with the two assailant theory was advanced in Reyes's separate criminal proceedings. Reyes pled guilty in his criminal proceeding on the theory he participated in the Bocanegra murders only by acting as a lookout during the murders and then assisting Joey and Petitioner after the murders. See People v. Robert Gabriel Reyes, Kern County Superior ***Court*** Case No. 34638, RT [10/3/91] 2-3; SResp. Ex. A. Even if there were inconsistencies in testimony regarding the Reyes involvement in the Bocanegra murders, inconsistencies alone are not sufficient to establish that the prosecutor knowingly permitted the admission of false testimony. Zuno-Arce, 44 F.3d at 1423.

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The ***Court*** does not find that Petitioner's trial was fundamentally unfair. The two assailant theory was consistent with the evidence at the guilt and special circumstance phase and inference therefrom and was not objected to by Toton. (RT 147-149, 191, 211-12; claims 1, 3, 10.) See Donnelly, 416 U.S. at 647-48 (1974) (improper jury argument by the ***state*** does not present a claim of constitutional magnitude unless it is so prejudicial that the petitioner's trial was fundamentally unfair . . . [t]o establish prejudice, the petitioner must demonstrate either persistent and pronounced misconduct or that the evidence was so insubstantial that, in all probability, but for the remarks, no conviction would have occurred); see also Darden, 477 U.S. at 182 (claim of prosecutorial misconduct rejected where the prosecutor's comments "did not manipulate or misstate the evidence, nor . . . implicate other specific rights of the accused, such as the right to counsel or to remain silent."). For the reasons ***stated*** in claims 1-4, the weight of evidence against Petitioner was not insubstantial.

Respondent also contends claim 32 is not cognizable because it creates and retroactively applies a "new rule" of constitutional law within Teague v. Lane, 489 U.S. 288. However, the ***Court*** finds the claim fails not because Petitioner seeks to apply a new rule of criminal procedure under Teague, but rather on grounds the claim lacks merit for the reasons ***stated***.

Accordingly, a fair-minded jurist could have found that the ***state court*** rejection of the claim was neither contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme ***Court***, nor an unreasonable determination of the facts in light of the evidence presented in the ***state court*** proceeding. See 28 U.S.C. § 2254(d).

g. Review of Claim 33

In this next claim, Petitioner alleges cumulative error from prosecutorial misconduct.

This claim was reached and summarily denied in Petitioner's ***state*** petition for habeas corpus (SPet. Claim AA). In re Sanchez, S049502 (DD). In such a case, "the habeas petitioner's burden still must be met by showing there was no reasonable basis for the ***state court*** to deny

relief," Richter, 562 U.S. at 98, and this ***Court*** "must determine what arguments or theories supported or . . . could have supported, the ***state court***'s decision; and then it must ask whether it



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is possible fair-minded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this ***Court***." Id. (emphasis added).

Petitioner cites to facts alleged in claims 28-32, ante, in support of this claim. However, the ***Court*** finds Petitioner has not made a sufficient showing of prejudiced by cumulative error from prosecutorial misconduct. The ***state court*** could reasonably have found that Petitioner failed to established prosecutorial misconduct causing him prejudice for the reasons discussed above in claims 28-32. These claims are insubstantial when considered cumulatively. See Karterman, 60 F.3d at 580; see also Rupe, 93 F.3d at 1445. Petitioner has not then established a

reasonable probability that the evidence of alleged prosecutorial error, considered cumulatively, would have produced a different result at trial.

Respondent contends claim 33 is not cognizable because it creates and retroactively applies a "new rule" of constitutional law within Teague v. Lane, 489 U.S. 288. However, the ***Court*** finds the claim fails not because Petitioner seeks to apply a new rule of criminal procedure under Teague, but rather on grounds the claim lacks merit for the reasons ***stated***.

Accordingly, for the reasons ***stated***, a fair-minded jurist could have found that the ***state court*** rejection of the claim was neither contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme ***Court***, nor an unreasonable determination of the facts in light of the evidence presented in the ***state court*** proceeding. See 28 U.S.C. § 2254(d).

Claim 33 is denied.

7. Cumulative Error in Guilt and Special Circumstance Phase – Claim 34

a. Clearly Established Law

The applicable legal standard is set forth above, in the ***Court***'s analysis of claim 18.

b. Review of Claim 34

In this next claim, Petitioner alleges that constitutional violations during the guilt and special circumstance phase, claims 1 through 33, ante, when considered together and taken as a whole, prejudicially caused an unfair guilt trial, in violation of the Fifth, Sixth, Eighth and

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Fourteenth Amendments.

The California Supreme ***Court*** summarily denied claim 34 (SPet. Claim BB) raised in Petitioner's ***state*** petition for habeas corpus. In re Sanchez, S049502 (DD).

The ***state*** supreme ***court*** also considered this claim on appeal and rejected it noting:
Defendant contends his conviction should be reversed because of the cumulative effect of the alleged guilt phase errors. He relies on the California Constitution, article I, section 15, and the Sixth and Fourteenth Amendments to the United ***States*** Constitution.
Contrary to defendant's contention, however, he has not sustained any of his claims of error. Accordingly, we find no cumulative deficiency in the guilt phase proceedings to support reversal. [Citation]
Sanchez, 12 Cal.4th, at 60.

Where none of the alleged claims ***state*** a violation of constitutional law, there is no reason to grant habeas relief based on cumulative error. Rupe, 93 F.3d at 1445. For the reasons ***stated*** in claims 1-33 above, this ***Court*** finds claim 34 fails substantively for reasons discussed in claims 1-33.
Respondent also contends claim 34 is not cognizable because it creates and retroactively applies a "new rule" of constitutional law within Teague v. Lane, 489 U.S. 288. However, the ***Court*** finds the claim fails not because Petitioner seeks to apply a new rule of criminal procedure under Teague, but rather on grounds the claim lacks merit for the reasons ***stated***.

Accordingly, the ***state court*** rejection of claim 34 was not contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme ***Court***. Nor was the ***state court***'s ruling based on an unreasonable determination of the facts in light of the evidence presented in the ***state court*** proceeding. See 28 U.S.C. § 2254(d).
Claim 34 is denied.

8. ***State*** Appellate Review of Guilt and Special Circumstance Phase – Claim 35

a. Clearly Established Law

A habeas petition must allege that the petitioner's detention violates the Constitution, a federal statute, or a treaty. 28 U.S.C. § 2241(c)(3); Rose v. Hodges, 423 U.S. 19, 21 (1975). No

Case 1:97-cv-06134-AWI-SAB Document 163 Filed 07/23/15 Page 103 of 213

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constitutional provision or federal law entitles Petitioner to any ***state*** collateral review. Pennsylvania v. Finley, 481 U.S. 551, 557 (1987). As the Ninth Circuit and nearly all other

circuit ***courts*** have found, “federal habeas relief is not available to redress alleged procedural

errors in ***state*** post-conviction proceedings.” Ortiz v. Stewart, 149 F.3d 923, 939 (9th Cir. 1998);

Franzen v. Brinkman, 877 F.2d 26 (9th Cir. 1989) (“a petition alleging errors in the ***state*** postconviction review process is not addressable through habeas corpus proceedings”); Williams v.

***State*** of Mo., 640 F.2d 140, 143 (8th Cir. 1981) (infirmities in the ***state***'s post-conviction remedy

procedure cannot serve as a basis for setting aside a valid original conviction); Hassine v. Zimmerman, 160 F.3d 941, 954 (3d Cir. 1998) ("[T]he federal role in reviewing an application

for habeas corpus is limited to evaluating what occurred in the ***state*** or federal proceedings that actually led to the petitioner's conviction; what occurred in the petitioner's collateral proceeding does not enter into a habeas calculation."); Morris v. Cain, 186 F.3d 581, 585 n.6 (5th Cir. 1999)

(finding that "errors in ***state*** post-conviction proceedings will not, in and of themselves, entitle a petitioner to federal habeas relief"); Bryant v. Maryland, 848 F.2d 492, 493 (4th Cir. 1988)

("claims of error occurring in a ***state*** post-conviction proceeding cannot serve as a basis for federal habeas corpus relief"); Millard v. Lynaugh, 810 F.2d 1403, 1410 (5th Cir. 1987); Kirby v. Dutton, 794 F.2d 245, 247-48 (6th Cir. 1986); Spradley v. Dugger, 825 F.2d 1566, 1568 (11th Cir. 1987).

The Supreme ***Court*** has ***stated*** that "when a ***State*** chooses to offer help to those seeking relief from convictions," due process does not "dictat[e] the exact form such assistance must assume." Finley, 481 U.S. at 559. Since the petitioner has already been found guilty at a fair trial, he has only a limited due process interest in post-conviction relief. Dist. Attorney's Office for Third Judicial Dist. v. Osborne, 557 U.S. 52, 69 (2009). "[T]he question is whether

consideration of [defendant's] claim within the framework of the ***State***'s procedures for postconviction relief "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental," or "transgresses any recognized principle of fundamental fairness in operation." Id. (quoting Medina v. California, 505 U.S. 437, 446, 448

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(1992). “Federal ***courts*** may upset a ***State***'s post-conviction relief procedures only if they are fundamentally inadequate to vindicate the substantive rights provided.” Id.

Accordingly, a claim challenging the adequacy of ***state*** appellate review is not cognizable

on federal habeas. Under well-established principles of law and comity, a federal ***court*** has no

jurisdiction over ***state*** ***courts*** to assess the adequacy or competence of their review since appellate review is not constitutionally required. Evitts v. Lucey, 469 U.S. 387, 393 (1985) (citing McKane v. Durston, 153 U.S. 684 (1894)); see also Franzen v. Brinkman, 877 F.2d 26 (9th Cir.

1989) (federal habeas ***court*** may not review a petition alleging errors in the ***state*** post-conviction review process). The federal constitution only requires that an appellate forum be accessible and

available to all, regardless of economic status, once a ***state*** establishes a right to appeal. Lucey, 469 U.S. at 393-94.

b. Review of Claim 35

Petitioner alleges in this claim that the California Supreme ***Court*** affirmed his conviction and sentence on the basis of material misstatements and omissions of issues and facts, and then denied rehearing, violating his Fifth, Sixth, Eighth and Fourteenth Amendment rights.

The ***state*** supreme ***court*** considered this claim in the petition for rehearing. That ***court*** issued a modification opinion upon denial of rehearing (see 12 Cal. 4th 825b), corrected errors and withdrew the “Alleged Prosecutorial Misconduct” section of its opinion.

Petitioner alleges that the ***state*** supreme ***court*** erred by not re-assessing or re-analyzing legal issues in light of the modification.

Appellate review of California’s capital cases is authorized by California Penal Code sections 190.4(e) and 1239(b). At the time of Petitioner’s trial, section 1239(b) provided,

“[w]hen upon any ***plea*** a judgment of death is rendered, an appeal is automatically taken by the defendant without any action by him or his counsel.” Even where defendant’s counsel takes no

action, California’s high ***court*** has a duty to examine the complete trial record to “ascertain[] whether defendant was given a fair trial.” People v. Perry, 14 Cal. 2d 387, 392 (1939). Section 190.4 provides an automatic application for modification of a verdict imposing

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the death penalty, by which the trial judge reviews the evidence and reweighs the section 190.3 aggravating and mitigating circumstances before imposing sentence based on the jury's verdict. Denial of modification of a verdict of death is reviewed on the automatic appeal pursuant to section 1293(b). Such review includes the "evidence relied on by the [trial] judge." Pulley, 465 U.S. at 53 (quoting People v. Frierson, 25 Cal. 3d 142, 179 (1979)) ("the statutory requirements that the jury specify the special circumstances which permit imposition of the death penalty, and that the trial judge specify the reasons for denying the modification of the death penalty, serve to assure thoughtful and effective appellate review, focusing upon the circumstances present in each particular case.").

Aside from the ***state*** statutory duty to examine the complete trial record for fairness and the federal constitutional requirement that an appeal be available to indigent appellants, there are

no obligations placed on the California Supreme ***Court*** that could cause a violation of an appellant's federal constitutional rights. Sections 190.4(e) and 1239(b), and the cases construing them, provide the mechanism for meaningful appellate review.

Petitioner alleges misstatements regarding the Bocanegra murders; misstatements and omissions regarding disciplinary proceedings against Toton; misstatements and omissions regarding reporter immunity under California Shield Law; misstatements regarding alleged prosecutorial misconduct; and other misstatements and omissions. Nonetheless, the ***state*** supreme ***court***'s affirmance was based on its modified opinion. Reasonably implicit in the modified opinion is that ***court***'s re-examination of the issues underlying its issuance of the modified opinion.

Additionally, Petitioner has not made a showing on the evidentiary record that the modified opinion contained any misstatements or omission. In that no material misstatements or omissions are identified in the modified opinion, and given that ***court***'s adjudication of all Plaintiff's claims on the merits, this ***Court*** cannot find the ***state*** supreme ***court***'s determination of facts to be unreasonable or unfair on the record before it.

Respondent contends claim 35 is not cognizable because it creates and retroactively

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applies a “new rule” of constitutional law within Teague v. Lane, 489 U.S. 288. However, the ***Court*** finds the claim fails not because Petitioner seeks to apply a new rule of criminal procedure under Teague, but rather on grounds the claim lacks merit for the reasons ***stated***.

Accordingly, the ***state court*** rejection of claim 35 was not contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme ***Court***. Nor was the ***state court***'s ruling based on an unreasonable determination of the facts in light of the evidence presented in the ***state court*** proceeding. See 28 U.S.C. § 2254(d).

Claim 35 is denied.

9. Constitutionality of California Death Penalty – Claim 36

a. Clearly Established Law

Supreme ***Court*** cases have established that a ***state*** capital sentencing system must: “(1) rationally narrow the class of death-eligible defendants; and (2) permit a jury to render a reasoned, individualized sentencing determination based on a death-eligible defendant's record, personal characteristics, and the circumstances of his crime.” Kansas v. Marsh, 548 U.S. 163, 173-74 (2006). If the “***state*** system satisfies these requirements,” then the “***State*** enjoys a range of discretion in imposing the death penalty, including the manner in which aggravating and mitigating circumstances are to be weighed.” Id. (citing Franklin v. Lynaugh, 487 U.S. 164, 179 (1988) and Zant v. Stephens, 462 U.S. 862, 875–876, n.13 (1983)).

A ***state*** may narrow the class of murderers eligible for the death penalty by defining degrees of murder. Sawyer v. Whitley, 505 U.S. 333, 342 (1992). A ***state*** may further narrow the class of murderers by finding “beyond a reasonable doubt at least one of a list of statutory aggravating factors.” Id.; see also Gregg, 428 U.S. at 196-97.

b. Review of Claim 36

In this claim Petitioner alleges that California’s death penalty scheme in effect in 1987 was unconstitutional because it was arbitrary and unpredictable, failing to genuinely narrow class of murders eligible for the death penalty, violating his Eighth and Fourteenth Amendment rights.

The California Supreme ***Court*** summarily denied claim 34 (SPet. Claim YY) raised in



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Petitioner's ***state*** petition for habeas corpus. In re Sanchez, S049502 (DD).

The ***state*** supreme ***court*** also considered this claim on appeal, as follows: Defendant contends that the 1978 death penalty law is unconstitutional under the

United ***States*** and California Constitutions because it fails to narrow the class of death-eligible murderers and thus renders "the overwhelming majority of intentional first degree murderers" death eligible. Defendant cites statistics of all first degree murder convictions in which a defendant was found death eligible, and concludes: "The vice of the California scheme is not that any one of the special circumstances taken alone is unconstitutional-each arguably identifies a subclass of all first degree murders more deserving of the death penalty than other members of the class. The vice is that, taken together, the special circumstances cover virtually all first degree murders (and a substantial majority of all murders), and, thus, they perform no narrowing function at all." Principally, defendant relies on Justice Blackman's dissent in Tuilaepa v. California, (1994) 512 U.S. ---, ---

[129 L.Ed.2d 750, 767-774, 114 S. Ct. 2630], in which he ***stated***: “By creating nearly 20 such special circumstances, California creates an extraordinarily large death pool.” Id.
We have repeatedly considered and rejected this identical claim beginning with our decision in People v. Rodriguez (1986) 42 Cal.3d 730, 770-779. [Citation]

Moreover, in Tuilaepa, supra, and in a number of previous cases, the high ***court*** has recognized that “the proper degree of definition” of death-eligibility factors

“is not susceptible of mathematical precision”; the ***court*** has confirmed that our death penalty law avoids constitutional impediments because it is not unnecessarily vague, it suitably narrows the class of death-eligible persons, and provides for an individualized penalty determination. [Citation] Defendant's argument fails to convince us to revisit the issue. [Citation]

Sanchez, 12 Cal.4th at 60-61. In addition, the ***state*** supreme ***court*** has further held that:
California's scheme for death eligibility satisfies the constitutional requirement that it “not apply to every defendant convicted of a murder[, but only] to a subclass of defendants convicted of murder. [Citation.]” Even after 1990 additions by virtue of Propositions 114 and 115, the special circumstances set forth in the statute are not over inclusive by their number or terms. [Citation] Nor have the statutory categories been construed in an unduly expansive manner. [Citation] Having been found guilty of an intentional murder in the course of a robbery, defendant falls within the “subclass” of murderers who are eligible for the death penalty. [Citation]
People v. Arias, 13 Cal.4th 92, 186-87 (1996) (citing Harris, 465 U.S. at 53) (upholding 1977 death penalty law).
Petitioner claims most of those who could be convicted of first degree murder are statutorily eligible for the death penalty, yet only a small portion of murderers who are statutorily

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eligible for the death penalty are actually sentenced to death.
However, in California, a defendant may be sentenced to death for first-degree murder if the trier of fact finds the defendant guilty and also finds true one or more of [then] 19 special circumstances listed in Cal. Penal Code § 190.2. As relevant here, one of the circumstances is: "[t]he defendant, in this proceeding, has been convicted of more than one offense of murder in the first or second degree." Cal. Penal Code § 190.2(a)(3). There is no question that this sentencing scheme satisfies clearly established constitutional requirements. First, the subclass of defendants eligible for the death penalty is rationally narrowed to those who have committed multiple murders. Tuilaepa, 512 U.S. at 969-73. The multiple murder special circumstance sufficiently guides the sentencer and is not unconstitutionally vague. See Godfrey v. Georgia, 446 U.S. 420, 428 (1980) (the sentencer's discretion must be guided by "clear and objective standards.").

In California v. Ramos, 463 U.S. 992 (1983), the United ***States*** Supreme ***Court*** ***stated*** that "[o]nce the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty" the jury's consideration of a myriad of factors and exercise of "unbridled discretion" in determining whether death is the appropriate punishment is not arbitrary and capricious. Id. at 1008-09. At the selection stage, an individualized determination includes consideration of the character and record of the defendant, the circumstances of the crime, and an assessment of the defendant's culpability. Tuilaepa, 512 U.S. at 972-73. However, the jury "need not be instructed how to weigh any particular fact in the capital sentencing decision." Id. at 979.

This ***Court*** finds that ***state*** supreme ***court*** could reasonably have determined that California's death penalty scheme in effect in 1987 did not fail to genuinely narrow the class of murderers eligible for the death penalty. California's scheme, which narrows the class of death eligible offenders to less than the definition of first degree murder and permits consideration of all mitigating evidence, has been approved by the United ***States*** Supreme ***Court***, Tuilaepa, 512

U.S. at 972-79; Harris, 465 U.S. at 38, and this ***Court***, see Ben-Sholom v. Woodford, Case No.

Case 1:97-cv-06134-AWI-SAB Document 163 Filed 07/23/15 Page 109 of 213

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CV-F-93-5531 (E.D. Cal. October 5, 2001).

The ***state court*** rejection of this claim was not contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme ***Court***. Nor was the ***state court***'s ruling was based on an unreasonable determination of the facts in light of the evidence presented in the ***state court*** proceeding, viewed most favoring the prosecution, Jackson, 443 U.S. at 319. See 28 U.S.C. § 2254(d).

Claim 36 is denied.

10. Prosecutorial Misconduct In The Penalty Phase – Claims 37 through 42

a. Clearly Established Law

The legal standard is set out in the preface to claims 28-32.

b. Review of Claim 37

Petitioner next claims prosecutorial misconduct in using, failing to correct and arguing false evidence by Bakersfield Police Detective Boggs.

The California Supreme ***Court*** summarily denied claim 37 (SPet. Claim CC) raised in Petitioner's ***state*** petition for habeas corpus. In re Sanchez, S049502 (DD).

The California Supreme ***Court*** also considered and rejected this claim on appeal, finding that the defense had waived the issue on appeal, Sanchez, 12 Cal.4th 65-66, and that the record did not support the claim because it was "simply a disagreement as to the interpretation of the evidence, and in no way indicates that Ryals encouraged or elicited false testimony from Boggs." Sanchez, 12 Cal.4th at 71.

As discussed above, the knowing use of false or perjured testimony against a defendant to obtain a conviction is unconstitutional. Napue v. Illinois, 360 U.S. 264 (1959). In Napue, the Supreme ***Court*** held that the knowing use of false testimony to obtain a conviction violates due process regardless of whether the prosecutor solicited the false testimony or merely allowed it to go uncorrected when it appeared. Id. at 269. The high ***court*** explained that the principle that a ***State*** may not knowingly use false testimony to obtain a conviction - even false testimony that goes only to the credibility of the witness - is "implicit in any concept of ordered liberty." Id. A

Case 1:97-cv-06134-AWI-SAB Document 163 Filed 07/23/15 Page 110 of 213

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conviction obtained by the knowing use of perjured testimony "must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." Bagley, 473 U.S. at 678. Nevertheless, simple inconsistencies in testimony are insufficient to establish that a prosecutor knowingly permitted the admission of false testimony. Zuno-Arce, 44 F.3d at 1423. "Discrepancies in . . . testimony . . . could as easily flow from errors in recollection as from lies." Id. To warrant habeas relief, Petitioner must establish that: 1) the testimony was actually false; 2) the prosecution knew or should have known it to be false; and 3) there is a reasonable likelihood that the false testimony could have affected the jury's verdict. Tayborn, 251 F.3d at 1130.

In this claim, Petitioner alleges that Boggs, testifying at the penalty phase, falsely attributed to Petitioner a statement actually made by Reyes, that after the Tatman murder he "kicked back, drank some whiskey, smoked some dope, ate some food, and mostly relaxed for the rest of the evening." (RT 2663-2664.) Though Boggs correctly attributed the statement to

Reyes at the preliminary ***hearing*** (CT 308), Petitioner contends that prosecutor Ryals did not correct the false testimony at the penalty phase, instead using it to highlight Petitioner's lack of remorse. (RT 2619, 3036.)

The evidence before the ***state court*** did not reasonably suggest Boggs knowingly testified falsely, or that Prosecutor Ryals was aware of the errant testimony. (SResp. Ex. B.) Boggs

***states*** in his June 29, 1995 declaration that he mistakenly testified at the penalty phase that

Petitioner, rather than Robert Reyes, ***stated*** that:

They returned to their own room and just, again in his own words, kicked back, drank some whiskey, smoked some dope, ate some food, and just relaxed for the rest of the evening.

SPet. Ex. 100. The ***state court*** could reasonably have determined that Prosecutor Ryals did not know that Boggs's testimony was erroneous and did not knowingly rely on erroneous testimony.

(SResp. Ex. B.) Petitioner has not pointed to evidence before the ***state court*** demonstrating either Ryals or Boggs was aware of the error in Boggs's testimony. Defense counsel Toton and Frank,



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who both were present at the preliminary ***hearing***, were themselves unaware of the erroneous testimony. (SPet. Exhs. 137, p. 12; 113, p. 10.)

Nor does there appear to be a reasonable likelihood the error affected imposition of the death penalty, see Agurs, 427 U.S. at 103, or made trial so fundamentally unfair as to deny due process. Donnelly, 416 U.S. at 645. The ***Court*** concurs in Respondent's argument that it is unlikely the erroneous testimony undercut juror sympathy for Petitioner given Petitioner's confession to Boggs of the circumstances of the Tatman murder, that Petitioner decided to "hit the old man" and take his food and refrigerator, that he and Reyes entered Mr. Tatman's room, that Reyes made stabbing motions at Tatman with a screwdriver, and that Petitioner stole Mr. Tatman's possessions after witnessing his murder. (RT 2658-2666; SPet. Ex. 129, pp. 1-2.)

For these reasons, the ***state court*** rejection of the claim was not contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme ***Court***, or based on an unreasonable determination of the facts in light of the evidence presented in the ***state court*** proceeding viewed most favoring the prosecution, Jackson, 443 U.S. at 319. See 28 U.S.C. § 2254(d).

Claim 37 is denied.

c. Review of Claim 38

Petitioner next claims prosecutorial misconduct in using false evidence at penalty phase by Criminalist Laskowski. He alleges that Laskowski falsely testified at the penalty phase, as he did in the guilt and special circumstance phase, that there were only two sets of footprints at the Bocanegra home after the murders, only later discovering a third set of footprints. Petitioner further argues that, as at the guilt and special circumstance phase, prosecutor Ryals used a twoperson theory to linking Petitioner to the murders.

The California Supreme ***Court*** summarily denied claim 38 (SPet. Claim DD) raised in

Petitioner's ***state*** petition for habeas corpus. In re Sanchez, S049502 (DD). In such a case, "the habeas petitioner's burden still must be met by showing there was no reasonable basis for the

***state court*** to deny relief," Richter, 562 U.S. at 98, and this ***Court*** "must determine what

113

arguments or theories supported or . . . could have supported, the ***state court***'s decision; and then it must ask whether it is possible fair-minded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this ***Court***." Id. (emphasis added).

Napue established that the knowing use of false or perjured testimony against a defendant to obtain a conviction is unconstitutional. A conviction obtained by the knowing use of perjured testimony "must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." Bagley, 473 U.S. at 678. Nevertheless, simple inconsistencies in testimony are insufficient to establish that a prosecutor knowingly permitted the admission of false testimony. Zuno-Arce, 44 F.3d at 1423. "Discrepancies in . . . testimony . . . could as easily flow from errors in recollection as from lies." Id. To warrant habeas relief, Petitioner must establish that: 1) the testimony was actually false; 2) the prosecution knew or should have known it to be false; and 3) there is a reasonable likelihood that the false testimony could have affected the jury's verdict. Tayborn, 251 F.3d 1125 at1130.

Petitioner cites to facts alleged in claims 30 and 32 in support of this claim. However, the ***state court*** could reasonably have found that the claim lacks merit. At the preliminary ***hearing*** (CT 376) and at the penalty phase of Petitioner's trial (RT 2813), Laskowski testified he was able to determine from crime scene photographs that there were two types of shoes in the kitchen. The following year he re-examined the photographs and determined that there were three types of shoe patterns in the kitchen and outside the Bocanegra home. (SPet. Ex. 121, p. 2; Ex. 417, pp. 1-2; SHCP Ex. 137, Ex. A.)

However, Petitioner does not make an evidentiary showing that either Laskowski or Ryals knew of the error at the time of the penalty phase. The ***Court*** finds that the Claim fails substantively for reasons ***stated*** in Claims 30 and 32, ante. The ***state court*** could reasonably conclude that neither Laskowski nor Ryals knew the former's interpretation was erroneous. Nor is there a reasonable likelihood the erroneous testimony affected the jury's imposition of the death penalty, see Agurs, 427 U.S. at 103, or made trial so fundamentally

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unfair as to deny due process. Donnelly, 416 U.S. at 645. The evidence against Petitioner was substantial as discussed in claims 30 and 32.

A fair-minded jurist could conclude from the evidence and statements Petitioner made to Hernandez and Trihey, that Petitioner assisted Joey in murdering Mr. Bocanegra and Mrs. Bocanegra (RT 2843-45, 2851-54, 2856-59) and that he desired to enter a guilty ***plea***. (SPet. Ex. 520, p. 2; see CT 891-92; RT [5/16/88] 7; RT-108a-155a.) Evidence suggesting the presence of a third non-victim in the Bocanegra Home does not does demonstrate or suggest a third person was present during the murders. (See claim 30, 32, ante.)

The ***Court*** finds the ***state court*** rejection of the claim was not contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme ***Court***. Nor was the ***state court***'s ruling was based on an unreasonable determination of the facts in light of the evidence presented in the ***state court*** proceeding, viewed most favoring the prosecution, Jackson, 443 U.S. at 319. See 28 U.S.C. § 2254(d).

Claim 38 is denied.

d. Review of Claim 39

Petitioner next alleges prosecutorial misconduct through use of false evidence at the penalty phase by Pathologist Holloway. He alleges that Holloway falsely testified at the penalty phase that Mr. Bocanegra's head wounds were a "contributory cause" of death, contradicting his guilt phase testimony and prosecutor Ryals argument based thereon that head wounds neither caused nor contributed to Mr. Bocanegra's death. Petitioner claims Ryals knew or should have known this testimony was false.

The California Supreme ***Court*** summarily denied claim 39 (SPet. Claim EE) raised in

Petitioner's ***state*** petition for habeas corpus. In re Sanchez, S049502 (DD).

The ***State*** Supreme ***Court*** also considered this claim on appeal and found that:
[T]the prosecutor did not commit misconduct in failing to correct Dr. Holloway's characterization of the nonfatal scalp wounds to Juan Bocanegra as a "contributory cause" rather than an "other condition" of death. The characterization of the scalp wounds as contributing to Juan's death was minimally significant to the jury's assessment of defendant's culpability in the murders. The facts showed that defendant struck disabling blows to the victim's
Case 1:97-cv-06134-AWI-SAB Document 163 Filed 07/23/15 Page 114 of 213
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head while Joey was stabbing him. Moreover, any misperceptions of the cause of Juan's death were corrected by the prosecutor's opening statement that the wounds inflicted by defendant with a metal bar, "were not the actual blows that killed the man. They were only a part of what killed the man. The actual blow to the man

was the stab wound inflicted by his son while defendant was beating him in the head with an iron pipe."
Sanchez, 12 Cal.4th at 71.
Under Napue the knowing use of false or perjured testimony against a defendant to obtain a conviction is unconstitutional. A conviction obtained by the knowing use of perjured testimony "must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." Bagley, 473 U.S. at 678. Nevertheless, simple inconsistencies in testimony are insufficient to establish that a prosecutor knowingly permitted the admission of false testimony. Zuno-Arce, 44 F.3d at 1423. "Discrepancies in . . . testimony . . . could as easily flow from errors in recollection as from lies." Id. To warrant habeas relief, Petitioner must establish that: 1) the testimony was actually false; 2) the prosecution knew or should have known it to be false; and 3) there is a reasonable likelihood that the false testimony could have affected the jury's verdict. Scott, 251 F.3d at 1130.

Here, Dr. Holloway's testimony was consistent from preliminary ***hearing*** through penalty phase that Mr. Bocanegra died from three fatal stab wounds to the torso. (RT 2697, 2699-2700.) Prosecutor Ryals argued as much in her opening statement. (RT 2620.) Holloway's preliminary

***hearing*** characterization of scalp wounds as an "other condition" attendant to fatal stab wounds, (CT 112-119, 158-59), and Holloway's penalty phase characterization of the same scalp wounds as a "contributory cause" attendant to fatal stab wounds, (RT 2706), was not erroneous because Holloway used the terms interchangeably to characterize non-fatal wounds. (SPet. Ex. 120, pp. 1-4.) The same applies to Mrs. Bocanegra, who also suffered scalp wounds but died from stab wounds. (CT 115-117, 153-154.)

For the reasons ***stated*** and those discussed in Claims 31 and 32, it is not reasonably likely Holloway's characterization of Mr. Bocanegra's head wounds as either "other conditions"

or a "contributory cause" misled the jury in its assessment of Petitioner's culpability. The ***state***
Case 1:97-cv-06134-AWI-SAB Document 163 Filed 07/23/15 Page 115 of 213
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***court*** was not unreasonable in concluding that:

"The characterization of the scalp wounds as contributing to Juan's death was minimally significant to the jury's assessment of defendant's culpability in the murders. The facts showed that defendant struck disabling blows to the victim's head while Joey was stabbing him. Moreover, any misperceptions of the cause of Juan's death were corrected by the prosecutor's opening statement that the wounds inflicted by defendant with a metal bar, were not the actual blows that killed the man. They were only a part of what killed the man. The actual blow to the man was the stab wound inflicted by his son while defendant was beating him in the head with an iron pipe."

Sanchez, 12 Cal.4th at 71.

A fair-minded jurist could conclude from the evidence and statements Petitioner made to Hernandez and Trihey, that Petitioner assisted Joey in murdering Mr. Bocanegra and Mrs. Bocanegra (RT 2843-45, 2851-54, 2856-59) and that he desired to enter a guilty ***plea***. (SPet. Ex. 520, p. 2; see CT 891-92; RT [5/16/88] 7; RT-108a-155a.)

Respondent contends claim 39 is not cognizable because it creates and retroactively applies a "new rule" of constitutional law within Teague v. Lane, 489 U.S. 288. However, the ***Court*** finds the claim fails not because Petitioner seeks to apply a new rule of criminal procedure under Teague, but rather on grounds the claim lacks merit for the reasons ***stated***.

This ***Court*** does not find that the ***state court*** rejection of the claim was contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme ***Court***, or that the ***state court***'s ruling was based on an unreasonable determination of the facts in light of the evidence presented in the ***state court*** proceeding, viewed most favoring the prosecution, Jackson, 443 U.S. at 319. See 28 U.S.C. § 2254(d).

Claim 39 is denied.

e. Review of Claim 40

In his next claim, Petitioner alleges prosecutorial misconduct by failure to disclose exculpatory evidence and using false evidence by Hernandez at the penalty phase.

The California Supreme ***Court*** summarily denied claim 40 (SPet. Claims FF) raised in

Petitioner's ***state*** petition for habeas corpus. In re Sanchez, S049502 (DD). In such a case, "the

Case 1:97-cv-06134-AWI-SAB Document 163 Filed 07/23/15 Page 116 of 213

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habeas petitioner's burden still must be met by showing there was no reasonable basis for the

***state court*** to deny relief," Richter, 562 U.S. at 98, and this ***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 fair-minded jurists could disagree that those arguments or

theories are inconsistent with the holding in a prior decision of this ***Court***." Id. (emphasis added).

As noted, there are three components of a Brady violation: (1) the evidence at issue must be favorable to the accused either because it is exculpatory or because it is impeaching; (2) the evidence must have been suppressed by the ***State*** either willfully or inadvertently; and (3) prejudice must have ensued. Banks, 540 U.S. at 691; Strickler, 527 U.S. at 281–82. "Such evidence is material if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Strickler, 527 U.S. at 280, (quoting Bagley, 473 U.S. 667, 682 (1985)). "[T]here is never a real Brady violation unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict." Strickler, 527 U.S. at 281.

Additionally, under Napue the knowing use of false or perjured testimony against a defendant to obtain a conviction is unconstitutional. A conviction obtained by the knowing use of perjured testimony "must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." Bagley, 473 U.S. at 678. Nevertheless, simple inconsistencies in testimony are insufficient to establish that a prosecutor knowingly permitted the admission of false testimony. Zuno-Arce, 44 F.3d at 1423. "Discrepancies in . . . testimony . . . could as easily flow from errors in recollection as from lies." Id. To warrant habeas relief, Petitioner must establish that: 1) the testimony was actually false; 2) the prosecution knew or should have known it to be false; and 3) there is a reasonable likelihood that the false testimony could have affected the jury's verdict. Tayborn, 251 F.3d at 1130).

Petitioner cites to claims 2, 7 and 28 in support of this claim. He alleges Hernandez testified falsely regarding his deal with the prosecution - that the prosecution had only promised

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to tell the sentencing judge of Hernandez's testimony, when the circumstantial evidence, (SHCP Exhs. 510, 511), suggested that he had a promise of probation in exchange for his testimony; and that Hernandez concealed that he was in custody on a heroin charge; and falsely ***stated*** he contacted the police when detective Stratton initiated the contact.

Petitioner's claim is unpersuasive. He has not made an evidentiary showing that there was an undisclosed sentence concession or that Hernandez testified falsely. (See claims 1-4 and 28, ante.) The record that was before the ***state court*** does not reasonably support any undisclosed sentence concession(s). (See SResp. Ex. B.) Hernandez's testimony that he contacted police, through a request made to a jail deputy (CT 477; see RT 2840) is not materially false and could not reasonably have affected the jury's imposition of the death sentence given the noted substantial evidence against Petitioner. Petitioner claims, but makes no evidentiary showing that Hernandez was a heroin addict.

For the reasons ***stated***, a fair-minded jurist could have found that the ***state court*** rejection of claims by the modified opinion was neither contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme ***Court***, nor an unreasonable determination of the facts in light of the evidence presented in the ***state court*** proceeding. See 28 U.S.C. § 2254(d).

Claim 40 is denied

f. Review of Claim 41

Petitioner next claims prosecutorial misconduct in Losing/Destroying Exculpatory Evidence at Penalty phase. He claims the police or prosecution lost or destroyed Hernandez's contemporaneous notes of conversations with Petitioner; notes which could have been used to impeach Hernandez.

The California Supreme ***Court*** summarily denied claim 41 (SPet. Claims GG) raised in Petitioner's ***state*** petition for habeas corpus. In re Sanchez, S049502 (DD). "[T]he habeas petitioner's burden still must be met by showing there was no reasonable basis for the ***state court*** to deny relief," Richter, 562 U.S. at 98, and this ***Court*** "must determine what arguments or

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theories supported or . . . could have supported, the ***state court***'s decision; and then it must ask whether it is possible fair-minded jurists could disagree that those arguments or theories are

inconsistent with the holding in a prior decision of this ***Court***." Id. (emphasis added).
Where the government fails to preserve evidence that is only potentially exculpatory, the right to due process is violated only if [the evidence] possesses "an exculpatory value that was apparent before the evidence was destroyed, and [is] of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." Trombetta, 467 U.S. at 489.

For the same reasons ***state*** in claim 29, ante, Plaintiff has not made a sufficient evidentiary showing that Hernandez acted for the police, or that the police and prosecution were required to preserve alleged notes of conversations Hernandez had with Petitioner, or that the

notes had material exculpatory value.

Respondent contends claim 41 is not cognizable because it creates and retroactively applies a “new rule” of constitutional law within Teague v. Lane, 489 U.S. 288. However, the ***Court*** finds the claim fails not because Petitioner seeks to apply a new rule of criminal procedure under Teague, but rather on grounds the claim lacks merit for the reasons ***stated***.

A fair-minded jurist could have found that Petitioner failed to establish that the ***state court*** rejection of the claim was contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme ***Court***. Nor was the ***state court***'s ruling based on an unreasonable determination of the facts in light of the evidence presented in the ***state court*** proceeding, viewed most favoring the prosecution. Jackson, 443 U.S. at 319. See 28 U.S.C. § 2254(d).

Claim 41 is denied.

g. Review of Claim 42

Petitioner next claims prosecutorial misconduct during penalty phase closing argument.

The California Supreme ***Court*** summarily denied claim 42 (SPet. Claims JJ) raised in Petitioner’s ***state*** petition for habeas corpus. In re Sanchez, S049502 (DD).

Case 1:97-cv-06134-AWI-SAB Document 163 Filed 07/23/15 Page 119 of 213

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The California Supreme ***Court*** also considered this claim on appeal and found that the defense had not objected on this ground or sought a curative admonition at trial and thus waived the issue on appeal, Sanchez, 12 Cal.4th at 65-66. Additionally, the ***state*** supreme ***court*** found as follows:

[A]ny error that did occur was harmless. As we explain in detail below, although the prosecutor may have, at times, pushed the limits of proper advocacy, any misconduct that did occur could not have contributed to the verdict and was thus rendered harmless.

Defendant contends Ryals improperly told the jury that he was Tatman's actual killer, and that Tatman was killed with a screwdriver seized from him. Defendant also asserts that Ryals improperly treated defendant's conviction under section 187 (without special circumstances) as a capital crime. Her argument, claims defendant, violated the doctrines of collateral estoppel and double jeopardy, and denied him his constitutional rights under both the ***state*** and federal Constitutions.

Defendant's first claim, that the prosecutor improperly argued to the jury that he was Tatman's actual killer, was based on the following comments made during the prosecutor's closing argument:

“First, Mr. Tatman, an old, sick man, wheelchair bound, living from payday to payday in the Bakersfield Inn, hardly a match for the defendant alone much less for the defendant and his friend, Robert Reyes.

“Think of the old man lying in his bed, fearful because there were burglars in his little room at the Bakersfield Inn. Think of how that fear turned to horror as he realized that they weren't just burglars but that they intended to take his life. Imagine how he must have felt when they approached him.

“Of course, the defendant told the police that he had no actual part in the murder, that he watched his buddy do it. But then, when you think of that, think that the defendant learned to lie to authorities at an early age, I believe Dr. Wright said the third grade. Remember that he denied to the police also anything or any facts concerning the Bocanegra murders, but then remember what he told Rufus Hernandez.

“He told Rufus Hernandez what happened, how the two of them killed Mr. Tatman, not how Robert [Reyes] killed Mr. Tatman or how he killed Mr. Tatman but how they killed Mr. Tatman. Think of that when you are considering what the penalty in this case should be.

"The two men could have taken the food. They could have taken the refrigerator. They could have taken everything that was in that room and not touched that old man who weighed less than one hundred pounds. They could have gone into that room, completely cleared it out, even stripped the bed clothes out from under him and never harmed him, never hurt him at all. But they didn't do that. The defendant didn't do that. They chose, for some useless, senseless reason, to commit an act of violence, the ultimate, ultimate act of violence, murder."



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In her rebuttal, the prosecutor told the jury that it should not attempt to relitigate the guilt phase facts, but then asked the jury to deliberate over what she had told it: "You do not know what evidence was presented in the previous ***hearing***. You are not to re-litigate that at this time. You ***hear***[d] the circumstances of the Tatman

murder. You know what the defendant told the police because you ***heard*** that. But you also know what the defendant told Rufus Hernandez because you ***heard*** that. It is up to you to weigh this and to deliberate on that and to determine who exactly struck the fatal blow."

Defendant asserts that the effect of the above argument was to ask "the jury to disregard completely the trial ***court***'s not true verdict on the robbery murder special circumstance under Count I which implicitly and necessarily rejected the charges that [defendant] was the actual killer in the Tatman homicide and that he harbored an intent to kill in committing the crime." Defendant claims Ryals's argument sought to elevate a noncapital murder to which defendant was an accomplice into a capital murder in violation of the guarantee against double jeopardy following acquittal under the Fifth Amendment to the United ***States*** Constitution and article I, section 15 of the California Constitution, and the related doctrine of collateral estoppel. [Citation]

In making his argument, defendant points to the ***court***'s guilt phase verdict, in which the ***court*** found defendant acted as an accomplice (and not the actual killer) in the Tatman murder:

"As to the first count [the Tatman murder], the ***Court*** finds defendant guilty of murder and fixes that murder as murder in the first degree based on the felony murder rule.

"The ***Court*** finds that it is not true that the murder of Woodrow Wilson Tatman was committed while the defendant was engaged in the commission or attempted commission of a felony, to wit: The crime of robbery, within the meaning of the special circumstance section. That does not mean, I hasten to add, that I do not think there was a robbery in progress; that simply means that I find that the defendant was an aider and abettor of the robbery but that the homicide occurred in the commission of that, and therefore it's a first degree felony murder."

The People observe that this verdict appears inconsistent. The confusion over the verdict is highlighted by the fact that early in the guilt phase arguments, the prosecutor appeared to concede (and the ***court*** appeared to agree) that defendant could be found guilty only of second degree felony murder in connection with the Tatman killing. Of course, any inconsistency in the verdict was harmless in light of our law recognizing that accomplice status is sufficient to elevate a defendant's complicity in the crime to the robbery-murder special circumstance as long as defendant acted with "intent to kill." [Citation]

What is clear from the verdict is the ***court***'s finding that defendant ***aided*** and abetted the robbery, and that the murder verdict was based on the felony-murder rule. It is less clear, however, whether the ***court*** found defendant was or was not

the actual killer. If we assume the ***court*** found the special circumstance untrue because the prosecution had proved neither that defendant was the actual killer, nor that he had the intent to kill, prosecutorial argument attempting to re-litigate the guilt phase as to actual killer status was improper. [Citation] To the extent Ryals crossed the line of proper argument, however, any misconduct was not prejudicial to defendant because it is not reasonably possible a result more favorable to the defendant would have occurred. Defendant was convicted of the



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multiple murders of Juan and Juanita Bocanegra (§ 190.2, subd. (a)(3)), and the jury was aware of defendant's prior violent criminal activity (§ 190.3, factors (b) & (c)). Thus, Ryals's references to defendant's role in the Tatman murder could not have affected the outcome of the penalty phase. [Citation]

Defendant next claims that the prosecutor deliberately misled the jury by her

opening statement comment that Tatman was actually murdered by Reyes with a screwdriver that had been stolen from the Bocanegra residence and later found on defendant's person. [Citation] Defendant asserts the prosecutor's comment contradicted guilt phase evidence indicating that Tatman was mortally wounded by a “massive blunt force injury to the left chest,” consistent with a heel stomp or blow by a similar object (with a dimension of two to three inches). According to the autopsy report, the screwdriver wounds were superficial stab wounds that did not actually contribute to Tatman's death. Accordingly, defendant contends, the prosecutor's misstatement of the evidence rendered the penalty phase fundamentally unfair. [Citation]

Any inaccurate reference to the screwdriver as the actual murder weapon (or comment that the weapon was found on defendant) could not properly be characterized as prejudicial or so egregious as to deny defendant a fair trial. [Citation] When, as here, the point focuses on the prosecutor's comments to the jury, the question is whether there is a reasonable possibility that the jury construed or applied any of the complained-of remarks in an objectionable manner. [Citation]

Here, the jury was told that only nonfatal stab wounds were inflicted upon Tatman. Forensic pathologist Holloway testified that the cause of Tatman's death was massive blunt force injury to his chest. Holloway also ***stated*** that some of the injuries sustained by Tatman were multiple superficial stab wounds to the chest “none of which would be construed as capable of a cause of death in themselves,” and a superficial stab wound to the abdomen which “would not itself have been a fatal wound.”

In addition, Bakersfield Police Detective Boggs testified that, on March 23, 1987, defendant told him that after he and Reyes had entered Tatman's hotel room, he saw Reyes standing over Tatman in a threatening manner with a screwdriver in his hand, that Reyes “freaked out” and stabbed Tatman with a screwdriver although defendant never saw the screwdriver enter Tatman's body, and that Reyes “possessed the screwdriver at all times.”

Moreover, the jury was consistently admonished by the ***court*** that it was to consider only the evidence presented, and that the opening statements of the lawyers were not to be considered evidence. The ***court*** admonished the jury that: “The important thing to remember is that what lawyers say in a trial, what they say in their argument, what they say in their opening statements, those simply are not evidence. They are just telling you what they expect to prove. You have to decide this case, however, based on what you ***hear*** under oath from the witness stand or based on some documents or pictures that I admit for your consideration. What a lawyer says . . . is not evidence.” [Citation] The ***court*** repeated its admonition following closing arguments.

Taken in context as an attempt to counter defense counsel's argument that defendant did not participate in the Tatman killing, it is not reasonably possible the prosecutor's alleged inaccurate remarks about the Tatman murder misled the

jury. [Citation] Moreover, the ***court***'s instruction that the lawyers' opening and
Case 1:97-cv-06134-AWI-SAB Document 163 Filed 07/23/15 Page 122 of 213
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closing statements were not to be considered evidence by the jury vitiated the

misleading effect of any inaccurate remarks. The ***court***'s instructions are determinative in their statement of law, and we presume the jury treated the

***court***'s instructions as statements of law, and the prosecutor's comments as words spoken by an advocate in an attempt to persuade. [Citation] We cannot conclude on this record that the prosecutor's isolated mischaracterization of the evidence in her opening statement misled the jury.

Defendant also asserts that by discussing the circumstances of the Tatman killing during the penalty phase, the prosecutor improperly misled the jury into believing it could sentence defendant to death for the murder of Tatman alone, when the penalty should have been considered only for the Bocanegra crimes, in which the multiple-murder special circumstance was found true.

Defendant's argument is misplaced. The circumstances of the Tatman crime were properly argued as an aggravating factor under section 190.3, factor (a) (circumstances of the crime and the existence of any special circumstances found to be true pursuant to section 190.1). [Citation] Moreover, defense counsel reminded the jury of defendant's aider and abettor status in the Tatman murder when he ***stated***: “Ted Sanchez did not kill Mr. Tatman nor did he share in Robert Reyes's intent to kill Mr. Tatman. Ted's role in that tragic incident was limited to removing some of Mr. Tatman's property.” Hence, we find no prosecutorial error occurred in Ryals's discussion of the circumstances of the Tatman murder at the penalty phase.

Defendant's other claims of prosecutorial misconduct to which there was no defense objection are not supported by the record. For example, defendant's contention that the prosecutor allowed Detective Boggs to testify falsely as to who told him-Reyes or defendant-that both men had “kicked back” and “relaxed” after the Tatman murder, is simply a disagreement as to the interpretation of the evidence, and in no way indicates that Ryals encouraged or elicited false testimony from Boggs. In addition, the prosecutor did not commit misconduct in failing to correct Dr. Holloway's characterization of the nonfatal scalp wounds to Juan Bocanegra as a “contributory cause” rather than an “other condition” of death. The characterization of the scalp wounds as contributing to Juan's death was minimally significant to the jury's assessment of defendant's culpability in the murders. The facts showed that defendant struck disabling blows to the victim's head while Joey was stabbing him. Moreover, any misperceptions of the cause of Juan's death were corrected by the prosecutor's opening statement that the wounds inflicted by defendant with a metal bar, “were not the actual blows that killed the man. They were only a part of what killed the man. The actual blow to the man was the stab wound inflicted by his son while defendant was beating him in the head with an iron pipe.”

Finally, defendant's claim that the prosecutor committed misconduct by asserting that the Bocanegras would not have been killed without defendant's assistance is without merit. The evidence supported the view that defendant restrained both victims while Joey Bocanegra stabbed them. “The argument came well within the broad discretion of the parties to ***state*** their views as to what the evidence shows and what inferences may be drawn therefrom.” [Citation]

Sanchez, 12 Cal.4th at 66-72.

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Petitioner alleges that prosecutor Ryals improperly argued and misstated evidence, that the Bocanegra and Tatman murders would not have occurred but for Petitioner's participation, that the jury was sentencing Petitioner for the Tatman murder, and that Petitioner stabbed Mr. Tatman to death, (See SHCP Ex. 124, ¶ 16), with a screwdriver (RT 2619.) Petitioner contends that the correct facts are that Petitioner was only vicariously liable in the murders, that Mr. Tatman was killed by blunt force rather than stab wounds (CT 109; RT 2695), and Petitioner was sentenced by the trial ***court*** to 25 years to life for the Tatman conviction.

The ***Court*** finds that the ***state court*** could reasonably have concluded this claim lacks merit. Petitioner contends the prosecution misled the jury into thinking it was sentencing Petitioner for the Tatman murder (RT 3047-3048), i.e., as a triple murderer (RT 3080), when in fact the trial ***court*** was responsible for sentencing Petitioner for the Tatman murder, which was a non-capital murder. (CT 1103; RT October 31, 1988 at p. 13.) Even if the prosecution argued

that Petitioner played a principal role in the Tatman murder, the ***state court*** could reasonably have determined no prejudice resulted. The Tatman conviction was presented to the jury as evidence in aggravation. The jury was appropriately admonished and instructed in this regard. (RT 2615-2616; CT 979-1021; RT 3082-3097.) The record included testimony of pathologist, Dr. Holloway that Mr. Tatman died of blunt force injury to his chest. (RT 2695.) Nothing in the evidentiary record suggests the trial ***court***'s admonishment and jury instructions were not understood and followed. Moreover, the penalty phase evidence in aggravation was substantial as discussed in claims 1 through 4, ante.

The record suggests that, as to Mr. Tatman, it was Petitioner's decision to "hit the old man" and take his food and refrigerator, that Petitioner and Reyes entered Mr. Tatman's room, that Reyes made stabbing motions at Mr. Tatman with a screwdriver, and that Petitioner stole Mr. Tatman's possessions after witnessing his murder. (RT 2658-2666; SPet. Ex. 129, pp. 1-2.) Hernandez testified he told detective Stratton (RT 2848-2849; 2855-2856), that Petitioner told him that "[Petitioner] and two other men entered an old man's room at the Bakersfield Inn, that the old man was in a wheelchair, that they beat the old man, that he and the other men stabbed

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the old man with a screwdriver, and that they took the old man's money." (RT 2842, 2846-2848.) Detective Stratton testified to that effect. (RT 2858-2861.)
The jury was made well aware that Mr. Tatman's stabbing wounds were non-fatal

injuries and that Petitioner's conviction for Mr. Tatman's murder was based on his ***aiding*** and abetting Reyes. (Id.; RT 235, 2693-2695.) Defense counsel made its argument to the jury that Petitioner did not intend to kill Mr. Tatman.
Ryals' argument that Petitioner had a principal role in the Bocanegra homicides, and that the Bocanegras would not have been killed without his assistance, did not in all reasonable likelihood mislead the jury or affect the death sentence imposed. The evidence weighed heavily against Petitioner as an aider and abettor of the homicides. Petitioner grabbed and held Mr. Bocanegra while Joey got a knife. (RT 2843, 2853-54.) Petitioner beat Mr. Bocanegra while Joey stabbed him. (RT 2696-2706, 2719-21, 2725, 2843-44, 2854, 2858.) Petitioner rushed Mrs. Bocanegra and told Joey to "shut her up." (RT 2844, 2858.) Petitioner pushed Mrs. Bocanegra into a back room and hit her on the head with a bar while Joey stabbed her. (RT 2710-14, 2720-21, 2725, 2752, 2844.) This occurred Mrs. Bocanegra's hands were bound and she was likely gagged. (RT 2708, 2723, 2749-51, 2754-55, 2774-2775.)
Petitioner's proffer of statements by jurors Bobbie Crowder (SHCP Ex. 124, ¶ 16) and John Rodriguez (SHCP Ex. 109, App. A, ¶ 3) suggesting they believed Petitioner to be equally culpable with Joey in the Bocanegra murders, even if such statements were competent evidence, does not reasonably demonstrate prosecutorial misconduct sufficiently significant to deny a fair trial or lack confidence in the verdict, given the above noted evidence in aggravation.
Given the unrebutted evidence presented at the penalty phase, the admonitions of the trial judge that argument is not evidence, the potential aggravating and mitigating effects of

circumstances surrounding the Bocanegra murders, the ***state court*** could reasonably have found that the prosecution arguments above were not so prejudicial as to make trial fundamentally unfair. The multiple murder special circumstance in the Bocanegra murders and the substantial

evidence in aggravation presented during the penalty phase show that the ***state court*** could

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reasonably determine the outcome would not likely have been different absent the alleged prosecutorial misconduct. See Donnelly, 416 U.S. at 643 (improper jury argument by the ***state*** does not present a claim of constitutional magnitude unless it is so prejudicial that the petitioner's trial was fundamentally unfair . . . [t]o establish prejudice, the petitioner must demonstrate either persistent and pronounced misconduct or that the evidence was so insubstantial that, in all probability, but for the remarks, no conviction would have occurred); see also Darden, 477 U.S. at 182 (claim of prosecutorial misconduct rejected where the prosecutor's comments "did not manipulate or misstate the evidence, nor . . . implicate other specific rights of the accused, such as the right to counsel or to remain silent."); Furman v. Wood, 190 F.3d 1002, 1006 (9th Cir. 1999) (rejecting habeas claim where, although some of prosecutor's arguments were improper, jury was told comments were not evidence, and evidence against defendant was substantial).

Generally, 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." Ceja v. Stewart, 97 F.3d 1246, 1253–1254 (9th Cir. 1996) (quoting United ***States*** v. Baker, 10 F.3d 1374, 1415 (9th Cir. 1993)); see also United ***States*** v. Molina, 934 F.2d 1440, 1445 (9th Cir. 1991) (prosecutor has wide latitude during closing argument to make reasonable inferences based on the evidence).

Accordingly, the ***state court*** rejection of the claim was not contrary to, or an unreasonable application of, clearly established federal law, and the ***state court***'s ruling was not based on an unreasonable determination of the facts in light of the evidence presented in the ***state court***

proceeding, viewed most favoring the prosecution, Jackson, 443 U.S. 307, 319 (1979). See 28 U.S.C. § 2254(d).

Claim 42 is denied on the merits.

11. Ineffective Assistance Of Counsel In Penalty Phase - Claims 43 through 61

a. Clearly Established Law

The applicable legal standard is set forth above, in the preface to the ***Court***'s analysis of

Case 1:97-cv-06134-AWI-SAB Document 163 Filed 07/23/15 Page 126 of 213

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claims 6-18. The basic requirements of Strickland apply with equal force in the penalty phase. Thus, Petitioner must show that counsel's actions fell below an objective standard of reasonableness, and that the alleged errors resulted in prejudice. Strickland, 466 U.S. at 687-88.

In the context of the penalty phase, just as in the guilt phase, the Supreme ***Court*** has "declined to articulate specific guidelines for appropriate attorney conduct and instead [has]

emphasized that '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" Wiggins, 539 U.S. at 521 (quoting Strickland, 466 U.S. at 688). In the penalty phase, defense counsel has an "obligation to conduct a thorough investigation of the defendant's background," Williams, 529 U.S. at 396, and defense counsel has a duty to investigate, develop, and present mitigation evidence during penalty phase proceedings, Wiggins, 539 U.S. at 521-23. Counsel has a duty to make a "diligent investigation into his client's troubling background and unique personal circumstances." Williams, 529 U.S. at 415 (O'Connor, J., concurring).

However, the Supreme ***Court*** has recognized that the duty to investigate does not require defense counsel "to scour the globe on the off chance something will turn up; reasonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste." Rompilla v. Beard, 545 U.S. 374, 382-83 (2005) (citing Wiggins, 539 U.S. at 525 (further investigation excusable where counsel has evidence suggesting it would be fruitless)); Strickland, 466 U.S. at 699 (counsel could "reasonably surmise . . . that character and psychological evidence would be of little help"); Burger, 483 U.S. at 794 (limited investigation reasonable because all witnesses brought to counsel's attention provided predominantly harmful information). The Strickland ***court*** ***stated***:

[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. In other words, 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 the circumstances, applying a heavy measure of deference to counsel's judgments.

Case 1:97-cv-06134-AWI-SAB Document 163 Filed 07/23/15 Page 127 of 213

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128

Strickland, 466 U.S. at 690-691.

"In assessing counsel's investigation, the ***Court*** must conduct an objective review of their performance, measured for reasonableness under prevailing professional norms," Strickland, 466 U.S. at 688, which includes a context-dependent consideration of the challenged conduct as seen "from counsel's perspective at the time," id., at 689 ("[e]very effort [must] be made to eliminate the distorting effects of hindsight")." Wiggins, 539 U.S. at 523. Further, the reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information. Strickland, 466 U.S. at 691.

In order to demonstrate prejudice, Petitioner must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."

Id. at 693-94. To assess that probability, the reviewing ***court*** must consider the totality of the available mitigation evidence and reweigh it against the evidence in aggravation. Porter v.

McCollum, 558 U.S. 30, 41 (2009) (citing Williams, 529 U.S. at 397-398). The ***court*** must consider whether the likelihood of a different result if the evidence had gone in is "sufficient to undermine confidence in the outcome" actually reached at sentencing. Rompilla, 545 U.S. at 393 (quoting Strickland, 466 U.S. at 694).

b. Review of Claim 43

In this claim, Petitioner alleges ineffective assistance of counsel by failure to seek sufficient continuance to prepare for penalty phase and avoid adverse publicity from defense counsel Toton's impending disbarment.

The California Supreme ***Court*** summarily denied claim 43 (SPet. Claim LL) raised in

Petitioner's ***state*** petition for habeas corpus. In re Sanchez, S049502 (DD). In this case, "the

habeas petitioner's burden still must be met by showing there was no reasonable basis for the



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***state court*** to deny relief," Richter, 562 U.S. at 98, and this ***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 fair-minded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this ***Court***." Id. (emphasis added).

Petitioner ***states*** that defense counsel Frank was aware that proper penalty phase preparation had not been completed when the penalty trial started. Petitioner faults Frank for failing to fully investigate neurological, psychiatric, drug use and social history defenses. Petitioner points to retained social historian Dr. Wright, who found the penalty preparations

disorganized. (SHCP Ex. 131, Att. B, ¶ 6.) This disorganization, according to Dr. Wright, was exacerbated by the accelerated penalty phase time line following trial waiver at the guilt and special circumstances phase, (SHCP Ex. 137, ¶ 16), and by defense counsel's delay in paying defense service providers. (SHCP Ex. 137, Att. B, ¶ 16.) Dr. Wright also suggested aspects of the penalty defense were not completed by the time of the penalty trial (SHCP Ex. 137, App. B, ¶¶ 11-14), such that defense counsel should have requested a continuance. (SHCP Ex. 137, ¶¶ 10-21.)

However, the ***state court*** could reasonably find here, as it did in claim 13, ante, that additional preparation time was unnecessary. Defense counsel consulted with a serologist and retained defense psychologist Donaldson in 1987. (RT [5/16/88] 3-4.) Defense counsel Frank, who was responsible for the penalty phase, had almost completed his preparation when, on July 14, 1988, Petitioner waived jury trial on guilt and special circumstances. (CT 892; RT-115a; SPet. Ex. 113, pp. 5-6.) By Frank's own estimate, his preparations were to be complete by July 25, 1988. (RT [5/16/88] 6.) This was reasonably sufficient time given that the penalty phase did not begin until September 21, 1988. (CT 949.) Defense counsel Frank was able to complete his defense investigation prior to the penalty phase. (RT [5/16/88] 3-6.) During this time, Frank retained Dr. Wright to prepare the social history (SHCP Ex. 137, Att. B, ¶ 3), and hired defense

investigators Peninger and McGregor. (SHCP Ex. 124, ¶¶ 1-2.) Given the foregoing, the ***state***

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***court*** could reasonably have found Dr. Wright allegations relating to inadequate trial preparation, if considered evidence, to be unpersuasive.

Defense counsel, having already been granted a partially opposed three week continuance on the eve of trial, could reasonably have concluded that a further continuance was unlikely. (RT [5/16/88] 5-6; CT 713-714.) Moreover, a further continuance was contrary to Petitioner's

***stated*** desire to plead guilty to the Bocanegra murders. (SPet. Ex. 520, p. 2; SPet. Ex. 700.) Petitioner waived jury trial (RT [5/16/88] 7-8) and submitted guilt and special circumstances

phase on the preliminary ***hearing*** transcript and the testimony of additional prosecution witnesses. See Sanchez, 12 Cal.4th at 23-30. Dr. Wright's suggestion a continuance would have been granted could have been viewed as speculative.

Petitioner also alleges his defense was affected by publicity of the pending disbarment proceedings against defense counsel Toton. Petitioner asserts that defense Counsel Toton received substantial adverse publicity in the Bakersfield Californian from his impending debarment some two weeks before jury selection. However, the record does not demonstrate that jurors had knowledge of the debarment proceedings or that the jury was unfair or biased as to Toton's disciplinary matter. As discussed in claims 49 and 55, post, the California Supreme

***Court*** reasonably have determined that there was "no showing the jury was unfair or biased."

Sanchez, 12 Cal. 4th at 62, n.6. That ***court*** noted that, during voir dire, only two of the jurors

selected, Razo and Rodriguez, had ***heard*** of the case. (RT 1814-1815; 2458-2460, 2471.)

Neither of those two jurors mentioned having ***hearing*** of Toton. Both of those jurors indicated

they could put what they had ***heard*** out of mind while deliberating. Id. Petitioner proffers no evidence these statements were untrue.

It is well-established that "juror impartiality . . . does not require ignorance." Skilling v.

United ***States***, 561 U.S. 358, 360 (2010) 81 (citing Irvin v. Dowd, 366 U.S. 717, 722 (1961)) (jurors are not required to be "totally ignorant of the facts and issues involved, scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case."); Reynolds v. U.S., 98 U.S. 145, 155–156 (1878) ("[E]very case of public



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interest is almost, as a matter of necessity, brought to the attention of all the intelligent people in the vicinity, and scarcely any one can be found among those best fitted for jurors who has not read or ***heard*** of it, and who has not some impression or some opinion in respect to its merits.").

When pretrial publicity is at issue, "primary reliance on the judgment of the trial ***court*** makes [especially] good sense" because the judge "sits in the locale where the publicity is said to have had its effect" and may base her evaluation on her "own perception of the depth and extent of news stories that might influence a juror." Mu'Min v. Virginia, 500 U.S. 415, 427 (1991).

Here, for the reasons ***stated***, the California Supreme ***Court*** could reasonably have concluded that there was no reasonable likelihood that Petitioner did not receive a fair trial despite limited pretrial publicity. Sanchez, 12 Cal.4th at 61. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight . . . and to evaluate the conduct from counsel's perspective at the time." Strickland, 466 U.S. at 689. Bearing that in mind, and as discussed in the claims above, the penalty phase evidence against Petitioner was substantial. Nothing suggests a reasonable likelihood of a more favorable outcome had there been a further continuance.

Accordingly, the ***state court*** could have reasonably determined that there was no

competent evidence of juror bias arising from Toton's ***state*** bar difficulties and related publicity. Petitioner has not established that defense counsel's failure to seek a further continuance to prepare for the penalty trial and to avoid adverse publicity fell below an objective standard of reasonableness and that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland, 466 U.S., at 687-694.

A fair-minded jurist could have found that the ***state court*** rejection of the claim was neither contrary to, or an unreasonable application of, clearly established federal law, as

determined by the Supreme ***Court***, nor an unreasonable determination of the facts in light of the

evidence presented in the ***state court*** proceeding. See 28 U.S.C. § 2254(d).
Claim 43 is denied.
c. Review of Claim 44
Case 1:97-cv-06134-AWI-SAB Document 163 Filed 07/23/15 Page 131 of 213
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132

Petitioner next claims ineffective assistance of counsel by the individual and cumulative failure to conduct additional investigation and present mitigating evidence in the Bocanegra homicides.

The California Supreme ***Court*** summarily denied claim 44 (SPet. Claim MM) raised in

Petitioner's ***state*** petition for habeas corpus. In re Sanchez, S049502 (DD). In this case, "the habeas petitioner's burden still must be met by showing there was no reasonable basis for the

***state court*** to deny relief," Richter, 562 U.S. at 98, and this ***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 fair-minded jurists could disagree that those arguments or

theories are inconsistent with the holding in a prior decision of this ***Court***." Id. (emphasis added).

The ***Court*** finds that Petitioner has not made a sufficient showing that he was prejudiced by defense counsel's failure to further investigate and present mitigating evidence of the Bocanegra homicides, for the reasons discussed below.

i. Jailhouse Informant Hernandez

The ***Court*** finds that, for reasons discussed in claims 2 and 7, the decision of defense counsel not to further investigate and impeach jailhouse informant Hernandez regarding substance abuse and heroin addiction (SCHP Exhs. 112, ¶ 10; 137, ¶ 37; 113, ¶ 34), and his changing testimony to inculpate Petitioner as an equal participant in all three homicides (CT 488; RT 2842-44), could reasonably reflect counsel's lack of knowledge of sufficient supporting facts. (SHCP Exhs. 137, ¶ 37; 113, ¶ 34; 112, ¶ 4.)

Additionally, it appears unlikely such impeachment would have been effective. See claims 2, 7, ante; see also Burger, 483 U.S. at 795 (failure to pursue fruitless or harmful investigation not unreasonable). The evidentiary record did not demonstrate that Hernandez, by

virtue of his alleged substance addition, his ***plea*** deal, or otherwise, was motivated to and did testify falsely or inaccurately. (SPet. Ex. 900, pp. 4, 11; SResp. Ex. B.) Defense counsel Toton

cross-examined Hernandez at the preliminary ***hearing*** and asked Hernandez about any



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undisclosed ***plea*** deal during cross-examination in the guilt and special circumstances phase. (CT 576-577.) Hernandez's testimony was consistent with Petitioner's statements and the physical evidence. (CT 355, 378-380; 576-77.) Hernandez was not offered any disposition of pending criminal matters prior to agreeing to testify at the Petitioner's proceeding. (Id.; See SResp. Ex. B.) Toton later cross-examined Hernandez during the penalty phase. Hernandez admitted a deal on a then pending charge in exchange for his testimony. (RT 2850-2857.) As discussed in claim 7, ante, Hernandez's testimony was not false or misleading.

Accordingly, the ***state court*** could reasonably have found that defense counsel were not deficient in the decision not to conduct additional investigation of Hernandez to impeach him.

ii. Jailhouse Informant Seeley

The ***Court*** finds that for reasons discussed in claims 2 and 8, the decision of defense counsel not to further investigate alleged statements of jailhouse informant Charles Seeley regarding Reyes's involvement in the Bocanegra homicides, could have been a reasonable trial tactic given the evidentiary record. Toton had dealt with Seeley in a separate matter and based thereon doubted Seeley's credibility and whether the prosecution would call him. (SPet. Ex. 137, p. 4.) Seeley's version of events seemed contrary to the physical evidence at the Bocanegra crime scene. (SPet. Ex. 419, pp. 5-6, 17; CT 355-382.) See e.g., Denham, 954 F.2d at 1505-06 (9th Cir. 1992) (defense counsel not ineffective where decision not to call witness based on inconsistencies in witness's testimony).

Also, Seeley's testimony could reasonably have been viewed as more inculpating of

Petitioner than was Hernandez's testimony. (SPet. Ex. 419, pp. 6-8, 18-19.) Seeley's testimony would have been subject to rebuttal by the substantial contrary evidence from Hernandez, Stratton, Trihey, as well as by the crime scene physical evidence.
Defendant counsel Frank, for his part, had a tactical reason for not interviewing Seeley to the extent any evidence provided by Seeley related only to the guilt and special circumstances phase that were handled by Toton. (See SPet. Ex. 113, p. 4.)

Accordingly, the ***state court*** could reasonably have found that defense counsel was not
Case 1:97-cv-06134-AWI-SAB Document 163 Filed 07/23/15 Page 133 of 213
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deficient in the decision not to conduct further investigation of Seeley and present him as a defense witness.
iii. Joey Bocanegra

The ***Court*** finds that, for reasons discussed in claims 2 and 9, the evidentiary record could

reasonably support as trial tactics, the failure of defense counsel to further investigate and present evidence about Joey's role in the murders of his parents including Joey's history of violence, violent temper, PCP use around the time of the murders, and the sudden fight with Mr.

Bocanegra that preceded the murder. There was substantial evidence that Petitioner ***aided*** and abetted the Bocanegra murders with premeditation and deliberation. (See claims 1-8.) So much so that defense counsel chose not to object to the prosecution's two assailant theory. Petitioner has not made an evidentiary showing of prejudice regarding evidence about

Joey. In the face of such substantial evidence of guilt, the ***state court*** could reasonably have determined that a showing of Joey's temper and prior assaultive conduct would not have raised a

reasonable doubt that Petitioner ***aided*** and abetted the premeditated and deliberate murders of Mr. Bocanegra and Mrs. Bocanegra. Moreover, such a defense was contrary to Petitioner's

***stated*** desire to plead guilty to the Bocanegra murders (SPet. Ex. 520, p. 2) and "dying for his crimes but dying with a clear conscience." (SPet. Ex. 700.) Petitioner waived jury trial and

submitted guilt and special circumstances phase on the preliminary ***hearing*** transcript and the testimony of additional prosecution witnesses. See Sanchez, 12 Cal.4th at 23-30.

The ***state court*** could reasonably have found that the record did not suggest that evidence about Joey would have changed the result, given Petitioner's incriminating statements to detective Stratton and reporter Trihey and the crime scene evidence corroborated by Hernandez's

testimony, (see claims 1-4, ante), supporting Petitioner's intent to ***aid*** and abet the murders.

The ***state court*** could reasonably have found that defense counsel was not deficient in the decision not to conduct additional investigation of Joey Bocanegra regarding his role in the murders of his parents.

iv. Physical Evidence

Case 1:97-cv-06134-AWI-SAB Document 163 Filed 07/23/15 Page 134 of 213

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The ***Court*** finds that, for the reasons discussed in claims 1, 3, 10, 38 and 39, the failure of defense counsel to further investigate crime scene evidence was not unreasonable. Petitioner revisits his allegations relating to Laskowski's testimony in this proceeding that crime scene photographs showed two types of shoe prints in the Bocanegra kitchen, and Laskowski's subsequent re-examination of the photographs and identification of three types of shoe patterns in the kitchen and outside the Bocanegra home. (Pet. Ex. 121, p. 2; Ex. 417, pp. 1-2; SHCP 137, Ex. A.) Petitioner argues further investigation could have shown that Reyes, not Petitioner, caused the scalp wounds. However, Reyes admitted in subsequent proceedings that he served as lookout during the murders and entered the residence only afterwards to assist Petitioner and Joey. (SResp., Ex. A.) Evidence of Petitioner's shoeprint in the kitchen also undermines Seeley's testimony that Petitioner watched the assault on Mr. Bocanegra from the hallway. (SHCP, Ex. 419, pp. 6, 7, 22-23.) Evidence suggesting the presence of a third nonvictim in the Bocanegra Home does not does demonstrate or suggest a third person was present during the murders. (See claim 30, 32, ante.) Significantly, defense counsel did not to object to the two assailant theory (SHCP Ex. 137, ¶ 22) and the ***state*** record suggests this decision was not unreasonable.

Petitioner also revisits testimony by Dr. Holloway that the scalp wounds were non-fatal. (CT 119, 158-159.) Petitioner argues that further investigation could have shown the blows to the head were not of such force as would show an intent to kill. However, as discussed in claims 1 and 3, there was substantial evidence of Petitioner's aider and abetter liability. The violent nature and extended duration of the struggles with Mr. Bocanegra and Mrs. Bocanegra, with Joey taking time to get a kitchen knife, and Petitioner attempting to subdue and restrain each of the victims during Joey's assault on them, along with the multiple stab and blunt force wounds inflicted during room to room struggle with the victims, reasonably suggest a plan to kill them. (CT112-120; 149-156; 159; 167; 181; 192-194; 357-383; 479-483; 488.) Each victim suffered multiple stab wounds (id.) and was left unassisted to hemorrhage to death. (CT 114-119.) There was evidence Mrs. Bocanegra's wrists had been tied together and that she had been gagged. (CT

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113, 149-150, 153.) She suffered 26 stab wounds, three fatal, and six scalp wounds during the struggle. (CT 115-116, 153-154.) Mr. Bocanegra was stabbed at least eight times and had nine scalp wounds. (Id.) Defense counsel could reasonably have determined to focus limited resources elsewhere.

Additionally, there is no reasonable likelihood that the foregoing testimony of Laskowski and Holloway affected the jury's imposition of the death penalty, see Agurs, 427 U.S. at 103, or made trial so fundamentally unfair as to deny due process. Donnelly, 416 U.S. at 645. The evidence against Petitioner was substantial. A fair-minded jurist could conclude from the evidence and statements Petitioner made to Hernandez and Detective Stratton, that Petitioner assisted Joey in murdering Mr. Bocanegra and Mrs. Bocanegra (RT 2843-45, 2851-2854, 2856-59) and that he desired to enter a guilty ***plea***. (SPet. Ex. 520, p. 2; see CT 891-92; RT [5/16/88] 7; RT- 108a-155a.)

Defense counsel's failure to further investigate and rebut the prosecution's physical evidence supporting the two assailant theory was not unreasonable given the evidentiary record.

v. Mental Defenses

The ***Court*** finds that, for the reasons discussed in claims 2 and 6, the failure of defense counsel to further investigate and present mitigating evidence of Petitioner's organic brain damage and psychiatric impairments could reasonably be justified by a lack of supporting evidence. (SHCP Exhs. 113, ¶ 31; 139, ¶ 11; 136, ¶ 10.) The evidentiary record suggests that Petitioner was not under the influence of phencyclidine (PCP), marijuana, or alcohol at the time of the Bocanegra and Tatman murders. The evidence proffered by Petitioner suggests a history of substance abuse (SPet. Exhs. 105, pp. 64-65, 74-75; 110, p. 1; 119, p. 8; 123, p.1; 128, pp. 1-2), continuing through the weeks prior to the murders. (SPet. Ex. 105, pp. 85-87.) However, Respondent correctly points to the absence of competent evidence that Petitioner ingested and/or was under the influence of phencyclidine, marijuana, or alcohol on the days the Bocanegra and Tatman murders occurred.

As discussed in claim 6, defense psychologist Donaldson did not recommended to

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137

defense counsel that a neuropsychological evaluation be performed. ***Court*** appointed psychiatrist Matychowiak, following his November 1987 examination, found that Petitioner was not suicidal or delusional or suffering memory gaps (SPet. Ex. 520, p.5); that Petitioner planned to tell the judge he was guilty (Id. at 2); and that Petitioner understood the proceedings and could cooperate with counsel. (Id. at 6.) Petitioner told Matychowiak that he planned to tell the jury he was guilty and "get it over with." (SPet. Ex. 520, p. 2.) Dr. Matychowiak found Petitioner competent to stand trial. (SPet. Ex. 520, p. 2-6.)

The ***state*** ***court*** could reasonably have found that defense counsel were not deficient in

the decision not to conduct additional investigation of mental ***state*** defenses. Accordingly, all the foregoing allegations of failure to investigate and present mitigating

evidence are insubstantial when considered cumulatively for the reasons ***stated***. See Karterman, 60 F.3d at 580.

For the reasons ***stated***, a fair-minded jurist could have found that the ***state*** ***court*** rejection of this claim was neither contrary to, or an unreasonable application of, clearly established

federal law, as determined by the Supreme ***Court***, nor an unreasonable determination of the facts

in light of the evidence presented in the ***state*** ***court*** proceeding. See 28 U.S.C. § 2254(d). Claim 44 is denied.

d. Review of Claim 45

In his next claim, Petitioner alleges ineffective assistance by counsel's failure to object to admission of prejudicial crime scene and autopsy photographs.

The California Supreme ***Court*** summarily denied claim 44 (SPet. Claim NN) raised in

Petitioner's ***state*** petition for habeas corpus. In re Sanchez, S049502 (DD).

The ***state*** supreme ***court*** also considered and rejected this claim on appeal:

The trial ***court*** admitted into evidence 44 photographs, including 2 photographs of the autopsies of Juan and Juanita Bocanegra depicting the extensive nature of their scalp wounds. (Exhibits Nos. 13 & 14.) The autopsy photographs had been excluded from the guilt phase following a successful motion in limine by

defendant. The trial ***court*** overruled defendant's objection to the admission of the autopsy photographs, however, for the penalty phase. We first review his

contention that the trial ***court*** erred in admitting the autopsy photographs because



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they were cumulative, misleading and inflammatory, and their prejudicial effect substantially outweighed their probative value.

In overruling defendant's objection, the ***court*** ***stated***: “These scalp wounds are absolutely very important that the jury see. And they are not the kind of autopsy pictures-they're bad, I'll say that, all autopsy pictures are bad, but they're not the blood and guts type of thing that you sometimes see in autopsy pictures. And I think the prejudicial effect is far, far, far, and I can't stress it enough, outweighed by the probative value of these scalp wounds.”

Defendant contends the trial ***court*** committed prejudicial error in admitting Exhibits Nos. 13 and 14 in violation of his right to a fair trial and reliable penalty determination under the Eighth and Fourteenth Amendments of the federal Constitution. The thrust of his argument is that the photos were not relevant to the penalty determination, were cumulative to the testimony of Dr. Holloway (the forensic pathologist who performed the autopsies on the Bocanegras), and seriously misled the jury as to defendant's culpability in the Bocanegra murders.

In sum, the sole purpose of allowing the photographs, defendant asserts, was to improperly shock and horrify the jury.
Defendant points to the prosecutor's explanation to the jury as to why she believed the autopsy photographs were important evidence and asserts her comment actually exploited the prejudicial effect of the evidence: “You will have the pictures available to you. Look at the scalp wounds. You make the decision. But whatever, [Mrs. Bocanegra] would not have been killed but for the help of Teddy Brian Sanchez, and he is just as guilty of the murder as Joey Bocanegra.” Defendant claims that because the probative value of the photographs was clearly outweighed by their prejudicial effect, their admission violated his constitutional rights.

The decision whether to admit photographs is within the trial ***court***'s discretion and will not be disturbed unless their prejudicial effect substantially outweighs their probative value. [Citation] We have examined Exhibits Nos. 13 and 14 and have determined they are not so horrific or shocking that we can conclude the trial

***court*** abused its discretion in admitting them. [Citation] The jury was familiar with the facts of the crime, and the photographs had substantial probative value in demonstrating defendant's culpability as an aider and abettor, and as corroborative of Hernandez's testimony implicating defendant in the crimes. Moreover, the probative value of the photographs was not diminished simply because the scalp wounds alone were not fatal to the victims. The photographs corroborated the testimonial evidence and were relevant to a determination of the appropriateness of the death penalty. [Citation]
Defendant's claim that there was no dispute as to the circumstances of the murders is not supported by the facts. Defense counsel Frank argued at the penalty phase that defendant should be spared the death penalty if the jury had a “lingering doubt” about the extent of defendant's participation in the Bocanegra killings.
Nor is defendant assisted by People v. Love (1960) 53 Cal.2d 843, 856-857, in

which we held that the trial ***court***'s admission of a photograph showing the victim's face as she was dying, and of a tape recording of her last words as she lay on a hospital table in extreme pain, was prejudicial because it “served primarily to inflame the passions of the jurors.” [Citation] Here, by contrast, the autopsy photographs depicting the Bocanegras' scalp wounds were clearly probative of (i) the manner in which the victims were wounded, (ii) defendant's culpability as an

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aider and abettor, (iii) the malice and aggravation of the crime, and (iv) the appropriate ultimate penalty. [Citation]

Because we find no error in admitting the autopsy photographs, we need not address defendant's claims that admission of other photographs during the penalty phase (Exhibits Nos. 9, 18, 19 & 25, depicting the wounds on the Bocanegras and Tatman) did not render harmless the prejudicial effect of the autopsy photos. Nor do we address defendant's related argument that, assuming we conclude the admission of these photographs "undercut the prejudice resulting from the admission" of the autopsy photographs, trial counsel was ineffective for failing to object to their admission. Neither argument is persuasive in light of our conclusion that the ***court*** did not err in admitting the autopsy photographs at the penalty phase.

Sanchez, 12 Cal.4th at 63-65.

A due process claim can be ***stated*** where graphic photos of victims make the trial fundamentally unfair. Jammal, 926 F.2d at 919. However, photos that are relevant to the crime charges and elements thereof are admissible. See Villafuerte v. Lewis, 75 F.3d 1330, 1343 (1996). Under California law, "photographs which disclose the manner in which the victim was wounded are relevant on the issues of malice and aggravation of the crime and the penalty."

People v. Thompson, 50 Cal.3d 134, 182 (1990).

Petitioner, citing in support to claim 56, post, alleges the jury was allowed to view inflammatory and prejudicial autopsy, crime scene and victim photographs (RT 2891-2892), depicting graphic and gory injuries unrelated to actions attributed to Petitioner, which should have been excluded under California Evidence Code section 352, and that caused the penalty trial to be fundamentally unfair. He claims there was no tactical reason not to object to these photographs.

The ***state*** record shows that defense counsel Toton did move to exclude all photographs during the guilt phase (RT-30a-33a). At the penalty phase, two autopsy photos of Mr. Bocanegra and Juanita's scalp wounds (People's Exhs. 13, 14) were admitted, over the defense's objection, (RT 2876, 2880-2281, 2285, 2891-2892), and the victim photos were admitted without objection. (RT 2891).

However, the ***state court*** could reasonably find that Petitioner was not prejudiced by

introduction of the photos or failure of defense counsel to object to them. The ***Court*** agrees with

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140

the ***state court*** reasoning in finding the photographs relevant and probative of charges and elements including intent to kill, aggravation and penalty.
Nor does the failure to object necessarily demonstrate ineffective assistance. See Nefstad v. Baldwin, 66 F.3d 335 at *3 (9th Cir. 1995) (holding no violation of due process where prosecutor during closing argument shows photographs of victim before and after murder because relevant to intent).
Even without the photographs, it is not reasonably probable the jury would have returned a sentence less than death given the evidence in aggravation including the circumstances surrounding the murders of the Bocanegras and Mr. Tatman, and Petitioner's 1982 assaults on Ammarie and Pena. (RT 2863-2874.)

Accordingly, the ***state court*** could reasonable have found that Petitioner failed to make an evidentiary showing that defense counsel's performance fell below an objective standard of reasonableness and that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland, 466 U.S., at 687-694.

It follows that the ***state court*** rejection of the claim was neither contrary to, or an unreasonable application of, clearly established federal law, nor based on an unreasonable

determination of the facts in light of the evidence presented in the ***state court*** proceeding. See 28 U.S.C. § 2254(d).
Claim 45 is denied.
e. Review of Claim 46
Petitioner next claims ineffective assistance by failure to contest prosecution evidence of lack of remorse.

The California Supreme ***Court*** summarily denied claim 46 (SPet. Claim OO) raised in

Petitioner's ***state*** petition for habeas corpus. In re Sanchez, S049502 (DD). In this case, "the habeas petitioner's burden still must be met by showing there was no reasonable basis for the

***state court*** to deny relief," Richter, 562 U.S. at 98, and this ***Court*** "must determine what

arguments or theories supported or . . . could have supported, the ***state court***'s decision; and then
Case 1:97-cv-06134-AWI-SAB Document 163 Filed 07/23/15 Page 140 of 213
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141

it must ask whether it is possible fair-minded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this ***Court***." Id. (emphasis added).

Petitioner alleges that he was prejudiced by Boggs's false testimony attributing to Petitioner the lack of remorse shown by Reyes following the Tatman murder, i.e., that Reyes and Petitioner "kicked back, drank some whiskey, smoked some dope, ate some food, and just relaxed for the rest of the evening." (RT 2663-64; SPet. Ex. 100.) An error that Ryals also made in her opening argument. (RT 2619.) Petitioner faults his counsel for failure to cross-examine Boggs, and failure to introduce evidence of Petitioner's remorse expressed to reporter Trihey and his friends Robin and Debbie Lozano.

The ***Court*** is not persuaded by this claim. Petitioner's contention regarding to Boggs's allegedly false testimony and defense counsel's failure to cross-examine Boggs on this issue fails substantively for reasons discussed in claim 37, i.e., the ***state court*** could reasonably have concluded that prosecutor Ryals did not know of and knowingly rely upon Boggs's erroneous testimony, (SPet. Exhs. 137, p. 12; 113, p.10; SResp. Ex. B), and there is no reasonable likelihood the error affected the result of trial or caused an unfair trial.

Petitioner also alleges prejudice from Ryals's opening argument in which she made reference to Boggs's errant testimony. Under California law, the absence or presence of remorse is a factor relevant to the jury's penalty determination. People v. Ghent, 43 Cal.3d 739, 771 (1987); see also Harris v. Pulley, 885 F.2d 1354, 1384 (9th Cir. 1988). The prosecutor's

comment is impermissible only where it is “manifestly intended to call attention to the defendant's failure to testify or is of such a character that the jury would naturally and necessarily take it to be a comment on the failure to testify.” Beardslee v. Woodford, 358 F.3d 560, 586 (9th Cir. 2003). Here the prosecution evidence of lack of remorse did not refer to Petitioner’s failure to testify, but rather to statements that were already in evidence.

Additionally, there is not a reasonable probability that statements of remorse to Trihey and acquaintances, the Lozanos, even if taken as admissible evidence of remorse, could have



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affected the jury’s imposition of the death penalty. Statements of remorse to Trihey were themselves inculpating. (SPet. Ex. 113, p. 12.) Moreover, a lack of remorse is in any event suggested by Petitioner’s statements describing Mr. Tatman’s murder and robbery, his intention to rob Mr. Tatman, how Reyes stabbed Mr. Tatman, and how Petitioner and Reyes then took Mr. Tatman’s things back to their room. (RT 2658-2666.) Tactical reasons for not presenting

remorse evidence are reasonably suggested by hearsay issues relating to Petitioner's proffer (Pet. 719) and the defense strategy to not admit guilt but rather focus on "residual or lingering doubt." (SPet. Ex. 113, pp. 8-12.)

The ***state court*** could have reasonably believed that Petitioner's confession to Boggs of the circumstances surrounding Tatman's murder and Petitioner's involvement in it would have undercut any sympathy toward him by the jury. (See RT 2658-2666.) Moreover, defense counsel could reasonably have decided that a lingering doubt defense and mitigating social history might well have been weakened by evidence of remorse. (See RT 3053-3055, 3063-3064.)

The ***Court*** finds that Petitioner has not established that defense counsel's performance fell below an objective standard of reasonableness and that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland, 466 U.S., at 687-694.

For the reasons ***stated***, a fair-minded jurist could have found that Petitioner failed to

establish that the ***state court*** rejection of the claim was contrary to, or an unreasonable application of, clearly established federal law, or an or an unreasonable determination of the

facts in light of the evidence presented in the ***state court*** proceeding, viewed most favoring the prosecution. Jackson, 443 U.S. at 319. See 28 U.S.C. § 2254(d).
Claim 46 is denied.
f. Review of Claim 47
Petitioner next claims ineffective assistance by counsel's failure to investigate and present mitigation evidence regarding the 1982 Ammarie and Pena Crimes.

The California Supreme ***Court*** summarily denied claim 47 (SPet. Claim PP) raised in
Case 1:97-cv-06134-AWI-SAB Document 163 Filed 07/23/15 Page 142 of 213
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Petitioner's ***state*** petition for habeas corpus. In re Sanchez, S049502 (DD). In this case, "the habeas petitioner's burden still must be met by showing there was no reasonable basis for the ***state court*** to deny relief," Richter, 562 U.S. at 98, and this ***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 fair-minded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this ***Court***." Id. (emphasis added).

The trial record reveals Mr. Ammarie, the store keeper victim in one incident, testified at the penalty phase that, on May 7, 1982, Petitioner assaulted him when Ammarie refused to "get [Petitioner] some bacon." Petitioner stabbed Ammarie in the left shoulder and neck, took money and ran away, leaving Ammarie in the hospital for two weeks. (RT 2862-2866; see Sanchez, 12 Cal.4th at 22.) The victim in the other incident, Mr. Pena, a friend of and Petitioner, testified at the penalty phase that Petitioner, without any provocation, stabbed him three times with a kitchen knife and demanded money, leaving Pena hospitalized for two days. (RT 2868-74.) Petitioner contends that, as to the Ammarie and Pena crimes, defense counsel failed to investigate and present mitigating evidence of Petitioner's emotional and family turmoil, possible PCP psychosis, organic brain damage, and belief he acted in self-defense in these incidents. Petitioner claims there was no tactical reason for these omissions.

The ***Court*** finds this claim unavailing. Petitioner does not offer facts showing the nature and extent of the investigation conducted by defense counsel Frank, or what information if any, Petitioner provided to defense counsel Frank in preparation for the penalty phase, or what Petitioner did, if anything, to cooperate in developing mitigating penalty phase evidence. As the Supreme ***Court*** ***stated*** in Strickland, the information supplied by the defendant is "critical" in determining whether counsel's investigation decisions are reasonable. 466 U.S. at 691. Counsel is "strongly presumed" to make decisions in the exercise of professional judgment. Id. at 690. Petitioner faults defense counsel Frank for failure to consult with counsel who assisted Petitioner in the 1982 criminal proceedings. Yet Petitioner does not ***state*** what credible,

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probative mitigating information this consultation would have yielded over and above the police and ***court*** records relating to the 1982 convictions, which Petitioner concedes defense counsel undertook to obtain. (SHCP Exhs. 137, ¶ 35; 113, ¶ 30.)

Petitioner faults defense counsel's for a failure to investigate possible social and mental defenses contemporaneous to the 1982 crimes, including probable effects of alleged heavy PCP use. Petitioner offers in support the 1995 opinion of a clinical psychologist, Jeri Doane, as to the effect of losses and turmoil in his personal life (SPet. Ex. 105, pp. 75-78), as well as anecdotal assertions of Petitioner and others regarding potential mental and other defenses to his 1982 criminal conduct. (SPet. Exhs. 105, pp. 1-5, 79-82, 99- 100; 802; 506, pp.6-8; 128, p. 2.)

But even assuming this type of mitigating information could be competent evidence, it does not suggest Petitioner informed defense counsel in this proceeding of the existence of this mitigating information, or that defense counsel in this proceeding was otherwise aware of it or

should have been aware of it. Moreover, defense counsel Frank could reasonably have believed such information, if developed, would have little if any mitigating value. Petitioner does not dispute that he was convicted of the 1982 crimes. Post hac assertion of defenses to convictions suffered years prior could reasonably be found to have little if any mitigating value. As to mental defenses, the lack of supporting evidence (see claim 6), and the fact that Petitioner was convicted for these 1982 offenses, could reasonably suggest further investigation was unwarranted. Based on the evidentiary record, defense counsel could reasonably presume viable defenses in the 1982 proceedings were raised therein.

These defenses would not advance defense counsel Frank's tactic of lingering doubt.

"Rare are the situations in which the 'wide latitude counsel must have in making tactical decisions' will be limited to any one technique or approach." Richter, 131 S. Ct. at 789 (quoting Strickland, 466 U.S. at 689); see also Williams, 529 U.S. at 415 (O'Connor, J., concurring) (defense counsel conducted a reasonable investigation into Petitioner's troubling background and unique personal circumstances developed a coherent and organized strategy, proffered evidence, and presented a case for mitigation); Wiggins, 539 U.S. at 521 (citing Strickland, 466 U.S. at

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688) (“the proper measure of attorney performance remains simply reasonableness under prevailing professional norms.”).

Just as the Supreme ***Court*** found in Van Hook,

> This is not a case in which the defendant's attorney [] failed to act while potentially powerful mitigating evidence stared [him] in the face, cf. Wiggins, 539 U.S., at 525, 123 S. Ct. 2527, or would have been apparent from documents any reasonable attorney would have obtained, cf. Rompilla v. Beard, 545 U.S. 374, 389–393, 125 S. Ct. 2456, 162 L.Ed.2d 360 (2005). It is instead a case, like Strickland itself, in which defense counsel's “decision not to seek more” mitigating evidence from the defendant's background “than was already in hand” fell “well within the range of professionally reasonable judgments.”

Bobby v. Van Hook, 558 U.S. 4, 11-12 (2009) (quoting Strickland, 466 U.S. at 699).

Additionally, even if defense counsel Frank’s investigation and presentation relating to the 1982 crimes was deficient, there was no reasonable probability such mitigation evidence could have affected the jury’s imposition of the death penalty given the noted substantial evidence against Petitioner. The ***state court*** could reasonably have concluded that defense counsel’s investigation was adequate given the above noted facts underlying these prior criminal convictions, defense counsel Frank’s theory of lingering doubt and the social and personal history mitigation evidence discussed in claims 6, 26, ante.

For these reasons, Petitioner has failed to overcome the strong presumption that counsel made decisions in the exercise of professional judgment. Strickland, 466 U.S. at 690. Even if defense counsel had discovered this evidence and still chose to proceed with his strategy as opposed to the strategy Petitioner now advocates, a fair-minded jurist could conclude that his decision was reasonable. “Counsel was entitled to formulate a strategy that was reasonable at the time and to balance limited resources in accord with effective trial tactics and strategies.” Richter, 562 U.S. at 107. “[T]he Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight.” Yarborough, 540 U.S. at 8.

Petitioner fails to demonstrate that no reasonable jurist could have found that he failed to make a prima facie showing that defense counsel rendered ineffective assistance during the penalty phase of the trial relating to mitigating the 1982 criminal convictions.

Case 1:97-cv-06134-AWI-SAB Document 163 Filed 07/23/15 Page 145 of 213

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For the reasons ***stated***, a fair-minded jurist could have found that the ***state court*** rejection of this claim was neither contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme ***Court***, nor an unreasonable determination of the facts in light of the evidence presented in the ***state court*** proceeding. See 28 U.S.C. § 2254(d). Claim 47 is denied.

g. Review of Claim 48

Petitioner next claims ineffective assistance by counsel's failure to fully and completely develop and present adequate and reliable evidence about Petitioner's character, background, and behavior.

The California Supreme ***Court*** summarily denied claim 48 (SPet. Claim QQ) raised in Petitioner's ***state*** petition for habeas corpus. In re Sanchez, S049502 (DD). In this case, "the habeas petitioner's burden still must be met by showing there was no reasonable basis for the ***state court*** to deny relief," Richter, 562 U.S. at 98, and this ***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 fair-minded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this ***Court***." Id. (emphasis added).

Petitioner, citing to facts alleged in claim 6, contends that background and character testimony from four family members as well as social anthropologist Isabel Wright did not fully present evidence of his unstable family life, sporadic education, disabling physical violence, abuse, deprivation, and emotional suffering of his childhood and adolescence his caring for siblings and heavy drug use. He alleges that defense counsel Frank, consistent with Wright's requests, should have presented a full social history prepared by a social anthropologist, along with evidence of organic brain damage and psychiatric disorders prepared by a psychologist or psychiatrist, such as included with his ***state*** petition. (SHCP Exhs. 105, 111, 114.)

During the sentence selection stage, the Supreme ***Court*** has imposed a requirement that the jury make "an individualized determination on the basis of the character of the individual and



147

the circumstances of the crime." Tuilaepa, 512 U.S. at 972-73 (citing Zant, 462 U.S. at 879, and

Woodson v. North Carolina, 428 U.S. 280, 303-304 (1976)). This "requirement is met when the jury can consider relevant mitigating evidence of the character and record of the defendant and the circumstances of the crime." Id. (citing Blystone v. Pennsylvania, 494 U.S. 299, 307 (1990)) ("requirement of individualized sentencing in capital cases is satisfied by allowing the jury to consider all relevant mitigating evidence"). The ***court*** may not "impede [] the sentencing jury's ability to carry out its task of considering all relevant facets of the character and record of the individual offender" by excluding "relevant mitigating evidence." Skipper v. South Carolina, 476 U.S. 1, 8 (1986). Nevertheless, the ***court*** retains "the traditional authority of a ***court*** to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense." Lockett v. Ohio, 438 U.S. 586, 605 n.12 (1978).

The ***Court*** does not find that Petitioner was prejudiced by any failure of defense counsel to develop and present complete, adequate, and reliable evidence of Petitioner's character, background, and behavior at the time of the Bocanegra and Tatman homicides. Defense counsel Frank, while arguing for life without the possibility of parole, (RT 2895-2896, 2910, 2923, 2928, 3021), did present the following significant mitigating background and character evidence from family members including Petitioner's wife and retained social anthropologist Dr. Wright. (RT 2897, 2912, 2928, 2930, 3007-3008, 3017.) Petitioner's mother became pregnant with him when she was fifteen. (RT 2897-2898, 2943-2945.) His mother turned to alcohol and drugs (2899-2900, 2902-2903) and embarked upon a succession of unstable and unsupportive marriages and relationships. Petitioner experienced an impoverished, nomadic, neglected and sometimes abusive upbringing with little positive parental or adult supervision. (RT 2902-2941, 2958-2964, 3003-3006.) He lived in a car and then cheap motels. (RT 2904, 2908, 2918-2919.) His parents drank and argued, (RT 2905, 2909), and sometimes physically abused Petitioner (RT 2907, 2985.) His siblings were removed from the home for adoption. (RT 2913-2914, 2941, 2970, 2978-83.) His lack of stability in school, changing schools often and infrequently attending class, resulted in poor academic performance such that

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he did not progress beyond the eighth grade. (RT 2963-2969, 2941-2942, 2980, 2991-2994.) He began sniffing paint as a teen. (RT 2993, 2998.) His attempts at job training and employment (RT 2996-2997) were short-lived because of his lack of skills and education. (RT 3003-3004.) Defense Counsel Frank presented evidence that Petitioner nonetheless showed concern and care for his siblings, sometimes stealing food for them. (RT 2920.) Petitioner's grandmother, to whom he was close, died in 1982 (RT 3000). Petitioner's mother died from alcohol related complications at age thirty-eight while he was in prison for the 1982 Ammarie and Pena stabbings. (RT 2897, 2912, 2916, 3001.) Petitioner's step-father also died from complication of alcohol. (RT 2919, 2961.) Petitioner lived a transient existence after his release from prison in 1986. (RT 3001-3002.) Petitioner was unable to find work and resorted to drugs. (Id.) Petitioner married Robin Alvarado shortly before his 1988 homicide trial, (RT 2925, 2928), and prior to that cared for her children. (RT 2927, 3000, 3018-3019.) Social anthropologist, Dr. Wright, testified that the major influences in Petitioner's life were his migratory lifestyle secondary to poverty and inconsistent family relationships. (RT 2939, 3003, 3006.)
The evidentiary record demonstrates defense counsel argued all the foregoing in urging the jury to return a life sentence without the possibility of parole for the then twenty-five year old Petitioner. (RT 2895-2896, 2910, 2923, 2928, 3021.) Moreover, prosecutor Ryals, in her argument to the jury, acknowledged there were mitigating factors in Petitioner's background and character that evoked sympathy for him. (RT 3043-3047, 3079.)

The ***Court*** finds that, given the substantial inculpating evidence against Petitioner, it is not reasonably probable that Petitioner would have received a more favorable sentence had further evidence of his background, character and behavior been presented. In particular, presentation of additional evidence regarding Petitioner's substance abuse would not have necessarily added weight to his case for mitigation. See Cullen, 131 S. Ct. at 1410 (noting that evidence of serious substance abuse is "by no means clearly mitigating"); id. at 1406–07 (noting that Strickland "rejected the notion that the same investigation will be required in every case"

and requires the habeas ***court*** to strongly presume that counsel exercised reasonable judgment in



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making all significant decisions).

The ***state court*** could reasonably find Petitioner's alleged neurological and psychiatric conditions and related mental defenses were not sufficiently supported by the record and failed for reasons discussed in claims 6 and 26, ante.

Petitioner has not established that defense counsel's performance fell below an objective standard of reasonableness and that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland, 466 U.S., at 687-694.

For the reasons ***stated***, a fair-minded jurist could have found that Petitioner failed to establish that the ***state court*** rejection of the claim was contrary to, or an unreasonable application of, clearly established federal law, or an unreasonable determination of the facts in

light of the evidence presented in the ***state court*** proceeding, viewed most favoring the prosecution. Jackson, 443 U.S. at 319. See 28 U.S.C. § 2254(d).
Claim 48 is denied.
h. Review of Claim 49

Petitioner alleges defense counsel was ineffective by failing to request that the trial ***court*** voir dire prospective jurors about adverse publicity from Bakersfield Californian articles relating to debarment proceedings against defense counsel Toton.

The California Supreme ***Court*** summarily denied claim 49 (SPet. Claim RR) raised in

Petitioner's ***state*** petition for habeas corpus. In re Sanchez, S049502 (DD).

The ***state*** supreme ***court*** considered and rejected this claim on direct appeal:
[I]t is evident from the record that defendant failed to preserve his claim of

improper voir dire by objecting to the ***court***'s questioning during trial. [Citation]

On the merits, our review of the record shows the trial ***court***'s voir dire adequately insured an impartial jury, without unnecessarily exposing the jury to the very information defendant found could prejudice his case . . . .

The trial ***court*** assisted counsel and to ensure a fair and impartial jury by requiring the 201 prospective jurors to fill out a one-page questionnaire asking the panel

members whether they had ever ***heard*** of the case, and if so, to name their source.

[Citation] Of the jurors eventually selected to serve, eight told the ***court*** they had

never ***heard*** of defendant's case, were not familiar with counsel, and either did not subscribe to or did not read on a consistent basis the Bakersfield Californian. In

addition, pursuant to further questioning by the ***court***, four of these jurors
Case 1:97-cv-06134-AWI-SAB Document 163 Filed 07/23/15 Page 149 of 213
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indicated they did not believe everything they read in the newspaper.
Two other jurors who acknowledged they read the Bakersfield Californian

observed that they had never ***heard*** of defendant's case.
Two of the twelve jurors selected had prior knowledge of defendant's case, but their voir dire responses clearly indicated that their exposure to the newspaper articles about defendant's case was limited to an awareness of the general facts and circumstances of the Bocanegra and Tatman murders. Their knowledge of the case did not include any specific information regarding Toton's pending

disbarment. Thus, it appears that the trial ***court*** acted well within its discretion in proposing the general question of the jurors' knowledge of Toton's pending disbarment without unnecessarily educating the jury about that matter. The trial

***court***'s strategy thus avoided informing the jury of Toton's troubles, while assuring defendant a fair and impartial jury. [Citation] Under these facts, we find

the trial ***court*** did not err in limiting voir dire to general questions concerning pretrial publicity. [Citation]
Sanchez, 12 Cal.4th at 61-63. The record demonstrates that defense counsel Toton agreed, reasoning that questioning jurors about the publicity was likely to be more prejudicial than that

publicity itself. (SHCP Ex. 137, ¶ 29). This ***Court*** finds the tactic not unreasonable.
The Sixth Amendment secures to criminal defendants the right to trial by an impartial jury. Skilling, 561 U.S. at 377-78; Irvin, 366 U.S. at 722. Nevertheless, “juror impartiality, we have reiterated, does not require ignorance.” Skilling, 561 U.S. at 381 (citing Irvin, 366 U.S. at 722) (jurors are not required to be “totally ignorant of the facts and issues involved.”). To merit relief for violation of his due process rights due to pretrial publicity, Petitioner must demonstrate that the case is one in which prejudice is presumed, or he must demonstrate actual prejudice. Skilling, 561 U.S. at 379, 385.

"A presumption of prejudice . . . attends only the extreme case." Id. at 381. The

Supreme ***Court*** has determined that pretrial publicity so manifestly tainted a criminal prosecution that prejudice must be presumed in only three cases: Rideau v. Louisiana, 373 U.S. 723, 726-27 (1963) (televised confession); Estes v. Texas, 381 U.S. 532, 536 (1965) (massive pretrial media interference); and Sheppard v. Maxwell, 384 U.S. 333, 355-356 (1966) (months of virulent pretrial publicity).

"To establish actual prejudice, the defendant must demonstrate that the jurors exhibited

actual partiality or hostility that could not be laid aside." United ***States*** v. Sherwood, 98 F.3d

Case 1:97-cv-06134-AWI-SAB Document 163 Filed 07/23/15 Page 150 of 213

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402, 410 (9th Cir. 1996). When pretrial publicity is at issue, "primary reliance on the judgment

of the trial ***court*** makes [especially] good sense" because the judge "sits in the locale where the publicity is said to have had its effect" and may base her evaluation on her "own perception of

the depth and extent of news stories that might influence a juror." Mu'Min, 500 U.S., at 427.

Appellate ***courts*** making after-the-fact assessments of the media's impact on jurors should be mindful that their judgments lack the on-the-spot comprehension of the situation possessed by trial judges. Skilling, 561 U.S. at 386.

Petitioner contends that neither the trial ***court*** nor defense counsel asked prospective jurors about newspaper the articles appearing in the Bakersfield Californian two weeks before jury selection that discussed the impending debarment of lead defense counsel Toton. He maintains there was no tactical reason for not questioning jurors about these newspaper articles and that jurors prejudiced thereby may have been empaneled.

Petitioner's case is immediately distinguishable from Estes and Sheppard. He does not allege, nor is there any evidence, that media coverage of attorney disciplinary proceedings interfered with his right to a fair trial. See Skilling, 561 U.S. at 382 n.14 ("Skilling's reliance on Estes and Sheppard is particularly misplaced; those cases involved media interference with courtroom proceedings during trial. [Citation] Skilling does not assert that news coverage reached and influenced his jury after it was empaneled."). Rideau is the only case in which the

Supreme ***Court*** overturned a conviction based on pretrial publicity.

Petitioner's case also is readily distinguished from Rideau. See Sanchez, 12 Cal.4th at

61-63. Here, during voir dire, the following eight jurors indicated they had never ***heard*** of the case, did not know counsel, and did not subscribe to and did not usually read the Bakersfield Californian: juror Jones (CT 258; RT 594, 596-597, 606); juror Mooney (CT 256, RT 647, 664); juror Roberts (CT 237, RT 1170); juror Stell (CT 184, RT 1882); juror G. Clark (CT 229, RT 2120); juror P. Clark (CT 228; RT 2140-2141); juror O'Toole (CT 220, RT 2401-2402, 2406); and juror Raymond (CT 217, RT 2438-2439).

Two jurors, Crowder and Zamora, regularly read the Bakersfield Californian but were

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unaware of the case and of counsel. (CT 207; RT 1342-1343 regarding juror Crowder; CT 213; RT 2554, 2563 regarding juror Zamora.)

Only two of the jurors selected, Razo and Rodriguez, ***stated*** they had ***heard*** of the case.

(RT 1814-1815; 2458-2460, 2471-2472.) Neither of these jurors mentioned having ***hearing*** of Toton; both indicated they did not believe everything they read in newspapers and could put

what they had ***heard*** out of mind while deliberating. Id. Petitioner has not made an evidentiary showing that these juror statements were untrue.

“[P]retrial publicity—even pervasive, adverse publicity—does not inevitably lead to an unfair trial.” Nebraska Press Assn. v. Stuart, 427 U.S. 539, 554 (1976). In the rare case that prejudice is presumed, there will have been a “‘barrage of inflammatory publicity immediately prior to trial,’ [Citation], amounting to a ‘huge . . . wave of public passion.’” Patton v. Yount, 467 U.S. 1025, 1033 (1984) (quoting Murphy v. Florida, 421 U.S. 794, 798 (1975) and Irvin, 366 U.S. at 728). The coverage in this case was neither all pervasive nor constant leading up to trial. Certainly there was no barrage of inflammatory publicity immediately prior to trial or in

the six months leading up to trial. Based on the foregoing, the ***state court*** reasonably could have concluded that this was not an extreme case wherein prejudice should be presumed from pretrial publicity.

As discussed above and in claim 55, post, the trial judge considered the impact of pretrial publicity on the jurors who served on Petitioner’s case. None of the twelve selected jurors had been exposed to media accounts of Toton’s disciplinary problems. Sanchez, 12 Cal.4th at 61-63.

Only two jurors had ***heard*** of the case. Id. It is well-established that “juror impartiality . . . does not require ignorance.” Skilling, 561 U.S. at 381 (citing Irvin, 366 U.S. at 722) (Jurors are not required to be “totally ignorant of the facts and issues involved”; “scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case.”); Reynolds, 98 U.S. at 155–156 (“[E]very case of public interest is almost, as a matter of necessity, brought to the attention of all the intelligent people in the vicinity, and scarcely any

one can be found among those best fitted for jurors who has not read or ***heard*** of it, and who has



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not some impression or some opinion in respect to its merits.").

Petitioner's suggestion that the manner in which Toton conducted voir dire was selfinterested is unsupported by the evidence for reasons discussed in claims 21-24, ante. Moreover, even if defense counsel's failure to request voir dire about attorney discipline publicity was deficient performance, nothing in the evidentiary record suggests presumed or actual prejudice. The noted substantial evidence against Petitioner suggested no reasonable probability of a more favorable outcome even had defense counsel requested voir dire about publicity from Toton's disciplinary proceeding.

The ***state court*** could reasonably have concluded that Petitioner failed to establish that defense counsel's performance fell below an objective standard of reasonableness and that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

Strickland, 466 U.S., at 687-694. For the reasons above, this ***Court*** agrees with the ***state court*** that there was no reasonable likelihood that Petitioner did not receive a fair trial despite the limited voir dire regarding pretrial publicity.

Accordingly, the ***state court***'s rejection of this claim was not contrary to, or an unreasonable application of, clearly established federal law, or an unreasonable determination of

the facts in light of the evidence presented in the ***state court*** proceeding, viewed most favoring the prosecution. Jackson, 443 U.S. at 319. See 28 U.S.C. § 2254(d).
Claim 49 is denied.
i. Review of Claim 50
Petitioner next claims ineffective assistance by counsel's failure to object to prosecutorial misconduct during closing argument.

The California Supreme ***Court*** summarily denied claim 50 (SPet. Claim SS) raised in

Petitioner's ***state*** petition for habeas corpus. In re Sanchez, S049502 (DD).

That ***court*** also considered and rejected the claim on direct appeal, finding that:
In his closing argument, co-counsel Frank consistently pointed out the prosecution's inaccurate statements to the jury, reminding it of the evidence presented. Counsel's performance in demonstrating for the jury the prosecutor's

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improper argument reveals counsel's attention to detail rather than incompetence. Counsel's careful references during the prosecutor's misstatements demonstrates that defense counsel was aware of the misstatements and, in exercising reasonable professional judgment, chose not to object for tactical reasons. In any event, we find no reasonable probability that defense counsel's failure to object prejudiced defendant's case.
Sanchez, 12 Cal.4th at 71.
Petitioner faults defense counsel’s failure to object when prosecutor Ryals argued in closing that Petitioner killed Mr. Tatman, suggesting the jury was sentencing Petitioner for the Tatman homicide, and argued that the Bocanegras would not have been killed but for the actions of Petitioner.

However, the ***state court***, based on the record before it, could have found it reasonable for the defense not to object in such circumstances. (See claim 42; see also Flieger v. Delo, 16 F.3d 878, 886 (8th Cir. 1994) (reasonable trial strategies do not amount to ineffective assistance even where unsuccessful).
The Tatman conviction was presented to the jury as evidence in aggravation and the jury appropriately admonished and instructed in this regard. Prosecution argument that Petitioner had a principal role in the Tatman killing, and that the Bocanegras would not have been killed without his assistance, did not in all reasonable likelihood mislead the jury or affect the death sentence imposed. The weight of evidence against Petitioner as an aider and abettor of the homicides was substantial. Evidence showed that Petitioner grabbed and held Mr. Bocanegra while Joey got a knife (RT 2843, 2853-54); that Petitioner beat Mr. Bocanegra while Joey stabbed him (RT 2696-2706, 2719-21, 2725, 2843-44, 2854, 2858); that Petitioner rushed Mrs. Bocanegra and told Joey to “shut her up” (RT 2844, 2858); that Petitioner pushed Mrs. Bocanegra into a back room and hit her on the head with a bar while Joey stabbed her (RT 2710-14, 2720-21, 2725, 2752, 2844), and that while this occurred Mrs. Bocanegra’s hands were bound and she was likely gagged (RT 2708, 2723, 2749-51, 2754-55, 2774-2775). Moreover, the jury certainly was made well aware that Mr. Tatman’s stabbing wounds were non-fatal injuries and that Petitioner’s conviction for Mr. Tatman’s murder was based on

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his ***aiding*** and abetting Reyes. (Id.; RT 2693-94.) Generally, 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." Ceja, 97 F.3d at 1253–1254 (quoting Baker, 10 F.3d at 1415).

Petitioner has not made a sufficient showing he was prejudiced by defense counsel's failure to object to alleged prosecutorial misconduct during closing argument. The evidence against Petitioner was not insubstantial considering the multiple murder special circumstance in the Bocanegra murders and the substantial evidence in aggravation presented during the penalty phase. There is no reasonably likelihood the outcome would have been different absent the alleged prosecutorial misconduct. See Donnelly, 416 U.S. at 643 (improper jury argument by the ***state*** does not present a claim of constitutional magnitude unless it is so prejudicial that the petitioner's trial was fundamentally unfair . . . [t]o establish prejudice, the petitioner must demonstrate either persistent and pronounced misconduct or that the evidence was so insubstantial that, in all probability, but for the remarks, no conviction would have occurred).

The ***state court*** could reasonably have concluded that Petitioner failed to establish that defense counsel's performance fell below an objective standard of reasonableness and that, but

for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland, 466 U.S., at 687-694.

Accordingly, the ***state court***'s rejection of this claim was not contrary to, or an unreasonable application of, clearly established federal law, or an unreasonable determination of

the facts in light of the evidence presented in the ***state court*** proceeding, viewed most favoring the prosecution. Jackson, 443 U.S. at 319. See 28 U.S.C. § 2254(d).
Claim 50 is denied.
j. Review of Claim 51
In his next claim, Petitioner alleges ineffective assistance by counsel during penalty phase closing Argument.

The California Supreme ***Court*** summarily denied claim 51 (SPet. Claim TT) raised in
Case 1:97-cv-06134-AWI-SAB Document 163 Filed 07/23/15 Page 155 of 213
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Petitioner's ***state*** petition for habeas corpus. In re Sanchez, S049502 (DD). In this case, "the habeas petitioner's burden still must be met by showing there was no reasonable basis for the ***state court*** to deny relief," Richter, 562 U.S. at 98, and this ***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 fair-minded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this ***Court***." Id. (emphasis added).

Generally, 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." Ceja, 97 F.3d at 1253–1254 (quoting Baker, 10 F.3d at 1415); see also Molina, 934 F.2d at 1445 (prosecutor has wide latitude during closing argument to make reasonable inferences based on the evidence).

Petitioner contends that defense counsel's closing argument failed to respond to the prosecutor's improper argument regarding Petitioner's involvement in the Tatman and Bocanegra homicides. To this end, Petitioner repeats his allegations in claims 7, 42 and 50, ante, that defense counsel failed to point out evidence discrediting prosecution informant Hernandez (RT 2842, 2847-2848, 3051), and that Petitioner never told Hernandez that he (Petitioner) had stabbed anyone, (RT 2847-2848), and that he (Petitioner) did not inflict the fatal stab wounds upon the Bocanegras, (RT 2846), and that he (Petitioner) had no robbery motive. (RT 2852.)

Nonetheless, for the reasons ***stated*** in claims 7, 42 and 50, the ***state court*** could reasonably have found that the performance of defense counsel was not deficient and did not prejudice the outcome of trial proceedings.

The trial judge appropriately admonished the jury that argument is not evidence. As to the evidence, the ***state court*** could reasonably have found it weighed substantially against the Petitioner as an aider and abettor of the homicides. The murders occurred about one month after Petitioner's release from prison for the 1982 assaults. (RT 2877-2879 2973-2974.) The evidence reasonably showed that Petitioner grabbed and held Mr. Bocanegra while Joey got a knife (RT

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2843-2854), beat Mr. Bocanegra while Joey stabbed him (RT 2696-2706, 2719-2721, 2725, 2843-2844, 2854, 2858), rushed Mrs. Bocanegra and told Joey to “shut her up” (RT 2844, 2858), pushed Mrs. Bocanegra into a back room while Joey stabbed her, hitting her on the head with a bar (RT 2710-2714, 2720-2721, 2725, 2752, 2844), and that Mrs. Bocanegra’s hands were bound and she was likely gagged (RT 2708, 2723, 2749-2751, 2754-2755, 2774-2775).

The ***state court*** also could have reasonably determined there was no basis upon which Petitioner could have effectively impeached Hernandez. Petitioner has not shown that Hernandez gave contradictory, inconsistent or false testimony, or that Hernandez was motivated by an undisclosed ***plea*** bargain. No facts or discrepancies between the testimony and the physical evidence establish or compel the conclusion that Hernandez, by virtue of his alleged substance addition, his ***plea*** deal, or otherwise, was motivated to and did testify falsely or inaccurately. (SPet. Ex. 900, pp. 4, 11; SResp. Ex. B.) Having cross-examined Hernandez at the preliminary ***hearing***, Toton determined on that basis not to interview him. (SPet. Ex. 137, p. 4.) During cross-examination at the guilt and special circumstance phase, Hernandez’s testimony was consistent with Petitioner’s statements and the physical evidence that he had not been offered any disposition of then pending criminal matters prior to agreeing to testify at the Petitioner prosecution. (CT 576-577.) During cross-examination at the penalty phase, Hernandez admitted a deal on a then pending charge in exchange for his testimony in Petitioner. (RT 2850-2851.) Petitioner has not demonstrated that Hernandez’s testimony was false or misleading, or that defense counsel acted unreasonably in not interviewing Hernandez. Petitioner goes on to argue that defense counsel failed to explain the Bocanegra and Tatman evidence and verdicts, and failed to dispel the suggestion Tatman homicide was a capital crime for which they would sentence Petitioner (RT 3055), and failed to support the “lingering

doubt" defense (RT 3063-3082). Petitioner points out that, as discussed in claim 42, prosecutor Ryals improperly argued that the jury was to decide whether Petitioner killed Mr. Tatman. (RT 3034-3036.) However, the record reflects that defense counsel pointed out improper argument and reminded the jury of the evidence presented in favor of the lingering doubt defense. (RT

Case 1:97-cv-06134-AWI-SAB Document 163 Filed 07/23/15 Page 157 of 213

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3063-3082.)

As with the claims above, the jury was made well aware that Mr. Tatman's stabbing wounds were non-fatal injuries and that Petitioner's conviction for Mr. Tatman's murder was based on his ***aiding*** and abetting Reyes. (RT 235, 2693-2695.) Defense counsel made his argument to the jury that Petitioner did not intend to kill Mr. Tatman (CT 109; RT 2695), and the Bocanegras (CT 479, 500; see SHCP Ex. 419), and that there may have been a third assailant in the Bocanegra murders. (Pet. Exhs. 121, p. 2; 417, pp. 1-2; SHCP Ex. 137, Att. A.) Given Petitioner's desire to plead guilty to the Bocanegra murders, (SPet. Exhs. 520, p. 2; 700), the

unrebutted evidence presented at the penalty phase, the admonitions of the trial judge that argument is not evidence, and the potential aggravating and mitigating effects of circumstances surrounding the Tatman murder, it is not reasonably probable that even had defense counsel further responded to Ms. Ryals's closing statements, a different sentence would have been returned.

Accordingly, it could reasonably be found that the prosecution arguments were not so prejudicial as to make trial fundamentally unfair. See Donnelly, 416 U.S. at 643 (improper jury

argument by the ***state*** does not present a claim of constitutional magnitude unless it is so prejudicial that the petitioner's trial was fundamentally unfair . . . [t]o establish prejudice, the petitioner must demonstrate either persistent and pronounced misconduct or that the evidence was so insubstantial that, in all probability, but for the remarks, no conviction would have occurred); see also Furman, 190 F.3d at 1006 (rejecting habeas claim where, although some of prosecutor's arguments were improper, jury was told comments were not evidence, and evidence against defendant was substantial).

The ***state court*** could have reasonably concluded that Petitioner failed to establish that defense counsel's performance fell below an objective standard of reasonableness and that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland, 466 U.S., at 687-694.

A fair-minded jurist could therefore reasonably conclude that Petitioner failed to

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establish rejection of the claim was contrary to, or an unreasonable application of, clearly established federal law, or an or an unreasonable determination of the facts in light of the

evidence presented in the ***state court*** proceeding, viewed most favoring the prosecution. Jackson, 443 U.S. at 319. See 28 U.S.C. § 2254(d).
Claim 51 is denied.
k. Review of Claim 52
Petitioner claims cumulative ineffectiveness during the penalty phase, citing to claims 43-51, which he contends demonstrate defense counsel's failure to present evidence of Petitioner's minimal culpability, mitigating factors and defenses to the Tatman and Bocanegra homicides.

The California Supreme ***Court*** summarily denied claim 52 (SPet. Claim UU) raised in

Petitioner's ***state*** petition for habeas corpus. In re Sanchez, S049502 (DD).

The California Supreme ***Court*** considered this issue on direct appeal and rejected it, finding that:
Defendant claims that in combination, the errors at the penalty phase caused cumulative prejudice warranting a reversal of penalty. After review of the record, we disagree. Any prosecutorial misconduct that did occur did not significantly influence the fairness of defendant's trial or detrimentally affect the jury's determination of the appropriate penalty. [Citation]
Sanchez, 12 Cal.4th at 84.

For the reasons discussed in claims 43-51, the ***state court*** could reasonably have determined that Petitioner failed to establish in those claims that defense counsel was ineffective at penalty phase. These claims are insubstantial when considered cumulatively. See Karterman, 60 F.3d at 580; Rupe, 93 F.3d at 1445.
Respondent contends claim 52 is not cognizable because it creates and retroactively applies a "new rule" of constitutional law within Teague v. Lane, 489 U.S. 288. However, the

***Court*** finds the claim fails not because Petitioner seeks to apply a new rule of criminal procedure

under Teague, but rather on grounds the claim lacks merit for the reasons ***stated***.

Accordingly, this ***Court*** does not find Petitioner has established that defense counsel's

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cumulative performance at penalty phase fell below an objective standard of reasonableness and that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland, 466 U.S., at 687-694.

The ***state court***'s rejection of this claim was not contrary to, or an unreasonable application of, clearly established federal law, or an unreasonable determination of the facts in

light of the evidence presented in the ***state court*** proceeding, viewed most favoring the prosecution. Jackson, 443 U.S. at 319. See 28 U.S.C. § 2254(d).

Claim 52 is denied.

l. Review of Claim 53

In this claim, Petitioner alleges ineffective assistance of counsel due to conflict of interest arising from publicity about defense counsel Toton's pending disbarment.

The California Supreme ***Court*** summarily denied claim 53 (SPet. Claim VV) raised in

Petitioner's ***state*** petition for habeas corpus. In re Sanchez, S049502 (DD). In this case, "the

habeas petitioner's burden still must be met by showing there was no reasonable basis for the ***state court*** to deny relief," Richter, 562 U.S. at 98, and this ***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 fair-minded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this ***Court***." Id. (emphasis added).

The Sixth Amendment provides that a criminal defendant shall have the right to "the Assistance of Counsel for his defense." As a general matter, a defendant alleging a Sixth Amendment violation must demonstrate "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. An exception exists for cases in which counsel actively represents conflicting interests. Mickens, 535 U.S. at 166; Cuyler, 446 U.S. at 345-50. In such a case, prejudice is presumed. Id. However, Petitioner must establish that "an actual conflict of interest actually affected the adequacy of [defense counsel's] representation." Sullivan, 446 U.S. at 348-49.

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Thus, “until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance.” Id., at 350 (emphasis in original).
Petitioner cites to the facts in claims 23, 24 and 43 and alleges that lead defense counsel Toton’s disbarment publicity placed Toton in an actual conflict of interest of a personal and financial nature, preventing his effective assistance at penalty phase in ways not fully disclosed to Petitioner. The trial judge, according to Petitioner, did not adequately inquire into the matter and thereby allowed Toton to remain on the case. Petitioner alleges the trial judge never questioned Toton specifically about the debarment (Sealed RT July 26, 1988, at pp. 80-84),

never obtained a copy of the debarment ***hearing*** decision, and agreed to Toton’s proposal to have co-defense counsel Frank talk to Petitioner about the debarment. (Id., at p. 82-84.) Petitioner asserts that Toton sought to avoid the issue of debarment. Toton refused to appear at the

debarment ***hearing***. (SHCP Ex. 517, p. 8.) He refused to comment to reporters about the issue. (SCHP Exhs. 703, 704.)

This ***Court*** finds it unlikely that Toton’s pending debarment influenced his actions as

defense counsel, for reasons discussed by the ***state court***. See Sanchez, 12 Cal.4th at 45-48, summarized as follows. Toton’s refusal to allow Petitioner to plead guilty lengthened rather than shortened the duration of this proceeding. Toton participated in arrangements for defense investigation and engaged in pre-trial preparation. (RT [5/16/88] 3-4.) He conducted pre-trial discovery (CT 649-663, 769), made preemptory challenges (CT 836-840) filed evidentiary motions (CT 841-45, 846-53, 854-58, RT 80, 97-113), conducted vigorous witness examination and cross-examination (CT 518-625; RT 2664-2670), and made a reasoned closing argument (RT 169-196). The evidentiary record simply does not suggest the pace, manner and method of Toton’s representation was influenced by the disciplinary proceedings. Toton was not disbarred

until eight months after the ***court*** and defendant learned of the proceedings against him, and several month after completion of the penalty phase of defendant’s trial. Sanchez, 12 Cal.4th at 45-48.
Case 1:97-cv-06134-AWI-SAB Document 163 Filed 07/23/15 Page 161 of 213
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Even if there were a conflict, Petitioner was aware of the possible problems with Toton's continued representation and his right to conflict free representation, having discussed these matters with co-counsel Frank for approximately an hour and he expressly waived any such conflict. Sanchez, 12 Cal.4th at 46; RT [7/27/88] 4-10. Based thereon, the ***state*** supreme ***court*** could reasonably have found that Petitioner validly waived any such conflict on the record and decided to keep Toton as counsel. See Sanchez, 12 Cal.4th at 37-39, 45-46.

Petitioner alleges that it was likely that one or more jurors was aware of Toton's adverse publicity and, given Toton's failure to withdraw, was prejudiced by it. However, he offers no evidentiary predicate supporting the allegation. The evidence does not suggest the trial ***court***'s failure to question juror's about Toton's debarment rendered trial "fundamentally unfair." (See RT 591-609 (juror Jones), RT 647-669 (juror Mooney), RT 1168-1183 (juror Roberts), RT 1338-1355 (juror Crowder), RT 1813-1831 (juror Razo), RT 1879-1892 (juror Stell), RT 2117-2136 (juror G. Clark), RT 2137-2155 (juror P. Clark), RT 2401-2412 (juror O'Toole), RT 2435-2448 (juror Raymond), RT 2454-2472 (juror Rodriguez), RT 2554-2566 (juror Zamora)). For reasons more fully discussed in claims 49 ante, and 55, post, this ***Court*** agrees with the California Supreme ***Court***'s determination that there was "no showing the jury was unfair or biased." Sanchez, 12 Cal. 4th at 62, n.6. As noted by that ***court***, during voir dire only two of the jurors selected, Razo and Rodriguez, had ***heard*** of the case. (RT 1814-1815; 2458-2460, 2471.) Neither of those two jurors mentioned having ***hearing*** of Toton. Both of those jurors indicated

they could put what they had ***heard*** out of mind while deliberating. Id. Petitioner proffers no evidence these statements were somehow untrue. The ***state court*** could have reasonably determined that none of the jurors selected were exposed to media coverage of Toton's disciplinary matters. Sanchez, 12 Cal.4th at 61; claim 55, post. Moreover, the ***state court*** could reasonably find that questioning jurors about the publicity was likely to be more prejudicial than that publicity itself. (SHCP Ex. 137, ¶ 29.)

Petitioner has not established that defense counsel's performance at the penalty phase fell below an objective standard of reasonableness and that, but for counsel's unprofessional errors,

Case 1:97-cv-06134-AWI-SAB Document 163 Filed 07/23/15 Page 162 of 213

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the result of the proceeding would have been different. Strickland, 466 U.S., at 687-694. It was not objectively unreasonable for the ***state court*** to find there was no reasonable probability any juror was aware of the debarment proceeding and influenced by it. See Sanchez, 12 Cal.4th at 61.

Accordingly, the ***Court*** finds that a fair-minded jurist could have found that Petitioner

failed to establish that the ***state court*** rejection of the claim was contrary to, or an unreasonable application of, clearly established federal law, or an or an unreasonable determination of the facts

in light of the evidence presented in the ***state court*** proceeding, viewed most favoring the prosecution. Jackson, 443 U.S. at 319. See 28 U.S.C. § 2254(d).

Claim 53 is denied.

m. Review of Claim 54

In his next claim, Petitioner alleges that juror George Razo was not an impartial juror.

The California Supreme ***Court*** summarily denied claim 54 (SPet. Claim KK) raised in

Petitioner's ***state*** petition for habeas corpus. In re Sanchez, S049502 (DD). In this case, "the habeas petitioner's burden still must be met by showing there was no reasonable basis for the

***state court*** to deny relief," Richter, 562 U.S. at 98, and this ***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 fair-minded jurists could disagree that those arguments or

theories are inconsistent with the holding in a prior decision of this ***Court***." Id. (emphasis added).

"[T]he right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors." Irvin, 366 U.S. at 722; see also Skilling, 561 U.S. at 377-78. "[P]art of the guarantee of a defendant's right to an impartial jury is an adequate voir dire to identify unqualified jurors." Morgan v. Illinois, 504 U.S. 719, 729 (1992). "Voir dire 'is

conducted under the supervision of the ***court***, and a great deal must, of necessity, be left to its sound discretion.'" Ristaino v. Ross, 424 U.S. 589, 594 (1976) (quoting Connors v. United

***States***, 158 U.S. 408, 413 (1895)). "[T]he trial ***court*** retains great latitude in deciding what questions should be asked on voir dire." Mu'Min, 500 U.S. at 424. No hard-and-fast formula

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dictates the necessary depth or breadth of voir dire, see United ***States*** v. Wood, 299 U.S. 123, 145–146 (1936), and "[t]he Constitution . . . does not dictate a catechism for voir dire, but only that the defendant be afforded an impartial jury." Morgan, 504 U.S. at 729. A trial ***court***'s failure to ask certain questions does not violate the Constitution unless it "render[s] the defendant's trial fundamentally unfair." Mu'Min, 500 U.S. at 426.

Petitioner contends that, during voir dire, Razo admitted his exposure to a news article about this case and ***stated*** that the murder of his cousin four years earlier would not affect his deliberations (RT 1815, 1822), but after the trial, Razo ***stated*** to a defense investigator that his cousin's murder may have had some impact on him in Petitioner's case. (SPet. Exhs. 124, App. B, ¶ 5; 124, ¶ 13.)

The record before the ***state court*** shows that juror Razo ***stated*** during voir dire that he recalled reading an article in the Bakersfield Californian that included Petitioner's picture and ***stated*** his involvement in a number of alleged criminal activities. (RT 1814-1816.) Razo ***stated*** that the article and the murder of his cousin four years earlier would not affect his deliberations. (RT 1821-1822.) The evidence in the record suggests it unlikely that Razo's deliberation was affected by the article. (See claim 49, ante.) Nor are Razo's post-trial hearsay and unsigned statements competent evidence that he was other than truthful during voir dire concerning his cousin's murder. See Fed. R. Civ. P. 802; Fed. R. Evid. 606(b); Cal. Evid. Code § 1150.

In addition, Petitioner has not demonstrated prejudice, i.e., that the error had a "substantial and injurious effect or influence in determining the jury's verdict." Brecht, 507 U.S. at 638. For the reasons just discussed, the ***state court*** could reasonably have concluded that Razo's deliberations were unaffected by the article.

Accordingly, it was not objectively unreasonable for the ***State*** Supreme ***Court*** to find

there was no reasonable probability juror Razo was other than an impartial juror. 28 U.S.C. § 1746; Ortiz v. INS, 179 F.3d 1148, 1153-54 (9th Cir. 1994) (no ineffective assistance where no demonstration of prejudice).

The ***state court*** could reasonably have concluded that Petitioner failed to establish that the



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performance of defense counsel at the penalty phase fell below an objective standard of reasonableness and that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland, 466 U.S., at 687-694.

The ***Court*** finds that a fair-minded jurist could have found that Petitioner failed to

establish that the ***state court*** rejection of the claim was contrary to, or an unreasonable application of, clearly established federal law, or an unreasonable determination of the facts in

light of the evidence presented in the ***state court*** proceeding, viewed most favoring the prosecution. Jackson, 443 U.S. at 319. See 28 U.S.C. § 2254(d).
Claim 54 is denied.
n. Review of Claim 559

In this claim, Petitioner alleges ***court*** error by failure to voir dire the jury regarding publicity about defense counsel's pending disbarment.

The California Supreme ***Court*** considered this claim on appeal and found that the defense had not objected on this ground or sought a curative admonition at trial and thus waived the issue on appeal. Sanchez, 12 Cal.4th 61-62. That ***court*** also found that there was "no showing the jury was unfair or biased", Sanchez, 12 Cal. 4th at 62, n.6, and that "the trial ***court***'s voir dire adequately insured an impartial jury, without unnecessarily exposing the jury to the very information defendant found could prejudice his case." Sanchez, 12 Cal.4th at 62.
"[T]he right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors." Irvin, 366 U.S. at 722; see also Skilling, 561 U.S. at 377-78.

"[T]he trial ***court*** retains great latitude in deciding what questions should be asked on voir dire." Mu'Min, 500 U.S. at 424. A trial ***court***'s failure to ask certain questions does not violate the Constitution unless it "render[s] the defendant's trial fundamentally unfair." Mu'Min, 500 U.S. at 426.
Two specific inquires of voir dire are constitutionally compelled: inquiries into racial prejudice against a defendant charged with a violent crime against a person of a different racial

9 The legal basis of the Eighth Amendment was stricken as unexhausted. ECF No. 60 at 9:5.
Case 1:97-cv-06134-AWI-SAB Document 163 Filed 07/23/15 Page 165 of 213

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group, id., at 424; and, in a capital case, inquiries into a juror's views on capital punishment. Morgan, 504 U.S. at 730-732. Petitioner does not raise such a basis for compelled inquiry in this claim. Instead he claims that the voir dire questionnaire, the trial ***court***, and defense counsel all failed to inquire whether prospective jurors had ***heard*** anything about the attorneys in this case.

The ***Court*** is unpersuaded by this claim for reasons discussed in claim 49, ante. During voir dire, the following eight jurors indicated they had never ***heard*** of the case, did not know counsel, and did not subscribe to and did not usually read the Bakersfield Californian: juror Jones (CT 258; RT 594, 596-597, 606); juror Mooney (CT 256, RT 647, 664); juror Roberts (CT 237, RT 1170); juror Stell (CT 184, RT 1882); juror G. Clark (CT 229, RT 2120); juror P. Clark (CT 228; RT 2140-2141); juror O'Toole (CT 220, RT 2401-2402, 2406); and juror Raymond (CT 217, RT 2438-2439). Two jurors, juror Crowder (CT 207; RT 1342-1343) and juror Zamora (CT 213; RT 2554, 2563) regularly read the Bakersfield Californian but were unaware of the case and did not know counsel.

Only two of the jurors selected, Razo and Rodriguez, ***stated*** they had ***heard*** of the case. (RT 1814-1815; 2458-2460, 2471-2472.) Neither mentioned having ***hearing*** of Toton; both indicated they did not believe everything they read in newspapers and could put what they had ***heard*** out of mind while deliberating. Id. Petitioner proffers no evidence these juror statements were untrue. The ***state court*** could reasonably have found that prospective jurors were properly voir dired regarding any pretrial publicity without exposing them to the allegedly prejudicial information.

Based on the record, the ***state court*** could reasonably have found that specific voir dire regarding Toton's disbarment proceeding was unnecessary and could serve to education the jurors on the potentially prejudicial information. See Mu'Mun, 500 U.S. at 425-428 (1991) (trial ***court***'s failure to ask questions must "render the defendant's trial fundamentally unfair" and may be overturned only for "manifest error.").

Nor has Petitioner pointed to evidence that demonstrates prejudice, i.e., that the error had



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a "substantial and injurious effect or influence in determining the jury's verdict." Brecht, 507 U.S. at 638 (1991). For the reasons just discussed, the ***state court*** could reasonably have concluded that, despite the limited voir dire regarding Toton's pretrial publicity, Petitioner received a fair trial.

Accordingly, the ***state court*** could reasonably have concluded that Petitioner failed to establish that defense counsel's performance fell below an objective standard of reasonableness and that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland, 466 U.S., at 687-694.

The ***state court*** rejection of the claim was not contrary to, or an unreasonable application of, clearly established federal law, or an unreasonable determination of the facts in light of the

evidence presented in the ***state court*** proceeding, viewed most favoring the prosecution. Jackson, 443 U.S. at 319. See 28 U.S.C. § 2254(d).

Claim 55 denied.

o. Review of Claim 56

In his next claim, Petitioner alleges prejudicial and misleading victim photos were erroneously admitted at trial. He complains of autopsy photographs, excluded at the guilt phase, and admitted over defense objection at the penalty phase, and of crime scene victim photographs not objected to by the defense that were admitted during the penalty phase. According to Petitioner, these photos were cumulative of other testimony and misleading as to Petitioner's culpability in the homicides as they showed injuries not inflicted by Petitioner. He claims the photographs had an impact on jurors.

The California Supreme ***Court*** summarily denied claim 56 (SPet. Claim NN) raised in

Petitioner's ***state*** petition for habeas corpus. In re Sanchez, S049502 (DD).

Additionally, the ***state*** supreme ***court*** found on direct appeal that admission of autopsy photographs was not prejudicial error:

We have examined [the autopsy photographs] and have determined "they are not so

horrific or shocking that we can conclude the trial ***court*** abused its discretion in admitting them." [Citation] The jury was familiar with the facts of the crime, and the photographs had substantial probative value in demonstrating defendant's

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culpability as an aider and abettor, and as corroborative of Hernandez's testimony implicating defendant in the crimes. Moreover, the probative value of the photographs was not diminished simply because the scalp wounds alone were not fatal to the victims. The photographs corroborated the testimonial evidence and were "relevant to a determination of the appropriateness of the death penalty." [Citation]

Defendant's claim that there was no dispute as to the circumstances of the murders is not supported by the facts. Defense counsel Frank argued at the penalty phase that defendant should be spared the death penalty if the jury had a "lingering doubt" about the extent of defendant's participation in the Bocanegra killings. . . . [T]he autopsy photographs depicting the Bocanegras' scalp wounds were clearly probative of (i) the manner in which the victims were wounded, (ii) defendant's culpability as an aider and abettor, (iii) the malice and aggravation of the crime, and (iv) the appropriate ultimate penalty. [Citation] . . . [T]he ***court*** did not err in admitting the autopsy photographs at the penalty phase.

Sanchez, 12 Cal.4th 64-65.

A due process claim can be ***stated*** where graphic photos of victims make the trial fundamentally unfair. Jammal, 926 F.2d at 919. However, photos that are relevant to the crime charges and elements thereof are admissible. See Villafuerte, 75 F.3d at 1343. Under California law, "photographs which disclose the manner in which the victim was wounded are relevant on the issues of malice and aggravation of the crime and the penalty." Thompson, 50 Cal.3d at 182.

The ***Court*** finds that, based on the evidentiary record, and for the same reasons discussed in claim 45, the ***state court*** could reasonably have found that the two autopsy photos of Mr. Bocanegra and Mrs. Bocanegra's scalp wounds (People's Exhs. 13, 14), and the victim and crime scene photos (People's Exhs. 5-9, 15-43 and 55-66) served to corroborate testimony as to circumstances of the murders, defense counsel arguments of diminished culpability (see RT 3051-3055), and were relevant and probative as aggravation evidence and going to penalty selection. Autopsy photographs of scalp wounds to Mr. Bocanegra and Mrs. Bocanegra were properly admitted as relevant to expert testimony and issues of aggravation and penalty and were not unnecessarily gruesome. The crime scene and autopsy photographs could reasonably be seen by the ***state court*** as relevant to circumstances of the murders, identities of murders and murders'

***states*** of mind.

It appears unlikely that Petitioner was subjected to prejudice from defense counsel's

Case 1:97-cv-06134-AWI-SAB Document 163 Filed 07/23/15 Page 168 of 213

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failure to object to the introduction of crime scene photographs depicting the wounds of the Bocanegras and Mr. Tatman. The trial ***court*** did not find the photographs prejudicial as depicting a "blood and guts type of thing. . . ." (RT 2881-2882.) The California Supreme ***Court*** could reasonably have found the photographs relevant and probative of charges and elements including intent to kill, aggravation and penalty, such that defense counsel's failure to object did not necessarily demonstrate ineffective assistance. See Nefstad, 66 F.3d 335, at *3 (holding no violation of due process where prosecutor during closing argument shows photographs of victim before and after murder because relevant to intent).

Admission of the photographs did not render trial "fundamentally unfair." Batchelor v.

Cupp, 693 F.2d 859, 865 (9th Cir. 1982) (admission of photographs lies largely within the

discretion of the trial ***court***, whose ruling will not be disturbed . . . unless the admission of the photographs rendered the trial fundamentally unfair). Defense counsel Frank argued his lingering doubt theory, (RT 3048-3072), that Petitioner did not intend to kill or assist in killing Mr. Tatman (id.,), and that Petitioner had no criminal intent when he went to the Bocanegra residence (id.).

Additionally, even without the photographs, it is not reasonably probable the jury would have returned a sentence less than death. The evidence in aggravation including the circumstances surrounding the murders of the Bocanegras and Mr. Tatman, and Petitioner's 1982 assaults on Ammarie and Pena, was not insubstantial. (RT 2863-2874.)

Accordingly, the ***state court*** could have found that Petitioner failed to establish that defense counsel's performance at penalty phase fell below an objective standard of reasonableness and that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland, 466 U.S., at 687-694.

This ***Court*** does not find that the ***state court*** rejection of the claim was contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme

***Court***, or that the ***state court***'s ruling was based on an unreasonable determination of the facts in

light of the evidence presented in the ***state court*** proceeding, viewed most favoring the

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prosecution, Jackson, 443 U.S. at 319. See 28 U.S.C. § 2254(d).
Claim 56 is denied.
p. Review of Claim 57

Petitioner next claims that the trial ***court*** erred by inadequately and erroneously explaining the guilt verdicts and by improperly restricting defense counsel's closing argument regarding the guilt verdicts.

The California Supreme ***Court*** summarily denied this claim (SPet. Claim II) raised in

Petitioner's ***state*** petition for habeas corpus. In re Sanchez, S049502 (DD).

The ***state*** supreme ***court*** also considered and rejected this claim on direct appeal. That

***court*** found that Petitioner failed to meet the ***state*** procedural requirement of timely objection and thus waived the issue on appeal and was procedurally barred on collateral review, noting that:

[C]ounsel did not object to the ***court***'s incorrect reading of the multiple-murder special-circumstances verdict. Hence, if any error occurred, it was waived. [Citation] Moreover, even if counsel had objected, we would find any error the

***court*** made in reading incorrectly the multiple-murder special-circumstance

findings, or any confusion caused by the ***court***'s verdict as to the Tatman charges, could have been rendered harmless by an admonition to the jury.
Sanchez, 12 Cal.4th at 75.

The ***state*** supreme ***court*** went on to consider the trial ***court***'s verdict misstatement and defense attorney Frank's argument to the jury clarifying and arguing the Tatman verdict, as follows:
Prior to penalty phase arguments, at defense counsel Frank's request, the trial

***court*** read the information and summarized the guilt verdict, including the special

circumstances findings, for the jury. In summarizing the verdict, the ***court*** purported to read from the August 3, 1988, minute order which . . . found true the multiple-murder special circumstance with respect to the Bocanegra murders only and did not include the Tatman murder in the special-circumstance disposition.

Purporting to read from the August 3 minute order, the ***court*** inexplicably included Tatman as part of the [special circumstance] finding when it summarized

the verdict to the jury. That finding is not in the record copy of the minute order. Also during penalty phase argument, Frank explained to the jury the meaning of the felony-murder charges in the Tatman verdict, and discussed defendant's role as an accomplice in the Tatman robbery and murder in an apparent attempt to clarify

the ***court***'s allegedly inconsistent verdicts finding defendant guilty of the first degree murder and robbery of Tatman, but finding not true the robbery-murder special circumstance. Frank's explanation of the felony-murder verdict was



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interrupted by Ryals's successful objection. Defendant now complains that the

***court***'s erroneous inclusion of the Tatman murder as part of the multiple-murder special-circumstance finding in the Bocanegra murders, and its failure to explain (or allow counsel to adequately explain) its allegedly inconsistent verdict and

special-circumstance finding in the Tatman murder verdicts amounted to “the use of false or misleading evidence in capital sentencing” in violation of defendant's Fourteenth Amendment right to due process, and the Eighth Amendment right to a fair trial. [Citation]

In addition, Frank's penalty phase argument explained to the jury the meaning of the Tatman verdict: “The significance of what [defendant] was and wasn't convicted of, I would submit to you, establishes a lot of facts, number one, that he

himself did not kill Woodrow [Wilson] Tatman. You ***heard*** the evidence. I think you can infer from the evidence, from the verdicts that it was not Ted Sanchez who killed Mr. Tatman, it was Robert Reyes. I submit to you that you can

logically infer from what you've ***heard*** that Ted Sanchez did not kill Mr. Tatman nor did he share in Robert Reyes' intent to kill Mr. Tatman. Ted's role in that tragic incident was limited to removing some of Mr. Tatman's property. You

***heard*** the evidence. Mr. Tatman was not supposed to even have known that his property had been taken . . . .”

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Frank next repeated to the jury: “Robert Reyes took it upon himself to kill, but Ted had no part in that.” Frank then explained the multiple-murder specialcircumstance findings and argued the circumstances of the Bocanegra murders as a mitigating factor. . . .

“Now let's turn to the charges involving the Bocanegras. Teddy was charged in count two of the Information with having killed Mr. Bocanegra and in count three of the Information with having killed Mrs. Bocanegra. Each count carried with it the special circumstance that the murder had been committed during the course of a robbery. Although he was found guilty of the murders of Mr. and Mrs. Bocanegra, the special circumstance that the murders occurred during the course of a robbery were not found true. In addition, he was found not guilty of robbing the Bocanegras as was alleged in count five.

“I submit to you that the importance of all this is that you can infer that when Tedthat when Ted went over to the Bocanegra house he did not do so with the intent to rob him. In fact, I would submit that you can infer that when he went over to that house he didn't intend to commit any criminal acts against the Bocanegras, and that it wasn't until after Joey and his father started fighting that Teddy thought about engaging in any criminal activity.

“Now, I bring all this to your attention because the law says that you can take into account the circumstances of the crimes when you deliberate on the issue of penalty . . . .

“Now this factor is general, looked upon as being an aggravating factor, one that doesn't usually contain any mitigating value, but I submit to you that, in this case, if you look closely at the facts and circumstances of what transpired at the Tatman and Bocanegra residence[s], you will find significant mitigating values there.”

Frank thereafter told the jury that it was Reyes, not defendant, who killed Tatman, and that defendant "had no criminal intent when he went over to [the Bocanegras'] house." He also argued that these same facts could be interpreted as mitigating evidence . . . Frank's argument likely clarified for the jury any misperceptions

about the verdict that occurred in light of the ***court***'s statement of the verdict.
Case 1:97-cv-06134-AWI-SAB Document 163 Filed 07/23/15 Page 171 of 213
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Sanchez, 12 Cal.4th at 74-76. The ***state court***, upon considering the foregoing found the misstatement to be alternatively procedurally barred and harmless:

We conclude any error the ***court*** made in the ***court***'s verdict statement was

harmless. Defendant requested the ***court*** read the verdict and special circumstance

findings, and failed to correct the ***court*** or offer clarifying instructions in order to

remedy any misperceptions the jury may have had about the verdict. Moreover, counsel's explanation of the verdict to the jury during argument more than clarified any potential confusion the jury may have experienced following the

***court***'s explanation. The prosecutor did not mention the erroneous verdict, or capitalize on its inclusion. Defendant was convicted of three counts of first degree murder, including one supportable special-circumstance allegation, as well as two counts of use of a deadly weapon, and one count of robbery. Under these

circumstances, there is no reasonable possibility that consideration of the ***court***'s potentially confusing reading of the guilt phase verdict could have improperly influenced the jury. [Citation]
Sanchez, 12 Cal.4th at 76.

Petitioner contends that the trial ***court*** misled the jury, telling them Petitioner was guilty of Mr. Tatman's first degree murder, and guilty of robbery of Mr. Tatman, but not guilty of the robbery special circumstance under California Penal Code section 190.2(a)(17). In Petitioner's view, the jury was unaware the verdict implicitly found that Petitioner was not Mr. Tatman's actual killer and that Petitioner was found not to have intended the killing of Mr. Tatman.

The ***Court*** finds, however, that the ***state*** supreme could reasonably have determined that

the trial ***court*** reading of the guilt verdicts was adequately clarified by defense counsel's penalty phase argument. Defense attorney Frank pointed out to the jury where the evidentiary record supported inference from the verdicts that Petitioner did not intend to kill Mr. Tatman and did not kill him. Sanchez, 12 Cal.4th at 74-77. Frank's argument was sufficient to make harmless

any error by the trial ***court*** in explaining the verdicts.

Petitioner contends the trial ***court*** errantly explained the verdict regarding the "multiple

murder" special circumstance, ***stating*** such was predicated on the murders of Mr. Tatman and Mr. Bocanegra when in fact it was predicated on the murders of Mr. & Mrs. Bocanegra. Petitioner claims this misled the jury into believing the Tatman murder was a capital crime and

as such was an aggravating factor. Here as well, the ***state*** supreme ***court*** could reasonably have

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found defense counsel Frank's argument and the ***court***'s admonitions and instructions to be

sufficiently clarifying of misstatement by the trial ***court***. Frank argued at penalty phase that, based on the evidence, Petitioner had no criminal intent when he arrived at the Bocanegra home, and explained to the jury the meaning of the felony-murder charges in the Tatman verdict, and discussed defendant's role as an accomplice in the Tatman murder and robbery. Id.; RT 3052-

3072. These defense arguments sufficiently clarified the trial ***court***'s allegedly inconsistent verdicts finding defendant guilty of the first degree murder and robbery of Mr. Tatman but finding not true the robbery-murder special circumstance.

Petitioner contends that the trial ***court*** improperly restricted Frank's closing argument regarding the Tatman conviction and felony murder rule, on grounds the rule was not part of the evidence. Petitioner maintains this was error in that the prosecution had argued to the jury that Petitioner killed Mr. Tatman, treating the first degree felony-murder conviction as a capital crime. However, as Respondent correctly notes, the felony murder rule was not in evidence or part of the jury instructions. Defense counsel Frank was not restricted in arguing the circumstances surrounding the Tatman murder and verdict. Petitioner was able to argue the inference that he did not intend to kill Mr. Tatman and did not kill him. Defense counsel Frank's

closing argument ***stated*** and clarified the specific charges levied and those upon which Petitioner was convicted and argued for mitigation based on the facts and circumstances in the evidentiary record. (RT 3050-3072.)

The ***state*** record does not reasonably suggest the likelihood that the trial ***court*** verdict

statement improperly influenced the jury. Any error in the trial ***court***'s statement of the verdicts, that the multiple murder circumstance was based on the murders of Mr. Tatman and Mr. Bocanegra, was harmless because, based on Frank's penalty phase and closing arguments (RT 3050-3072) and the instructions given (RT 2611-2616, 3082-3097; CT 979-1021), there is no reasonable probability the jury mistakenly believed Tatman was a capital crime. Accordingly, Petitioner has not established that defense counsel's performance at penalty phase fell below an objective standard of reasonableness and that, but for counsel's



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unprofessional errors, the result of the proceeding would have been different. Strickland, 466 U.S., at 687-694.

This ***Court*** does not find that the ***state court*** rejection of the claim was contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme

***Court***, or that the ***state court***'s ruling was based on an unreasonable determination of the facts in

light of the evidence presented in the ***state court*** proceeding, viewed most favoring the prosecution, Jackson, 443 U.S. at 319. See 28 U.S.C. § 2254(d).
Claim 57 is denied.
q. Review of Claim 5810
In his next claim, which includes multiple subclaims, Petitioner alleges inadequate and unconstitutional jury instructions at the penalty phase. The subclaims are reviewed separately.
i. Lingering Doubt

Petitioner alleges that the trial ***court*** rejected his "lingering doubt" instruction even though California law mandates mitigating consideration of lingering doubt and defense counsel argued discrepancies in Hernandez's testimony created lingering doubt as to Petitioner's guilt.

The ***state*** supreme ***court*** reached and rejected this subclaim on direct appeal, finding that

the trial ***court*** did not err in rejecting Petitioner's specific instruction on lingering doubt:
Defendant's proposed instruction asked the jury to "consider as a mitigating factor residual or lingering doubt as to Mr. Sanchez's guilt for the crimes of which he has

been convicted." Although defendant recognizes that the ***state*** and federal Constitutions do not require a residual doubt instruction, he asserts the instruction should have been given in this case because it was warranted by the evidence. He relies on section [California Penal Code §] 190.3, factor (f), which gives the judge discretion to instruct the jury "on any points of law pertinent to the issue," and

case law that holds section 190.3, factor (f) may require a ***court*** to give the "residual doubt" instruction should the evidence warrant it. [Citation] Claiming that the evidence was insufficient to find him guilty of the first degree murders of Mr. and Mrs. Bocanegra, defendant contends "residual doubt" was "a circumstance of the capital crimes that could be considered by the jury under both [section] 190.3, factors (a) and (k)."
We find no error. It is true, as defendant claims, that the jury's consideration of residual doubt is proper; defendant may assert his possible innocence to the jury as a factor in mitigation under section 190.3, factors (a) and (k). [Citation] But

10 The legal basis of the Fifth Amendment, and the legal basis of the Sixth Amendment except with regard to the lingering doubt instruction was stricken as unexhausted. ECF No. 60 at 9:6-8.

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there is no requirement, under either ***state*** or federal law, that the ***court*** specifically instruct the jury to consider any residual doubt of defendant's guilt. [Citation]

Here, the trial ***court*** instructed the jury that it could consider "[t]he circumstances of the crime of which defendant was convicted in the present proceeding and the existence of any special circumstance found to be true" (§ 190.3, factor (a)), and "any other circumstance which extenuates the gravity of the crime, even though it is not a legal excuse for the crime, and any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial" (Id., factor (k)). These instructions on the scope of mitigating circumstances sufficiently encompassed the concept of residual doubt about defendant's guilt. [Citation]

In addition, as we have observed, defense counsel told the jury that the circumstances of the crimes could be viewed as mitigating evidence of defendant's intent to kill. He also emphasized to the jury that section 190.3, factor (k) allows it to "consider any aspect of the defendant's character or record that he offers as a basis for a sentence less than death," and asked the jury whether it had "some lingering doubts about what [it] would have seen" if it had been inside the Bocanegra residence at the time of the murders. In light of the proper instructions

given to the jury, and counsel's argument, we conclude the trial ***court*** did not err in rejecting defendant's specific instruction on lingering doubt. [Citation]
Sanchez, 12 Cal.4th at 77-83.
"[T]he Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, 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, 438 U.S. 586 at 604; Eddings v. Oklahoma, 455 U.S. 104, 113-114 (1982) (adopting rule in Lockett). "The standard against which we assess whether jury instructions satisfy the rule of Lockett and Eddings was set forth in Boyde, 494 U.S. 370 (1990)." Johnson v. Texas, 509 U.S. 350, 367-68 (1993). In Boyde, the Supreme ***Court*** held that "there is no . . . constitutional requirement of unfettered sentencing discretion in the jury, and ***States*** are free to structure and shape consideration of mitigating evidence 'in an effort to achieve a more rational and equitable administration of the death penalty.'" Boyde, 494 U.S. at 377 (quoting Franklin, 487 U.S. at 181 (plurality opinion)).

In evaluating the instructions, the "reviewing ***court*** must determine 'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence.'" Johnson, 509 U.S. at 367 (quoting
Case 1:97-cv-06134-AWI-SAB Document 163 Filed 07/23/15 Page 175 of 213

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Boyde, 494 U.S. at 380). "[W]e do not engage in a technical parsing of this language of the instructions, but instead approach the instructions in the same way that the jury would—with a 'commonsense understanding of the instructions in the light of all that has taken place at the trial.'" Id., at 368 (quoting Boyde, 494 U.S. at 381). Further, a single instruction "may not be judged in artificial isolation," but must be considered in light of the instructions as a whole and the entire trial record." Estelle v. McGuire, 502 U.S. 62, 72 (1991).

The failure to identify whether factors are aggravating or mitigating is plainly not contrary to or an unreasonable application of Supreme ***Court*** authority. In Pulley v. Harris, the Supreme ***Court*** reviewed California's sentencing system, including the manner in which the jury considered relevant factors in deciding the penalty. Pulley, 465 U.S. at 51. The Supreme ***Court*** noted that the 1977 law (like the 1978 law applicable in this case) did not identify or separate the aggravating or mitigating factors. Id. at 53 n.14. The ***Court*** found California's death penalty law to be constitutional. Id. at 51 ("Assuming that there could be a capital sentencing system so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review, the 1977 California statute is not of that sort.").

In Tuilaepa v. California, the Supreme ***Court*** again considered California's death penalty sentencing scheme. The Supreme ***Court*** rejected the argument that California's "single list of factors" was unconstitutional. The ***Court*** ***stated***:

> This argument, too, is foreclosed by our cases. A capital sentencer need not be instructed how to weigh any particular fact in the capital sentencing decision. In California v. Ramos, for example, we upheld an instruction informing the jury that the Governor had the power to commute life sentences and ***stated*** that "the fact that the jury is given no specific guidance on how the commutation factor is to figure into its determination presents no constitutional problem." 463 U.S., at 1008–1009, n. 22, 103 S. Ct., at 3457–3458, n. 22. Likewise, in Proffitt v. Florida, we upheld the Florida capital sentencing scheme even though "the various factors to be considered by the sentencing authorities [did] not have numerical weights assigned to them." 428 U.S., at 258, 96 S. Ct., at 2969. In Gregg, moreover, we "approved Georgia's capital sentencing statute even though it clearly did not channel the jury's discretion by enunciating specific standards to guide the jury's consideration of aggravating and mitigating circumstances." Zant, 462 U.S., at 875, 103 S. Ct., at 2742. We also rejected an objection "to the wide scope of evidence and argument" allowed at sentencing hearings. 428 U.S., at 203–204, 96

S. Ct., at 2939. In sum, “discretion to evaluate and weigh the circumstances relevant to the particular defendant and the crime he committed” is not impermissible in the capital sentencing process. McCleskey v. Kemp, 481 U.S.



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279, 315, n. 37, 107 S. Ct. 1756, 1779, n. 37, 95 L.Ed.2d 262 (1987). “Once the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty ... the jury then is free to consider a myriad of factors to determine whether death is the appropriate punishment.” Ramos, supra, 463 U.S., at 1008, 103 S. Ct., at 3457. Indeed, the sentencer may be given “unbridled discretion in determining whether the death penalty should be imposed after it has found that the defendant is a member of the class made eligible for that penalty.” Zant, supra, 4[62] U.S., at 875, 103 S. Ct., at 2742; see also Barclay v. Florida, 463 U.S. 939, 948–951, 103 S. Ct. 3418, 3424–3425, 77 L.Ed.2d 1134

(1983) (plurality opinion). In contravention of those cases, petitioners' argument

would force the ***States*** to adopt a kind of mandatory sentencing scheme requiring a jury to sentence a defendant to death if it found, for example, a certain kind or number of facts, or found more statutory aggravating factors than statutory

mitigating factors. The ***States*** are not required to conduct the capital sentencing process in that fashion. See Gregg, supra, 428 U.S., at 199–200, n. 50, 96 S. Ct., at 2937–2938, n. 50.

Tuilaepa, 512 U.S. at 975. The ***Court*** finds that, based on the ***state*** record, the jury was adequately instructed that it could consider the circumstances of the convictions in the present proceeding including any special circumstance found to be true and any other mitigating circumstances under § 190.3, factor (k), encompassing the concept of residual or lingering doubt about Petitioner's guilt.

There is no persuasive argument that the instruction given in this case in any way foreclosed the jury from considering any relevant mitigating evidence. As noted by Respondent,

the Supreme ***Court*** has examined the language in California's jury instruction on mitigation multiple times, and upheld it against constitutional challenges every time. See Ayers v. Belmontes, 549 U.S. 7 (2006); Brown v. Payton, 544 U.S. 133, 141, 142 (2005); Boyde, 494

U.S. 370. Thus, the ***state court*** rejection of the claim was reasonable. Even if constitutional trial error did occur, Petitioner is not entitled to relief because any such error did not have a "substantial and injurious effect or influence in determining the jury's verdict." Brecht, 507 U.S. at 638.

The trial ***court***'s use of the standard penalty phase instruction, California Criminal Jury Instruction, (CALJIC), No. 8.84.1 (1986 rev.), regarding California Penal Code § 190.3 factor (k), is adequate to permit jurors to consider relevant mitigating evidence. Boyde, 494 U.S. 370 at 381-382; Lockett, 438 U.S. at 604. The Eighth Amendment does not require that a jury be instructed on particular statutory mitigating factors. Buchanan v. Angelone, 522 U.S. 269, 275-

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77 (1998).
Petitioner then failed to established that defense counsel's performance at the penalty phase fell below an objective standard of reasonableness and that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland, 466 U.S., at 687-694.
Respondent contends this subclaim is not cognizable because it creates and retroactively applies a "new rule" of constitutional law within Teague v. Lane, 489 U.S. 288. However, the

***Court*** finds the claim fails not because Petitioner seeks to apply a new rule of criminal procedure

under Teague, but rather on grounds the claim lacks merit for the reasons ***stated***.

The ***Court*** finds the ***state court*** rejection of the subclaim was not contrary to, or an unreasonable application of, clearly established federal law, or an unreasonable determination of

the facts in light of the evidence presented in the ***state court*** proceeding, viewed most favoring the prosecution. Jackson, 443 U.S. at 319. See 28 U.S.C. § 2254(d).
This subclaim is denied.
ii. California Penal Code § 190.3 Sentencing Factors

Petitioner next alleges that the trial ***court***'s use of CALJIC No. 8.84.1 (1986 rev.), which includes (Cal. Pen. Code § 190.3) sentencing factors "a" (consideration of current offense), "b" (consideration of violent criminal activity), and "c" (consideration of prior felony conviction), erroneously allowed the jury to inflate the aggravating weight of Petitioner's guilt phase crimes. Petitioner contends the jury improperly applied sentencing factors regarding presence of "violent criminal activity" and "prior felony convictions" to the charged offenses and to Petitioner's 1982 assaults on store owner Hassan Ammarie and friend Arturo Pena.

The ***state*** supreme ***court*** reviewed this subclaim on direct appeal and rejected it, providing that:

[California Penal Code] Section 190.3 requires the jury to consider the circumstances of the offense (§ 190.3, factor (a)), the presence of violent criminal activity, (id., factor (b)), and prior felony convictions (id., factor (c)). The jury was instructed in the statutory language. [Citation] Defendant now claims the

***court*** erred by failing to clarify the differences between the above factors, thus



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allowing the jury to give multiple consideration to the aggravating evidence under all these factors. He also asserts that the instructions erroneously permitted the jury to consider defendant's prior assaults under both factors (b) and (c), and improperly inflated the weight the jury should have given to either prior crime. We have noted that section 190.3, factor (b), concerns crimes other than those for

which defendant is being prosecuted [Citation], and we have directed that ***courts***

should give clarifying instructions “to avoid any confusion” that may be caused by the above factors. [Citation.] But we have consistently found that the absence of clarifying instructions is harmless [Citation], and that the standard instructions do not “inherently encourage 'double-counting' under section 190.3.” [Citation] Therefore, “even if one or more jurors mistakenly consider a particular criminal incident under the wrong factor, there is little risk that a reasonable jury will give a single incident duplicative consideration.” [Citation] Moreover, both the prosecutor and defense counsel separately explained the proper use of the evidence under the separate factors. Thus, any potential confusion the jury may have faced in light of the instructions was adequately addressed by both counsel's arguments. Accordingly, given the arguments and the absence of any improperly

admitted evidence, we find that the ***court***'s failure to clarify the scope of each factor did not affect the outcome of the trial.
Sanchez, 12 Cal.4th at 79.
The legal standard for review of penalty phase instructions is also set forth in the subclaim above, to wit, “whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence.” Boyde, 494 U.S. at 380.

Petitioner’s allegations lack merit. It is plainly not contrary to Supreme ***Court*** precedent

to instruct the jury with all sentencing factors. The Supreme ***Court*** ***stated*** in Gregg v. Georgia:
The petitioner objects, finally, to the wide scope of evidence and argument

allowed at [penalty] hearings. We think that the Georgia ***court*** wisely has chosen not to impose unnecessary restrictions on the evidence that can be offered at such

a ***hearing*** and to approve open and far-ranging argument. So long as the evidence

introduced and the arguments made at the [penalty] ***hearing*** do not prejudice a defendant, it is preferable not to impose restrictions. We think it desirable for the jury to have as much information before it as possible when it makes the sentencing decision.
Gregg, 428 U.S. at 203-204 (citations omitted).

The ***Court*** finds there is no reasonable likelihood the jury misinterpreted the instruction by inflating aggravation from the guilt phase crimes. It is well established that a sentencing

***court*** need not identify which factors are aggravating and which are mitigating. Pulley, 465 U.S. at 51 and 53 n.14; Tuilaepa, 512 U.S. at 979-80.
Case 1:97-cv-06134-AWI-SAB Document 163 Filed 07/23/15 Page 179 of 213
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The ***state court*** could reasonably have found that the prosecution guilt phase argument was relevant only under the first sentencing factor. In fact, defense counsel Frank argued as much to the jury, that the guilt phase crimes should be considered only with regard to the first sentencing factor, (RT 3066-3067), ameliorating any juror confusion as to the current offense factor "a".

The Ninth Circuit has found the second factor, which refers to crimes for which the defendant has not been convicted, not to be unconstitutionally vague, Bonin v. Calderon, 59 F.3d 815, 848 (9th Cir. 1995), and that the third factor on its face aggravates for prior felony convictions precluding any reasonable probability the jury aggravated for the charged offenses. Id. The penalty phase evidence was relevant only to the second and third factors. The jury then could properly have considered the 1982 assaults under both the second and third factors, and that the prosecution's argument in this regard was not improper. People v. Melton, 44 Cal.3d 713, 764 (1988) (no constitutional obstacle to separate consideration of properly distinct aspects of the penalty determination, even when those aspects happen to coexist in a single incident). Additionally, any error was harmless given the substantial weight of evidence in aggravation. Clemons v. Mississippi, 494 U.S. 738, 753 (1990) ("what is important . . . is an individualized determination on the basis of the character of the individual and the circumstances of the crime.").

Respondent contends this subclaim is not cognizable because it creates and retroactively applies a “new rule” of constitutional law within Teague v. Lane, 489 U.S. 288. However, the

***Court*** finds the claim fails not because Petitioner seeks to apply a new rule of criminal procedure

under Teague, but rather on grounds the claim lacks merit for the reasons ***stated***.

The ***Court*** finds that the ***state court*** rejection of the subclaim was not contrary to, or an unreasonable application of, clearly established federal law, or an unreasonable determination of

the facts in light of the evidence presented in the ***state court*** proceeding, viewed most favoring the prosecution. Jackson, 443 U.S. at 319. See 28 U.S.C. § 2254(d).
This subclaim is denied.
Case 1:97-cv-06134-AWI-SAB Document 163 Filed 07/23/15 Page 180 of 213
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iii. Instructing Which Sentencing Factors were Aggravating/Mitigating

Petitioner next alleges that the trial ***court*** improperly rejected defense instructions addressing which sentencing factors were aggravating and which were mitigating, (CT 1078-83), allowing the jury to improperly consider the absence of a mitigating factor as itself an aggravating factor.

The ***state*** supreme ***court*** considered and rejected this subclaim on direct appeal:
Defendant claims the prosecutor improperly implied that the absence of mitigating evidence under [California Penal Code] section 190.3, factors (e) and (f) should be considered as aggravating evidence. [Citation] We find no error. The prosecutor simply told the jury that there "was no evidence" of factor (e), and also argued that she could not recall ***hearing*** any factor (f) evidence, but that if the jury ***heard*** it the evidence could be considered in mitigation. Moreover, the jury was specifically instructed, pursuant to defendant's request, that the "absence of any particular factor in mitigation is not to be treated as any factor in aggravation." It is presumed that the jury followed the ***court***'s instruction. [Citation]
Sanchez, 12 Cal.4th at 77-83.
The legal standard for review of penalty phase instructions is also set forth in the subclaim above, to wit, "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." Boyde, 494 U.S. at 380.

The ***Court*** finds it clearly established that a sentencing ***court*** need not identify which factors are aggravating and which are mitigating. Pulley, 465 U.S. at 51 and 53 n.14; Tuilaepa, 512 U.S. at 979-80. The failure to identify whether factors are aggravating or mitigating is not contrary to or an unreasonable application of Supreme ***Court*** authority. Pulley, 465 U.S. at 53 n.14; Tuilaepa, 512 U.S. at 975-80. This is fatal to Petitioner's subclaim, since he cannot show that the ***state*** ***court*** rejection of his claim was contrary to or an unreasonable application of Supreme ***Court*** precedent.
The Ninth Circuit arrived at the same conclusion in Williams v. Calderon: "The death penalty statute's failure to label aggravating and mitigating factors is constitutional." Williams v. Calderon, 52 F.3d 1465, 1484-1485 (9th Cir. 1995). The Ninth Circuit has found California's

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death penalty statute does not violate due process by failure to label factors as aggravating or mitigating. See Williams, 52 F.3d at 1148-1485.

Respondent contends this subclaim is not cognizable because it creates and retroactively applies a "new rule" of constitutional law within Teague v. Lane, 489 U.S. 288. However, the

***Court*** finds the claim fails not because Petitioner seeks to apply a new rule of criminal procedure under Teague, but rather on grounds the claim lacks merit for the reasons ***stated***.

The ***Court*** finds that the ***state court*** rejection of the subclaim was not contrary to, or an unreasonable application of, clearly established federal law, or an unreasonable determination of the facts in light of the evidence presented in the ***state court*** proceeding, viewed most favoring the prosecution. Jackson, 443 U.S. at 319; see 28 U.S.C. § 2254(d).

This subclaim is denied.

iv. Deleting Inapplicable Mitigating Factors

Petitioner alleges in this subclaim that the trial ***court*** erred in rejecting instructions deleting mitigating factors (Cal. Pen. Code § 190.3 (e) and (f)) which were not claimed by Petitioner and thus not relevant this case, i.e., factors that "victims participated in, or consented to their own deaths" or that Petitioner's actions were "morally justified." (CT 1078-1079.) Petitioner alleges that the prosecution argued the absence of evidence supporting these claims and thereby implied an illusory aggravating factor.

The ***state*** supreme ***court*** considered this claim on direct appeal and rejected it, noting that:

Defendant contends the ***court*** erred when it rejected his request to delete inapplicable mitigating factors (e) (whether victim participated in crime) and (f) (moral justification for crime) of [California Penal Code] section 190.3 from its standard statutory instructions, and injected irrelevant considerations into the jury's penalty deliberations, depriving him of his right to a fair and reliable penalty determination under the Eighth and Fourteenth Amendments.

The jury, however, was properly instructed to consider all the factors “if applicable” and later told to “take into account and be guided by” the applicable factors. [Citation] As we have in previous cases, we assume the jury properly followed the instruction and concluded that mitigating factors not supported by evidence were simply not “applicable.” [Citation]

Sanchez, 12 Cal.4th at 79.

Case 1:97-cv-06134-AWI-SAB Document 163 Filed 07/23/15 Page 182 of 213

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The ***Court*** finds this subclaim to be unavailing. As noted in discussion of the subclaims above, the jury was instructed with CALJIC No. 8.84.1. That instruction allowed the jury to "consider" each factor "if applicable", (CT 994-995; RT 3087-3089), precluding any reasonable probability Petitioner's rights were violated by a failure to delete sentencing factors (Cal. Pen. Code § 190.3 (e) and (f)).

The legal standard for review of penalty phase instructions is "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." Boyde, 494 U.S. at 380. In this instance, it was not contrary to Supreme ***Court*** precedent to instruct the jury with all sentencing factors where the instructions expressly indicated that the jury was to consider each factor only if applicable. The Supreme ***Court*** ***stated*** in Gregg v. Georgia:

The petitioner objects, finally, to the wide scope of evidence and argument allowed at [penalty] hearings. We think that the Georgia ***court*** wisely has chosen not to impose unnecessary restrictions on the evidence that can be offered at such a ***hearing*** and to approve open and far-ranging argument. So long as the evidence introduced and the arguments made at the [penalty] ***hearing*** do not prejudice a defendant, it is preferable not to impose restrictions. We think it desirable for the jury to have as much information before it as possible when it makes the sentencing decision.

Gregg, 428 U.S. at 203-04. In Williams v. Calderon, the Ninth Circuit ***stated***:

Williams argues that it was error to read to the jury the entire list of factors the ***state*** considered relevant to the sentencing decision, even when some did not apply. To the contrary, the jury instructions expressly indicated that the jury was to consider each factor only "if applicable." Moreover, "[i]t seems clear ... that the problem [of jury inexperience] will be alleviated if the jury is given guidance regarding the factors about the crime and the defendant that the ***State***, representing organized society, deems particularly relevant to the sentencing decision." Gregg v. Georgia, 428 U.S. 153, 192, 96 S. Ct. 2909, 2934, 49 L.Ed.2d 859 (1976) (plurality opinion). The reading of the complete list gave the jury more guidance, not less. We find nothing in the Constitution prohibiting the very practice Gregg encouraged.

Williams, 52 F.3d 1465 at 1481.

Consistent with the foregoing, this ***Court*** finds that the ***state*** ***court*** could reasonably have found it unlikely that the jury applied the challenged instruction in a way that prevented



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consideration of constitutionally relevant evidence. There was no requirement that a trial ***court*** redact the instructions to include only those factors deemed applicable. Moreover, the instruction itself advises the jury to consider the factors "if applicable." In Bonin v. Calderon, the Ninth Circuit again rejected the argument posited by Petitioner. Bonin, 59 F.3d at 847-48.

The Bonin ***court*** noted that "the cautionary words 'if applicable' warned the jury that not all of the factors would be relevant and that the absence of a factor made it inapplicable rather than an aggravating factor." Id.
Respondent contends this subclaim is not cognizable because it creates and retroactively applies a "new rule" of constitutional law within Teague v. Lane, 489 U.S. 288. However, the

***Court*** finds the claim fails not because Petitioner seeks to apply a new rule of criminal procedure

under Teague, but rather on grounds the claim lacks merit for the reasons ***stated***.

The ***Court*** finds that that the ***state court*** rejection of the subclaim was not contrary to, or an unreasonable application of, clearly established federal law, or an or an unreasonable

determination of the facts in light of the evidence presented in the ***state court*** proceeding, viewed

most favoring the prosecution. Jackson, 443 U.S. at 319. See 28 U.S.C. § 2254(d).
This subclaim is denied.
v. Limiting Aggravation

Petitioner next alleges that the trial ***court*** erred by failing to instruct the jury it could not consider aggravating factors not included in the instructions. He claims this potentially allowed unrestricted aggravation. (RT 3087-3089, 3095.)

The ***state*** supreme ***court*** considered and rejected this subclaim on direct appeal, finding

that there was no violation of ***state*** law:

Defendant also asserts the trial ***court*** erred by failing to instruct the jury not to consider non-statutory aggravating evidence in determining penalty. We have repeatedly rejected this contention, and defendant has not persuaded us to

reconsider our conclusion. [Citation] Nor was the trial ***court*** required to label various factors as exclusively aggravating or mitigating. [Citation]
Sanchez, 12 Cal.4th at 79-80.
Case 1:97-cv-06134-AWI-SAB Document 163 Filed 07/23/15 Page 184 of 213

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The legal standard for review of penalty phase instructions is as set forth in the subclaim above, to wit, "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." Boyde, 494 U.S. at 380.

This ***Court*** agrees with the ***state court***'s rejection of the subclaim. At bottom, "what is important at the selection stage is an individualized determination on the basis of the character of the individual and the circumstances of the crime." Zant, 462 U.S. at 879. There is no constitutional prohibition against non-statutory aggravating factors. Harris v. Pulley, 692 F.2d 1189, 1193-94 (1982), overruled on other grounds, 465 U.S. 37 (1984); Zant, 462 U.S. at 878-79. As noted, California's death penalty scheme allows for a sufficiently individualized sentence determination. Tuilaepa, 512 U.S. at 975. The trial ***court***'s failure to instruct the jury that it could not consider non-statutory aggravating factors is plainly not contrary to or an unreasonable application of Supreme ***Court*** authority. Pulley, 465 U.S. at 51, 53 n.14; Tuilaepa, 512 U.S. at 975-80.

The California Supreme ***Court*** found the specific instructions given allowed a fully individualized evaluation of aggravating and mitigating evidence. Sanchez, 12 Cal.4th at 79-80, citing People v. Hawthorne, 4 Cal.4th 43 at 74-74. Petitioner's citation to People v. Boyd, 38 Cal.3d 762 (1985) is not authority otherwise. Nor is it "the province of a federal habeas ***court*** to re-examine ***state court*** determinations on ***state*** law questions." Estelle, 502 U.S. at 67-68.

Furthermore, as the Supreme ***Court stated*** in Gregg v. Georgia:
The petitioner objects, finally, to the wide scope of evidence and argument allowed at [penalty] hearings. We think that the Georgia ***court*** wisely has chosen not to impose unnecessary restrictions on the evidence that can be offered at such a ***hearing*** and to approve open and far-ranging argument. So long as the evidence introduced and the arguments made at the [penalty] ***hearing*** do not prejudice a defendant, it is preferable not to impose restrictions. We think it desirable for the jury to have as much information before it as possible when it makes the sentencing decision.
Gregg, 428 U.S. at 203-04.
Case 1:97-cv-06134-AWI-SAB Document 163 Filed 07/23/15 Page 185 of 213
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Respondent contends this subclaim is not cognizable because it creates and retroactively applies a “new rule” of constitutional law within Teague v. Lane, 489 U.S. 288. However, the

***Court*** finds the claim fails not because Petitioner seeks to apply a new rule of criminal procedure under Teague, but rather on grounds the claim lacks merit for the reasons ***stated***.

The ***Court*** finds that the ***state court*** rejection of the subclaim was not contrary to, or an unreasonable application of, clearly established federal law, or an unreasonable determination of the facts in light of the evidence presented in the ***state court*** proceeding, viewed most favoring the prosecution. Jackson, 443 U.S. at 319; see 28 U.S.C. § 2254(d).

This subclaim is denied.

vi. Limiting Modifiers

Petitioner alleges that the trial ***court*** erred in denying his requested special instruction that sought to delete the adjective “extreme” from the reference in [mitigation factor] (d) to being under the influence of mental or emotional disturbance, and the adjective “substantial” from the reference in [mitigation factor] (g) to being under the domination of another person. He claims this prevented presentation of his mitigation evidence. (CT 1078-1079.)

The ***state*** supreme ***court*** considered and rejected this claim on direct appeal, finding that:

Defendant contends the trial ***court*** violated the Eighth Amendment by refusing his requested deletion of the adjectives “extreme” and “substantial” in instructions given in the language of section 190.3, factors (d) (whether defendant was under the influence of extreme mental or emotional disturbance at time of offense), and (g) (whether defendant acted under extreme duress or substantial domination of another person). We have rejected this argument in numerous cases, and defendant has failed to persuade us that we should reconsider these decisions. (See Turner, supra, 8 Cal.4th at pp. 208-209, and cases cited [catchall provision of section 190.3, factor (k) referring to “any other circumstance which extenuates the gravity of the crime” allows consideration of non-extreme mental or emotional conditions when read in conjunction with instructions on factors (d) and (g)].)
Sanchez 12 Cal. 4th at 80.
The jury, however, was properly instructed to consider all the factors “if applicable” and later told to “take into account and be guided by” the applicable factors. [Citation] As we have in previous cases, we assume the jury properly followed the instruction and concluded that mitigating factors not supported by evidence were simply not “applicable.” [Citation]
Case 1:97-cv-06134-AWI-SAB Document 163 Filed 07/23/15 Page 186 of 213

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Sanchez, 12 Cal.4th at 79.
The Constitution requires that the jury must "not be precluded from considering, as a mitigating factor, 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, 438 U.S. at 604. The test is "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." Boyde, 494 U.S. at 380. Further, a single instruction "may not be judged in artificial isolation," but must be considered in light of the instructions as a whole and the entire trial record. Estelle, 502 U.S. at 72.

Here, the ***Court*** finds that the trial ***court***'s use of CALJIC No. 8.84.1 (1986 rev.), regarding California Penal Code § 190.3 factor (k), was adequate to permit jurors to consider

relevant mitigating evidence. Boyde, 494 U.S. at 381-82 (1990). The ***state*** supreme ***court***

rejected this subclaim, finding sufficient the trial ***court***'s instruction that (Cal. Pen. Code § 190.3(k)) includes:
[A]ny other circumstance which extenuates the gravity of the crime, even though it is not a legal excuse for the crime, and any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial.
The Ninth Circuit has rejected Petitioner's argument where, as here, the jury was advised it could consider any other mitigating matter. See Hendricks v. Vasquez, 974 F.2d 1099, 1109

(9th Cir. 1992). Moreover, as noted by the California Supreme ***Court***, factors (d) and (g) cannot be read in isolation. It is clear that factor (k) on its face allows the jury to consider non-extreme and non-substantial mental or emotional conditions when read in conjunction with instructions on factors (d) and (g). See Sanchez, 12 Cal. 4th at 80.

The Supreme ***Court*** has ***stated*** that factor (k) directed the jury to consider "any other circumstance that might excuse the crime. . . ." Boyde, 494 U.S. at 382. Nothing suggests the instruction in issue here precluded the jury from considering the mitigating evidence proffered
Case 1:97-cv-06134-AWI-SAB Document 163 Filed 07/23/15 Page 187 of 213
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by Petitioner. See e.g., Id. at 378. The Supreme ***Court*** has found that "[t]he factor (k) instruction is consistent with the constitutional right to present mitigating evidence in capital sentencing proceedings." Ayers, 549 U.S. at 24.

In addition, the Supreme ***Court*** has reviewed this instruction on several occasions. It has rejected claims that the instruction restricts the jury's consideration of mitigating evidence in every instance. See, e.g., Ayers, 549 U.S. at 7; Brown, 544 U.S. at 133; Boyde, 494 U.S. 370. Respondent contends this subclaim is not cognizable because it creates and retroactively applies a "new rule" of constitutional law within Teague v. Lane, 489 U.S. 288. However, the

***Court*** finds the claim fails not because Petitioner seeks to apply a new rule of criminal procedure

under Teague, but rather on grounds the claim lacks merit for the reasons ***stated***.

The ***Court*** finds that the ***state court*** rejection of the subclaim was not contrary to, or an unreasonable application of, clearly established federal law, or an unreasonable determination of

the facts in light of the evidence presented in the ***state court*** proceeding, viewed most favoring the prosecution. Jackson, 443 U.S. at 319. See 28 U.S.C. § 2254(d).
This subclaim is denied.
vii. "Pinpoint" Mitigation Instructions

In this subclaim, Petitioner alleges that the trial ***court*** erred in denying his requested special “pinpoint” instructions relating to the defense theory of mitigating childhood and family facts and circumstances. He argues that without the pinpoint instruction there is a reasonable likelihood the jury did not understand the defense and could consider all factors in the instructions as mitigation.

The ***state*** supreme ***court*** considered and rejected this subclaim on direct appeal, ***stating*** that:

Defendant complains that the ***court*** erred in rejecting his instructions discussing his childhood and background, that were required to augment the section 190.3, factor (k) instruction. We disagree. The jury was fully aware that it could consider defendant's childhood in mitigation under factor (k); it was further instructed that this factor allowed the jury to consider “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.” In addition, the jury was instructed that it was “free to assign whatever moral or sympathetic value you deem appropriate to each and all of the
Case 1:97-cv-06134-AWI-SAB Document 163 Filed 07/23/15 Page 188 of 213

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189
various factors" and that [t]o return a judgment of death, each of you must be persuaded that the aggravating evidence and/or circumstances is so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." These instructions, combined with the arguments of Ryals (informing the jury it could consider as mitigating defendant's background and character) and Frank (telling jury that factor (k) includes any evidence of defendant's character or background that he offers), lead us to conclude that there is no possibility the jury misunderstood its sentencing obligation to consider defendant's background and character in determining the appropriate penalty. [Citation]
Sanchez, 12 Cal.4th at 82.
As recited above, in reviewing penalty phase instructions, the test is "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." Boyde, 494 U.S. at 380. Further, a single instruction "may not be judged in artificial isolation," but must be considered in light of the instructions as a whole and the entire trial record. Estelle, 502 U.S. at 72.

Here, the ***state court*** could reasonably have found that the jury was not precluded from considering mitigating evidence including childhood and family evidence. The trial ***court*** rejected Petitioner's proffered special instruction, using instead CALJIC No. 8.84.1 (1986 rev.), which advised the jury to consider the circumstances of the present conviction (pursuant to Cal. Pen. Code § 190.3(a)) and any other extenuating circumstance and aspect of the defendant's character or record (pursuant to Cal. Pen. Code § 190.3(k)). (CT 994-995; RT 3087-3089.) Additionally, the prosecution argued to the jury that it was not precluded from considering mitigating evidence. (RT 3043-3044.) Defense counsel Frank did the same. (RT 3053-3060). At the time Petitioner's conviction became final on October 7, 1996, it was established that use of CALJIC No. 8.84.1 was adequate to permit jurors to consider relevant mitigating evidence. Boyde, 494 U.S. at 381-82 (1990). The Ninth Circuit has rejected Petitioner's argument where, as here, the jury was advised it could consider any other mitigating matter. See Hendricks, 974 F.2d at 1109. The Supreme ***Court*** has never required a sentencing ***court*** to instruct a jury on how to weigh and balance factors in aggravation and mitigation. As discussed in the subclaims above, in Tuilaepa v. California, the Supreme ***Court stated***, "[a] capital
Case 1:97-cv-06134-AWI-SAB Document 163 Filed 07/23/15 Page 189 of 213
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sentencer need not be instructed how to weigh any particular fact in the capital sentencing decision." Tuilaepa, 512 U.S. at 979. Similarly, in Kansas v. Marsh, the Supreme ***Court*** ***stated***:

> In aggregate, our precedents confer upon defendants the right to present sentencers with information relevant to the sentencing decision and oblige sentencers to consider that information in determining the appropriate sentence. The thrust of our mitigation jurisprudence ends here. "[W]e have never held that a specific method for balancing mitigating and aggravating factors in a capital sentencing proceeding is constitutionally required."

Marsh, 548 U.S. at 175 (quoting Franklin, 487 U.S. at 179) (citing Zant, 462 U.S. at 875–876, n.13). Petitioner has not made any sufficient evidentiary showing otherwise.

Respondent contends this subclaim is not cognizable because it creates and retroactively applies a "new rule" of constitutional law within Teague v. Lane, 489 U.S. 288. However, the ***Court*** finds the claim fails not because Petitioner seeks to apply a new rule of criminal procedure under Teague, but rather on grounds the claim lacks merit for the reasons ***stated***.

For the reasons ***stated***, the ***Court*** is persuaded the ***state*** ***court*** rejection of the subclaim

was not contrary to, or an unreasonable application of, clearly established federal law, or an or

an unreasonable determination of the facts in light of the evidence presented in the ***state court*** proceeding, viewed most favoring the prosecution. Jackson, 443 U.S. at 319. See 28 U.S.C. § 2254(d).

This subclaim is denied.

viii. Aggravation "Beyond a Reasonable Doubt" Instruction

Petitioner alleges in the next subclaim that the trial ***court*** erred in denying his requested special instructions requiring the jury to find aggravation outweighed mitigation beyond a reasonable doubt and that a death sentence was appropriate beyond a reasonable doubt. The trial

***court*** instead gave the statutory instruction, CALJIC No. 8.84.2 (1986 rev.), renumbered CALJIC No. 8.88 (1989 rev.).

The ***state*** supreme ***court*** considered and rejected this claim on appeal, ***stating*** that:

Defendant contends the trial ***court*** violated the federal Constitution by rejecting

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191

his instruction that would have required the jury unanimously to find the existence of an aggravating factor before considering it and to find beyond a reasonable doubt that the aggravating factors outweighed the mitigating factors before

choosing the penalty of death. Instead, the ***court*** instructed the jury pursuant to former CALJIC No. 8.84.2, which informed the jury it must "be guided by the applicable factors of aggravating and mitigating circumstances upon which [it] had been instructed." The instruction also emphasized to the jury that the penalty determination did not involve a mere mechanical weighing process, but required an individual assessment of the aggravating and mitigating circumstances (and assignment of "whatever moral or sympathetic value" it deemed appropriate) in determining the sentence. Defendant claims CALJIC No. 8.84.2 failed to inform the jury it must find that the aggravating factors outweighed the mitigating factors and that, if it found mitigating factors outweighed aggravating factors, it must impose a sentence of life without parole. We have previously rejected these contentions, and defendant has failed to persuade us to reconsider our decisions. [Citation]

As we have previously recognized, nothing in the federal Constitution requires the jury unanimously to find the existence of an aggravating factor, or to find beyond a reasonable doubt that the People proved each aggravating factor, that the aggravating circumstances outweighed the mitigating ones, or that death is appropriate. [Citation] Unlike the determination of guilt, "the sentencing function is inherently moral and normative, not factual" [Citation] and thus "not susceptible to a burden-of-proof quantification." [Citation] . . . Former CALJIC No. 8.84.2 adequately conveyed to the jury the seriousness of its obligation in determining the appropriate penalty, and we find no error in giving the instruction. [Citation]

Sanchez, 12 Cal.4th at 80-81.

Petitioner could correctly argue that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 U.S. 358, 364 (1970). In California, for a defendant to be eligible for the death penalty, the jury must, beyond a reasonable doubt, find him guilty of murder in the first degree, and must find true one of the special circumstances set forth in Cal. Penal Code § 190.2. Tuilaepa, 512 U.S. at 975.

However, once a defendant is convicted, "the prosecution has no burden of proof that death is the appropriate penalty, or that one or more aggravating factors or crimes exist, in order to obtain a judgment of death." People v. Anderson, 25 Cal. 4th 543, 589 (2001). Instead, the clearly established law at the time Petitioner's conviction became final vested the jury with


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192

"unbridled discretion in determining whether the death penalty should be imposed after it has found that the defendant is a member of the class made eligible for that penalty." Tuilaepa, 512 U.S. at 979-80.

There is no Supreme ***Court*** authority which constitutionally requires that a jury be instructed on a burden of proof in the sentence selection phase in a capital case. Further, "[t]he

United ***States*** Supreme ***Court*** has never ***stated*** that a beyond-a-reasonable-doubt standard is required when determining whether a death penalty should be imposed." Harris, 692 F.2d at

1195. Nor is there any Supreme ***Court*** authority which would require a burden of proof or persuasion be assigned to any of the jury's penalty phase determinations. On the contrary, the

Supreme ***Court*** has held that no "specific method for balancing mitigating and aggravating factors in a capital sentencing proceeding is constitutionally required." Marsh, 548 U.S. at 175. California's death penalty sentencing scheme has been consistently upheld as constitutional by

the Supreme ***Court***. Tuilaepa, 512 U.S. at 975-80; Pulley, 465 U.S. at 53.

The ***Court*** finds the statutory instruction, CALJIC 8.84.2, did appropriately advise the jury to consider the applicable factors of aggravating and mitigating circumstances and that to find for death each juror must be persuaded that the aggravating evidence and/or circumstances is so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole. (CT 1018; RT 3095-3096.) Due process requires no more. Harris, 692 F.2d at 1194. California is not required to adopt specific standards for instructing the jury on consideration of aggravating and mitigating circumstances. Zant, 462 U.S. at 890.

The ***state court*** then could reasonably find the requirement under California's death penalty statute, that the jury weigh aggravating and mitigating factors before imposing the death penalty, adequately guarantees the jury's discretion will be guided and its considerations deliberate.

Respondent contends this subclaim is not cognizable because it creates and retroactively applies a "new rule" of constitutional law within Teague v. Lane, 489 U.S. 288. However, the

***Court*** finds the claim fails not because Petitioner seeks to apply a new rule of criminal procedure

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under Teague, but rather on grounds the claim lacks merit for the reasons ***stated***.

The ***Court*** finds that the ***state court*** rejection of the subclaim was not contrary to, or an unreasonable application of, clearly established federal law, or an unreasonable determination of

the facts in light of the evidence presented in the ***state court*** proceeding, viewed most favoring the prosecution. Jackson, 443 U.S. at 319. See 28 U.S.C. § 2254(d).
This subclaim is denied.
ix. Written Aggravation Findings

Petitioner alleges in his next subclaim that the trial ***court*** erred in not instructing the jury to make written findings as to aggravating and mitigating factors, denying him due process and meaningful appellate review under the Eighth Amendment.

The ***state*** supreme ***court*** reviewed and rejected this claim on direct appeal, noting that:

Defendant contends the trial ***court*** erred by failing to require the jury to render written findings on the aggravating factors it selected. We have repeatedly held that such findings are not required, and accordingly, find no error. [Citation]
Federal law is in accord. See Harris, 692 F.2d at 1195, overruled on other grounds 465 U.S. 37 (1984).
Sanchez, 12 Cal.4th at 82.

The ***state court*** decision is not contrary to Supreme ***Court*** precedent. See Harris, 692 F.2d at 1195–96. Moreover, the California procedure provides a sufficient record for appellate review by requiring the judge to provide a written statement upholding or overturning the jury's verdict without requiring written findings by the jury on the aggravating circumstances. In

Proffitt v. Florida, the Supreme ***Court*** upheld the Florida death penalty statute which was comparable to California's procedure. 428 U.S. 242, 250-251 (1976). In the Florida statute, the jury is required to make a penalty recommendation to the trial judge, unaccompanied by any specific findings, and thereafter the judge determines the actual sentence and specifies in writing the reasons in support of the sentence. Id. at 249-250. In interpreting the Florida law, the

Supreme ***Court*** emphasized, "Since . . . the trial judge must justify the imposition of a death sentence with written findings, meaningful appellate review of each such sentence is made
Case 1:97-cv-06134-AWI-SAB Document 163 Filed 07/23/15 Page 193 of 213
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possible . . . .” Id. at 251. In a similar way, the California procedure provides for meaningful appellate review with respect to the disclosure of the reasons supporting a sentence of death.

The California procedure was approved by the Supreme ***Court*** in Pulley v. Harris, where it was ***stated***:

If the jury finds the defendant guilty of first degree murder and finds at least one special circumstance, the trial proceeds to a second phase to determine the appropriate penalty. Additional evidence may be offered and the jury is given a list of relevant factors. § 190.3. “After having ***heard*** all the evidence, the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section, and shall determine whether the penalty shall be death or life imprisonment without the possibility of parole.” Ibid. If the jury returns a verdict of death, the defendant is deemed to move to modify the verdict. § 190.4(e). The trial judge then reviews the evidence and, in light of the statutory factors, makes an “independent determination as to whether the weight of the evidence supports the jury's findings and verdicts.” Ibid. The judge is required to ***state*** on the record the reasons for his findings. Ibid. If the

trial judge denies the motion for modification, there is an automatic appeal. §§ 190.4(e), 1239(b). The statute does not require comparative proportionality review or otherwise describe the nature of the appeal. [Footnote omitted.] It does ***state*** that the trial judge's refusal to modify the sentence "shall be reviewed." § 190.4(e). This would seem to include review of the evidence relied on by the judge. As the California Supreme ***Court*** has said, "the statutory requirements that the jury specify the special circumstances which permit imposition of the death penalty, and that the trial judge specify his reasons for denying modification of the death penalty, serve to assure thoughtful and effective appellate review, focusing upon the circumstances present in each particular case." People v. Frierson, 25 Cal.3d 142, 179, 158 Cal. Rptr. 281, 302, 599 P.2d 587, 609 (1979).

. . .

The jury's "discretion is suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." Gregg, 428 U.S., at 189, 96 S. Ct., at 2932. Its decision is reviewed by the trial judge and the ***State*** Supreme ***Court***. On its face, this system, without any requirement or practice of comparative proportionality review, cannot be successfully challenged under Furman and our subsequent cases.

Pulley, 465 U.S. at 51-53 (emphasis added).

Respondent contends this subclaim is not cognizable because it creates and retroactively applies a "new rule" of constitutional law within Teague v. Lane, 489 U.S. 288. However, the ***Court*** finds the claim fails not because Petitioner seeks to apply a new rule of criminal procedure under Teague, but rather on grounds the claim lacks merit for the reasons ***stated***.

For the reasons ***stated***, the ***Court*** finds that the ***state court*** rejection of the subclaim was

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not contrary to, or an unreasonable application of, clearly established federal law, or an or an unreasonable determination of the facts in light of the evidence presented in the ***state*** ***court*** proceeding, viewed most favoring the prosecution. Jackson, 443 U.S. at 319. See 28 U.S.C. § 2254(d).

This subclaim is denied.

x. Proportionality

Petitioner next alleges that the California death penalty statute fails to require intra-case and inter-case proportionality and to provide for meaningful proportionality review, denying him protection from arbitrary imposition of the death penalty and denying him equal protection with non-capital felons and preventing the jury from considering all mitigation factors.

The ***state*** supreme ***court*** considered and rejected this subclaim on appeal, finding that:

Defendant complains that the lack of intra-case and inter-case proportionality review in this case renders the 1978 sentencing scheme under California's death penalty law arbitrary under the Eighth Amendment and in violation of his equal protection rights because such review is afforded to noncapital defendants. We have rejected the argument in numerous cases. [Citation]

Sanchez, 12 Cal.4th 83.

Generally, errors of ***state*** law are not cognizable on federal habeas. Estelle, 502 U.S. at 67. If a challenged instruction, viewed in the context of the overall charge, shows a denial of due process which renders the trial unfair, habeas relief may lie. See Cupp, 414 U.S. at 147; Henderson v. Kibbe, 431 U.S. 145, 154 (1976). A claim that instructional error violates a defendant's constitutional rights depends on the evidence and the overall instructions. Villafuerte v. Stewart, 111 F.3d 616, 624 (9th Cir. 1997).

In this instance, the ***state*** ***court*** could reasonably find Petitioner's intra-case and inter-case proportionality subclaim to be foreclosed by the Supreme ***Court***'s decision in Pulley, 465 U.S. 37. In Pulley, the high ***court*** reviewed California's death penalty procedure, and in particular,

considered the fact that California did not require any sort of comparative proportionality review.

Id. The Supreme ***Court*** found that the Eighth Amendment did not require a "***state*** appellate

Case 1:97-cv-06134-AWI-SAB Document 163 Filed 07/23/15 Page 195 of 213

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***court***, before it affirms a death sentence, to compare the sentence in the case before it with the penalties imposed in similar cases if requested to do so by the prisoner." Id. at 43-44. Further,

the Supreme ***Court*** held that "[o]n its face, [California's] system, without any requirement or practice of comparative proportionality review, cannot be successfully challenged under Furman [v. Georgia, 408 U.S. 238 (1972)] and our subsequent cases." Id. at 53.

In order to satisfy constitutional requirements, a death penalty law must narrow the class of death-eligible defendants, and provide for individualized penalty determination. McCleskey v. Kemp, 481 U.S. 279, 308 (1987). California's 1978 death penalty meets these requirements, People v. Rodriguez, 42 Cal.3d 730, 777-779 (1986), and has been upheld as constitutional by

the United ***States*** Supreme ***Court***. Ramos, 463 U.S. at 993-94. The federal ***court*** has rejected

proportionality review, Pulley, 465 U.S. at 53. So has the California Supreme ***Court***. People v. Cox, 53 Cal.3d 618, 692 (1991), disapproved on other grounds by People v. Doolin, 45 Cal.4th 390, 417 (2009).

Respondent contends this subclaim is not cognizable because it creates and retroactively applies a "new rule" of constitutional law within Teague v. Lane, 489 U.S. 288. However, the

***Court*** finds the claim fails not because Petitioner seeks to apply a new rule of criminal procedure

under Teague, but rather on grounds the claim lacks merit for the reasons ***stated***.

The ***Court*** finds that the ***state court*** rejection of the subclaim was not contrary to, or an unreasonable application of, clearly established federal law, or an unreasonable determination of

the facts in light of the evidence presented in the ***state court*** proceeding, viewed most favoring the prosecution. Jackson, 443 U.S. at 319. See 28 U.S.C. § 2254(d).

This subclaim is denied.

xi. Conclusions

For the reasons discussed in the subclaims above, the ***state court*** could reasonably have

found that Petitioner failed to establish ***state court*** rejection of claim 58 was contrary to, or an unreasonable application of, clearly established federal law, or an or an unreasonable

determination of the facts in light of the evidence presented in the ***state court*** proceeding, viewed

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most favoring the prosecution. Jackson, 443 U.S. at 319. See 28 U.S.C. § 2254(d).
Claim 58, including all its subclaims, is denied.
r. Review of Claim 5911

In his next claim, Petitioner alleges that the trial ***court***, during the (Cal. Pen. Code § 190.4(e)) automatic motion to independently review the evidence, erred by failing to consider mitigating evidence when imposing death.

The ***state*** supreme ***court*** considered and rejected this claim on direct appeal, ***stating*** that:

Defendant contends the trial ***court*** committed prejudicial error in denying his automatic motion for modification of the death sentence (§ 190.4, subd. (e)) because it failed to consider mitigating evidence of defendant's dysfunctional family and his kindness to his siblings (§ 190.3, factor (k)). We are not persuaded. After reviewing section 190.3, factors (a)-(i), and concluding that several statutory

mitigating factors did not apply to defendant, (the ***court*** did note that defendant

may have been high on PCP during the murders pursuant to factor (h)), the ***court*** asked: ”Are there other circumstances that mitigate against the aggravation of the [defendant], I think not.“ Moreover, before denying the modification motion, the

***court*** ***stated*** that it had considered defendant's motion to reduce penalty and the People's response, both of which referred to defendant's mitigating evidence.

Thus, although the ***court*** did not specifically mention defendant's mitigating

evidence of his family life, the ***court***'s statement regarding section 190.3, factor (k) evidence shows it considered all pertinent penalty phase evidence, including testimony about defendant's family life and his behavior toward his siblings, but merely found it unpersuasive. The record is clear that in ruling on the motion for

modification, the trial ***court*** independently assessed the weight of the evidence

under each factor, and ***stated*** its reasons for denying defendant's motion. [Citation] We conclude on this record that all constitutional and statutory considerations

were observed in the ***court***'s ruling. [Citation]
Sanchez, 12 Cal.4th at 83.

At the time Petitioner's conviction became final, Cal. Penal Code § 190.4(e) provided that:

In every case in which the trier of fact has returned a verdict or finding imposing the death penalty, the defendant shall be deemed to have made an application for modification of such verdict or finding pursuant to Subdivision 7 of Section 11. In ruling on the application, the judge shall review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in Section 190.3, and shall make a determination as to whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence presented. The judge shall ***state*** on the record the reasons for his findings.

11 The legal basis of the Fifth and Sixth Amendment were stricken as unexhausted. ECF No. 60 at 9:9-10.

198

The judge shall set forth the reasons for his ruling on the application and direct that they be entered on the Clerk's minutes. The denial of the modification of the death penalty verdict pursuant to subdivision (7) of Section 1181 shall be reviewed on the defendant's automatic appeal pursuant to subdivision (b) of Section 1239. The granting of the application shall be reviewed on the People's appeal pursuant to paragraph (6).
Cal. Penal Code § 190.4(e).

Petitioner alleges that the trial ***court***, during the (Cal. Pen. Code § 190.4(e)) automatic motion to modify and independently review of the evidence, did not mention and thus ignored much 190.3(k) mitigating evidence of his abysmal childhood, adolescence in an alcoholic, violent and dysfunctional family and his love and loyalty toward siblings, when it imposed the death penalty following its independent review. (CT 1103; RT [10/ 27-31, 1988] at pp. 2-16.) He claims the trial judge was not guided by aggravating and mitigating circumstances in upholding death and thus failed to comply with the mandate of California Penal Code § 190.4(e). The death penalty is constitutional if it "is imposed only after a determination that the aggravating circumstances outweigh the mitigating circumstances present in the particular crime committed by the particular defendant, or that there are no such mitigating circumstances." Blystone, 494 U.S. at 305. To the extent automatic modification under California's capital sentencing statute was part of the manner by which California fulfills its constitutional duty to tailor and apply its death sentencing scheme in a rational manner, see Pulley, 465 U.S. at 52, the evidentiary record shows the trial ***court*** reviewed the verdict, considered and discussed the aggravating and mitigating circumstances and factors and made an individualized determination of whether death was the proper punishment. RT [10/31/88] pp. 7-10; see Turner v. Calderon, 281 F.3d 851, 871 (9th Cir. 2002). The California Supreme ***Court***'s conclusion that the trial ***court***'s review was proper under ***state*** law is binding on this ***Court***. Wainwright v. Goode, 464 U.S. 78, 84 (1983) (per curiam).

The ***Court*** finds this claim raises solely an issue of ***state*** law without any claimed constitutional error, Estelle, 502 U.S. at 68, leaving the federal ***court*** unable to review it. As noted, habeas relief does not lie for errors of ***state*** law. Estelle, 502 U.S. at 67; Pulley, 465 U.S.

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at 41 ("A federal ***court*** may not issue the writ on the basis of a perceived error of ***state*** law.").

Petitioner's claim that the trial ***court*** incorrectly conducted its review of the jury's sentencing verdict is not cognizable on federal habeas. See Turner, 281 F.3d at 871. The Supreme ***Court*** has not held that such a review is required, and the high ***court*** has found California's review procedure to be constitutional. Pulley, 465 U.S. at 51-53.

Respondent contends this claim is not cognizable because it creates and retroactively applies a "new rule" of constitutional law within Teague v. Lane, 489 U.S. 288. However, the ***Court*** finds the claim fails not because Petitioner seeks to apply a new rule of criminal procedure under Teague, but rather on grounds the claim lacks merit for the reasons ***stated***.

For the reasons ***stated***, the ***Court*** finds that the ***state court*** rejection of the claim was not contrary to, or an unreasonable application of, clearly established federal law, or an unreasonable determination of the facts in light of the evidence presented in the ***state court*** proceeding, viewed most favoring the prosecution. Jackson, 443 U.S. at 319. See 28 U.S.C. § 2254(d).

Claim 59 is denied.

s. Review of Claim 60

In his penultimate claim, Petitioner alleges that the cumulative effect of constitutional error during the penalty phase warrants habeas relief. He cites to and incorporates claims 36-59 and argues cumulative error therefrom.

The ***state*** supreme ***court*** considered and rejected this claim on direct appeal, ***stating*** that:

Defendant claims that in combination, the errors at the penalty phase caused cumulative prejudice warranting a reversal of penalty. After review of the record, we disagree. Any prosecutorial misconduct that did occur did not significantly influence the fairness of defendant's trial or detrimentally affect the jury's determination of the appropriate penalty. [Citation]

Sanchez, 12 Cal.4th at 84.

The California Supreme ***Court*** also summarily denied claim 60 (SPet. Claim WW) as raised in Petitioner's ***state*** petition for habeas corpus. In re Sanchez, S049502 (DD).

Claims 36-59, ante, each fail for the reasons discussed above. Petitioner then cannot



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make a sufficient showing that he was prejudiced by defense counsel's cumulative

ineffectiveness during the penalty phase. The ***state court*** could reasonably have found that Petitioner failed to show the cumulative effect of alleged penalty phase errors deprived him of due process. These claims are insubstantial when considered cumulatively. See Karterman, 60 F.3d at 580; see also Rupe, 93 F.3d at 1445.

Respondent contends this claim is not cognizable because it creates and retroactively applies a "new rule" of constitutional law within Teague v. Lane, 489 U.S. 288. However, the ***Court*** finds the claim fails not because Petitioner seeks to apply a new rule of criminal procedure under Teague, but rather on grounds the claim lacks merit for the reasons ***stated***.

Accordingly, the ***Court*** finds that a fair-minded jurist could have found that Petitioner failed to establish that the ***state court*** rejection of the claim was contrary to, or an unreasonable application of, clearly established federal law, or an or an unreasonable determination of the facts in light of the evidence presented in the ***state court*** proceeding, viewed most favoring the prosecution. Jackson, 443 U.S. at 319. See 28 U.S.C. § 2254(d).

Claim 60 is denied.

t. Review of Claim 61

In his final claim, Petitioner alleges that his death sentence is grossly disproportionate given his actions, his merely vicarious culpability as an aider and abetter, and his severe neurological and psychiatric impairments, violating his rights under the Eighth and Fourteenth Amendments.

The ***state*** supreme ***court*** considered and rejected this claim on direct appeal, ***stating*** that:

Defendant contends his death sentence is disproportionate to his culpability under the Eighth Amendment and article I, section 17 of the California Constitution, which preclude punishment that is disproportionate to a defendant's individual culpability. [Citation] Defendant complains that the constitutional proscription against a disproportionate penalty has been especially violated in this case because his accomplices in the murders received either 25 years to life pursuant to a negotiated ***plea*** (Robert Reyes), or had the charges dismissed on insufficient evidence grounds (Joey Bocanegra).

Defendant relies on People v. Dillon (1983) 34 Cal.3d 441, 479, in which the ***court*** reduced a life sentence imposed on a 17-year-old with no prior convictions

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for a noncapital first degree felony murder to a sentence for second degree

murder. But, as we have subsequently ***stated***, Dillon does not mandate the type of intra-case proportionality review sought by defendant. See People v. Hill, 3 Cal.4th 959, 1013 (1992).

As the People observe, intra-case proportionality review is “an examination of whether defendant's death sentence is proportionate to his individual culpability irrespective of the punishment imposed on others.” People v. Adcox, 47 Cal.3d 207, 274 (1987). “The Eighth Amendment to the federal Constitution does not require us to incorporate into our proportionality determination any comparison of defendant's sentence with that of another culpable person, whether charged or uncharged.” Hill, 3 Cal.4th at p. 1014; Pulley, 465 U.S. 37, 53 (1984) [upholding California's absence of comparative proportionality review].)

Accordingly, we reject defendant's ***plea*** for “intra-case proportionality.” The evidence shows that he committed three brutal first degree murders of innocent and defenseless victims as an accomplice, only thirty-three days after he was

released from ***state*** prison on parole from an eight-year prison term imposed for two violent assaults. In light of the evidence presented at trial, the penalty is proportionate to defendant's culpability. [Citation]

Sanchez, 12 Cal.4th at 84-85.

The California Supreme ***Court*** also denied claim 61 (SHCP Claim XX) raised in

Petitioner's ***state*** petition for habeas corpus. In re Sanchez, S049502 (DD).
Petitioner purports to question the viability of Pulley. Yet he does not explain how and why the Pulley decision is infirm, or provide any authority showing that it is. Instead he argues simply that Pulley should not be applied to him because his liability was only vicarious and he is actually innocent of the charged murders.
The claim is not persuasive. Petitioner does not provide any sufficient basis for questioning the holding in Pulley or its application in his proceeding. Pulley was clearly established authority at the time Petitioner's conviction became final on October 7, 1996. Petitioner does not distinguish or limit application of Pulley based on facts of this case. Petitioner alleges his death sentence is disproportionate because the more culpable Reyes and Joey were not sentenced to death. However, this argument cannot succeed given that there is no

federal proportionality requirement. Pulley, 465 U.S. 37. The Supreme ***Court*** held that "[o]n its face, [California's] system, without any requirement or practice of comparative proportionality review, cannot be successfully challenged under Furman [v. Georgia, 408 U.S. 238 (1972)] and our subsequent cases." Id. at 53. California's 1978 death penalty has been upheld as
Case 1:97-cv-06134-AWI-SAB Document 163 Filed 07/23/15 Page 201 of 213

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202

constitutional by the United ***States*** Supreme ***Court***. Ramos, 463 U.S. at 993-94. The federal

***court*** has rejected proportionality review, Pulley, 465 U.S. at 53, as has the California Supreme

***Court***. Cox, 53 Cal.3d at 692. Moreover, the ***state*** ***court*** could reasonably find Petitioner's death sentence is not disproportionate to his culpability given the facts and circumstances of the crimes and his involvement in the crimes. (See claims 1-4 and subclaim "x" of claim 58, ante.)
Petitioner alleges that his death sentence is disproportionate given California's

extraordinarily large death pool. The Eighth Amendment requires that a ***state*** capital sentencing system must: "1) rationally narrow the class of death-eligible defendants; and 2) permit a jury to render a reasoned, individualized sentencing determination based on a death-eligible defendant's record, personal characteristics, and the circumstances of his crime." Marsh, 548 U.S. at 173-74.
As noted in claim 58, subclaim "x", it was established at the time Petitioner's conviction became final that California's system complied with these requirements. Pulley, 465 U.S. at 53-54.
Petitioner has not shown that Pulley does not control this case.
Petitioner's re-argument of actual innocence fails for the reasons discussed in claims 2 and 4, ante.

In sum, the ***Court*** finds this claim is entirely foreclosed by Pulley. Therein, the Supreme

***Court*** determined that the Eighth Amendment did not require a "***state*** appellate ***court***, before it affirms a death sentence, to compare the sentence in the case before it with the penalties imposed in similar cases if requested to do so by the prisoner." Pulley, 465 U.S. at 43-44. The California

Supreme ***Court***, applying ***state*** law, rejected Petitioner's intra-case proportionality argument,

***stating*** that:
The evidence shows that he committed three brutal first degree murders of innocent and defenseless victims as an accomplice, only thirty-three days after he

was released from ***state*** prison on parole from an eight-year prison term imposed for two violent assaults. In light of the evidence presented at trial, the penalty is proportionate to defendant's culpability.
Sanchez, 12 Cal.4th at 84-85. The Bocanegra murders in which Petitioner participated were violent, progressed over a period of time, and were bloody. (RT 2731, 2733, 2735-2736, 2739-

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2741, 2747-2749, 2752-2753, 2756, 2790-2797, 2799-2806, 2808-2820, 2829-2830, 2833-2834.) The Tatman murder in which Petitioner participated involved massive blunt force blows to the chest during a violent assault and stabbing. (RT 2646, 2650-2651, 2655, 2688-2695, 2718, 2842, 2846-2848, 2860.) Petitioner has not shown a reasonable probability that his sentence was grossly disproportionate to the crimes, see Hamelin v. Michigan, 501 U.S. 957, 959 (1991), so as to deny him a fair trial and a more favorable outcome.

Accordingly, for the reasons discussed above, the ***Court*** finds that the ***state court*** rejection of the claim was not contrary to, or an unreasonable application of, clearly established federal law, or an or an unreasonable determination of the facts in light of the evidence presented in the

***state court*** proceeding, viewed most favoring the prosecution. Jackson, 443 U.S. at 319; see 28 U.S.C. § 2254(d).

Claim 61 is denied.

VII.

MOTION FOR EVIDENTIARY ***HEARING***

On March 18, 2003, Petitioner filed a motion seeking an evidentiary ***hearing*** on claims 2,

4, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 20, 21, 22, 24, 25, 28, 30, 31, 32, 33, 34, 36, 37, 38, 40, 43, 44, 45, 46, 47, 48, 50, 51, 52, 54 and 60. (ECF No. 120.) Petitioner alleges in his motion that the ***state*** supreme ***court*** denied him a full and fair evidentiary ***hearing*** to resolve the following facts showing prejudice, facts that were not presented at trial because of ineffective assistance of counsel and prosecutorial misconduct:

1) Jailhouse informant Seeley's statements, disclosed to the defense prior to trial but not presented at trial by either side, that Reyes, the third person at the Bocanegra crime scene, confessed to a more culpable role in Mr. Bocanegra's murder, that Petitioner played no part in killing Mr. Bocanegra, and that Reyes admitted being the initial aggressor against Mrs. Bocanegra.

2) Inconsistencies between the physical evidence and jailhouse informant Hernandez's testimony at trial where he wanted to trade information for favorable treatment, exaggerated the

amount of time he spoke to Petitioner about the crime, failed to admit he was arrested for being under the influence of heroin, and failed to admit he had been a heroin addict for over five years.
3) Principal perpetrator Joey Bocanegra's violent temper, substance abuse through the night and early morning before killing his parents, history of requesting money for drugs from his parents and becoming violent if they refused his request.
4) Testimony by prosecution witnesses, the crime scene analyst and the forensic pathologist, supporting Petitioner's defense that Reyes was Joey's main assistant in the Bocanegra murders.
5) Petitioner's severe organic brain damage, low IQ, and serious psychiatric disorders, known to defense counsel before trial but not investigated and presented at trial.
6) Defense counsel's unreasonable acquiescence in the prosecution's use of statements Petitioner made to Detectives Stratton and Boggs which should have been excluded under Miranda, and to reporter Trihey which should have been placed in context and shown they were inconsistent with an inference that he intended to kill.

Respondent filed his opposition on July 18, 2003, arguing that an evidentiary ***hearing*** is not warranted because the claims lack merit, there is no sufficient offer of proof, and the new

evidence presented by Petitioner does not cast doubt on the California Supreme ***Court***'s finding that Petitioner failed to set forth facts which constitute a constitutionally cognizable claim. (ECF No. 137.) Petitioner filed a reply on September 19, 2003, re-arguing his position on the motion. (ECF No. 140.)
Section 2254(d), as amended by the AEDPA, provides:
An application for a writ of habeas corpus on behalf of a person in custody

pursuant to the judgment of a ***State*** ***court*** shall not be granted with respect to any

claim that was adjudicated on the merits in ***State*** ***court*** proceedings unless the 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.
Case 1:97-cv-06134-AWI-SAB Document 163 Filed 07/23/15 Page 204 of 213
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28 U.S.C. § 2254(d).

In Cullen v. Pinholster, the Supreme ***Court*** held that "review under § 2254(d)(1) is limited to the record that was before the ***state court*** that adjudicated the claim on the merits," and thus "evidence introduced in federal ***court*** has no bearing on § 2254(d)(1) review." Pinholster, 131 S. Ct. at 1398, 1400. Although the central holding of Pinholster pertained to § 2254(d)(1), the Supreme ***Court*** observed that "§ 2254(d)(2) includes the language 'in light of the evidence presented in the ***State court*** proceeding,'" providing "additional clarity" that review under § 2254(d)(2) is also limited to the record before the ***state court***. Id. at 1400 n.7. Therefore, for claims that were adjudicated on the merits in ***state court***, Petitioner can only rely on the record that was before the ***state court*** to satisfy the requirements of § 2254(d). See Landrigan, 550 U.S. at 474.

Petitioner seeks an evidentiary ***hearing*** on the forty-one claims set forth above. All of those claims were adjudicated on the merits in the ***state court***. See Richter, 562 U.S. at 99 ("[w]hen a federal claim has been presented to a ***state court*** and the ***state court*** has denied relief, it may be presumed that the ***state court*** adjudicated the claim on the merits in the absence of any indication or ***state***-law procedural principles to the contrary). For the reasons ***stated*** above, Petitioner fails to demonstrate that any of the forty-one claims overcomes the limitation of §

2254(d). Thus, Pinholster effectively bars a habeas ***court*** from any further factual development on these claims. Id. at 1411 n.20.

Petitioner further claims that he is entitled to a ***hearing*** under 28 U.S.C. § 2254(e)(2). Pinholster suggests this is not so. “Section 2254(e)(2) continues to have force where § 2254(d)(1) does not bar federal habeas relief.” Id. at 1401. Analysis of the claims under § 2254(d) must precede the granting of an evidentiary ***hearing*** under § 2254(e)(2). Id. Thus, only if Petitioner overcomes § 2254(d) can the ***Court*** consider a ***hearing*** under § 2254(e)(2). As Justice Breyer ***stated***: “If the federal habeas ***court*** finds that the ***state***-***court*** decision fails [§ 2254](d)'s test (or if [§ 2254](d) does not apply), then an [§ 2254](e) ***hearing*** may be needed.” Id. at 1412 (Breyer, J., concurring in part and dissenting in part).

Case 1:97-cv-06134-AWI-SAB Document 163 Filed 07/23/15 Page 205 of 213

As discussed above, § 2254(d) applies to all forty-one claims since they were adjudicated on the merits, and Petitioner fails to overcome § 2254(d) with respect to any of the forty-one claims.

For the reasons ***stated***, Petitioner's motion for evidentiary ***hearing*** shall be denied.

VIII.

MOTION AND RENEWED MOTION TO PRESERVE TESTIMONY

On June 25, 2014, Petitioner filed a motion to preserve testimony by deposing the following seven witnesses:

| Name | Case Relation | Age |
|---|---|---|
| Theodore S. Donaldson | Trial Defense Psychiatrist | 87 |
| Eugene F. Toton | Lead Trial Defense Attorney | 78 |
| Patricia L. McGregor | Trial Defense Investigator | 70 |
| Maria E. Valenzuela | Friend of victim, Mrs. Bocanegra | 68 |
| Susan M. Peninger | Trial Defense Investigator | 67 |
| Jeri A. Doane | Post-conviction Psychologist | 67 |
| David V. Foster | Post-conviction Psychologist | 67 |

Each of these individuals previously filed a declaration in support of the instant petition. (ECF No. 150.)

Petitioner argues good cause to preserve evidence because these witnesses are of advanced age and their proposed testimony will be probative of the claimed ineffective assistance of counsel, mental defenses, and Petitioner's actions and lack of culpability, as alleged in the petition. Respondent filed his opposition on August 27, 2014, arguing there is no good cause for such relief because Petitioner is not entitled to an evidentiary ***hearing***, and even if he were, there is no showing of the probity of proposed testimony or that these witnesses would be unavailable. (ECF No. 154.) Moreover, Respondent ***states*** his need for further discovery should the motion be granted. Petitioner replied on September 3, 2014, re-arguing good cause to preserve testimony relating to declarations of these aged witnesses already on file, and ***stating***

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that further discovery needs of Respondent can be litigated after the motion to preserve evidence is granted.

On May 1, 2015, Petitioner filed a motion renewing the pending motion to preserve testimony. (ECF No. 160.)

A judge may authorize discovery and may limit it under the Federal Rules of Civil Procedure upon a showing of the reasons for the request and good cause. Rules Governing § 2254 Cases, Rule 6. Discovery should be allowed if it will help illuminate issues underlying applicant's claim. Gaitan-Campanioni v. Thornburgh, 777 F. Supp. 1355, 1356 (E.D. Tex. 1991). Availability of discovery during habeas is vested in the sound discretion of the district

***court***. Campbell v. Blodgett, 982 F.2d 1356, 1358, (9th Cir. 1993).

Federal Rule of Civil Procedure 27 provides in pertinent part that:

The ***court*** where a judgment has been rendered may, if an appeal has been taken or may still be taken, permit a party to depose witnesses to perpetuate their

testimony for use in the event of further proceedings in that ***court***.

The party who wants to perpetuate testimony may move for leave to take the depositions, on the same notice and service as if the action were pending in the

district ***court***. The motion must show:

(A) the name, address, and expected substance of the testimony of each deponent; and

(B) the reasons for perpetuating the testimony.

If the ***court*** finds that perpetuating the testimony may prevent a failure or delay of

justice, the ***court*** may permit the depositions to be taken and may issue orders like those authorized by Rules 34 and 35. The depositions may be taken and used as

any other deposition taken in a pending district-***court*** action.

This Rule does not limit a ***court***'s power to entertain an action to perpetuate testimony and

may be used in habeas proceedings. Calderon v. U.S. Dist. ***Court*** for Northern Dist. of California, 144 F.3d 618, 621 (9th Cir. 1998); accord Martin v. Reynolds Metals Corp., 297 F.2d

49, 55 (9th Cir. 1961) (***court*** has the power to order taking of deposition for purpose of perpetuating evidence).

Good cause under Rule 27 may be found "[w]here specific allegations before the ***court***
Case 1:97-cv-06134-AWI-SAB Document 163 Filed 07/23/15 Page 207 of 213
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show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is . . . entitled to relief . . . ." Bracy v. Gramley, 520 U.S. 899, 908-09 (1997), citing Harris v. Nelson, 394 U.S. 286, 300 (1969).

Here, the ***Court*** finds that Petitioner has not made a sufficient factual showing to establish good cause as required by Habeas Corpus Rule 6(a). Apart from age, Petitioner offers no facts suggesting unavailability of these witnesses or reasons why this testimony will be lost if not preserved. See Penn. Mut. Life Ins. Co., v. U.S., 68 F.3d 1371, 1373 (C.A.D.C. 1995). While age of the deponent may be relevant in determining whether there is sufficient basis to perpetuate testimony, Penn. Mut. Life Ins. Co., 68 F.3d at 1375, this ***Court***, for purposes of this proceeding, does not find age alone a sufficient basis to grant relief. Even if it were, Petitioner supports probity of the proposed testimony only by citing generally to proposed deponents' declarations in the record. Petitioner does not ***state*** with sufficient specificity the expected substance of the testimony and how it would lead to evidence, admissible under AEDPA, relevant to claims in his petition and entitlement to relief. Petitioner has not made a sufficient showing that the proposed discovery would lead to relevant evidence likely to be lost. See Martin, 298 F.2d at 55. In sum, nothing reasonably suggests a basis to believe the proposed testimony would lead to factual development showing entitlement to relief, and that the proposed testimony might otherwise be lost. See Bracy, 520 U.S. at 908-09; see also Gilday v. Callahan, 99 F.R.D. 308, 309 (D.C. Mass. 1983) (no "good cause" under Rule 6 where the facts petitioner seeks to dispute had been resolved by ***state court***).

For the reasons ***stated***, Petitioner's motion to preserve evidence, as renewed, shall be denied.

IX.

MOTION FOR CASE MANAGEMENT CONFERENCE

On May 1, 2015, Petitioner filed a motion requesting a case management conference to discuss any assistance the ***Court*** might require to resolve the pending motion for evidentiary ***hearing***. (ECF No. 159.)

Case 1:97-cv-06134-AWI-SAB Document 163 Filed 07/23/15 Page 208 of 213

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However, there is no need for a case management conference given the discussion above

denying the motion for evidentiary ***hearing***. The motion for case management conference shall be denied.

X.

REQUEST TO SEAL AND PROTECT SUPPLEMENTAL LODGED DOCUMENTS

On June 23, 2015, Respondent filed a request that the following documents be filed under seal and protected from disclosure: (1) the Request to Seal the November 25, 1987 Reporter's Transcript & Penal Code Section 987.9 Materials, totaling two (2) pages, (2) the November 25, 1987 Reporter's Transcript (conditionally sealed Lodged Document # II), totaling Seven (7) pages, (3) all Penal Code Section 987.9 Materials (conditionally sealed Lodged Document # QQ), totaling ninety-five (95) pages, and (4) a [Proposed] Order Sealing the conditionally sealed Lodged Documents # II and # QQ), totaling one (1) page.

Respondent argues that these documents, sealed ***state court*** records, contain confidential information that should be protected from disclosure in this proceeding. Local Rule 141; California Penal Code Section 987.9(d).

The ***Court*** notes that Petitioner has been served with copies of these supplemental record documents. He has not opposed Respondent's request and the time for doing so has passed. Local Rule 141(c).

Documents may be sealed only by written order of the ***Court***, upon the showing required by applicable law. Local Rule 141(a). Confidential information may be protected by a protective order. Local Rule 141.1(a)(1).

The ***Court*** has reviewed the request to seal and protect documents and the supplemental lodged documents, and based thereon finds good cause to grant the request.

The supplemental lodged documents, sealed and unsealed, were not considered by the

***Court*** in its analysis and disposition of the foregoing claims. The ***Court*** notes that these documents, to the extent they are evidence of trial counsel's defense of Petitioner, do nothing but

support effective assistance by trial counsel and the ***Court***'s above analysis and disposition. (See

Case 1:97-cv-06134-AWI-SAB Document 163 Filed 07/23/15 Page 209 of 213

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210

[Sealed] Supplemental Lodged Documents #II and #QQ.)

XI.

CERTIFICATE OF APPEALABILITY

Because this is a final order adverse to the petitioner, Rule 11 of the Rules Governing

Section 2254 Cases requires this ***court*** to issue or deny a Certificate of Appealability ("COA").

Accordingly, the ***Court*** has sua sponte evaluated the claims within the petition for suitability for the issuance of a COA. See 28 U.S.C. § 2253(c); Turner, 281 F.3d at 864–65 (9th Cir. 2002).

A ***state*** prisoner seeking a writ of habeas corpus has no absolute entitlement to appeal a

district ***court***'s denial of his petition, and an appeal is only allowed in certain circumstances.

Miller–El, 537 U.S. at 335–36 (2003). The controlling statute in determining whether to issue a COA is 28 U.S.C. § 2253, which provides as follows:

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the ***court*** of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United ***States***, or to test the validity of such person's detention pending removal proceedings.

(c) (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the ***court*** of appeals from—

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a ***State*** ***court***; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

The ***court*** may issue a COA only "if jurists of reason could disagree with the district ***court***'s resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." Miller-El, 537 U.S. at 327; Slack v. McDaniel, 529 U.S. 473, 484 (2000). While the petitioner is not required to prove the merits of

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211

his case, he must demonstrate "something more than the absence of frivolity or the existence of mere good faith on his . . . part." Miller-El, 537 U.S. at 338.

In the present case, the ***Court*** finds that, with respect to the following claims, reasonable jurists could disagree with the ***Court***'s resolution or conclude that the issues presented are adequate to deserve encouragement to proceed further:

1) Claim 8: Whether defense counsel provided ineffective assistance by failure to investigate and present testimony of jailhouse informant Charles Seeley.

2) Claim 59: Whether the trial ***court*** failed to consider Petitioner's mitigations evidence when it imposed the death penalty.

3) Claim 61: Whether imposition of the death penalty is constitutionally disproportionate as to Petitioner.

Therefore, a certificate of appealability is granted as these three claims.

As to the remaining claims and requests for evidentiary ***hearing*** and to preserve testimony, the ***Court*** concludes that reasonable jurists would not find the ***Court***'s determination that Petitioner is not entitled to relief debatable, wrong, or deserving of encouragement to proceed further. Petitioner has not made the required substantial showing of the denial of a constitutional right. He has not demonstrated good cause to preserve testimony. Accordingly, the ***Court*** hereby declines to issue a COA as to the remaining claims and requests for evidentiary ***hearing*** and to preserve testimony.

XII.

ORDER

Accordingly, for the reasons ***stated***, it is HEREBY ORDERED that:

1. The Petition for Writ of Habeas Corpus (ECF No. 38) is DENIED,

2. Petitioner's motion for evidentiary ***hearing*** (ECF No. 120) is DENIED,

3. Petitioner's motion to preserve testimony (ECF No. 150) and renewed motion to preserve testimony (ECF No. 160) are DENIED,

4. Petitioner's motion for a case management conference (ECF No. 159) is

Case 1:97-cv-06134-AWI-SAB Document 163 Filed 07/23/15 Page 211 of 213

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212

DENIED.

5. Respondent's request to seal and protect supplemental lodged documents (ECF No. 162) is GRANTED such that:

a. The Clerk of the ***Court*** is directed to file under seal, (1) Petitioner's Request to Seal November 25, 1987 Reporter's Transcript & Penal Code Section 987.9 Materials, totaling two (2) pages, (2) the November 25, 1987 Reporter's Transcript (conditionally sealed Lodged Document # II), totaling Seven (7) pages, (3) all Penal Code Section 987.9 Materials (conditionally sealed Lodged Document # QQ), totaling ninety-five (95) pages, and (4) a [Proposed] Order Sealing Supplemental Lodged Documents # II and # QQ), totaling one (1) page,

b. The above documents filed under seal and the information therein constitute confidential information which shall not be disclosed, in whole or part, to any person other than the ***Court*** and ***Court*** staff and individually named counsel for the parties for their use solely in connection with litigation of the habeas petition pending before this ***Court***,

c. No publicly filed document shall include the above documents and/or the information therein unless authorized by the ***Court*** to be filed under seal, and

d. All provisions of this order shall continue to be binding after the conclusion of this habeas corpus proceeding and specifically shall apply in the event of a retrial of all or any portion of Petitioner's criminal case, except that either party maintains the right to request modification or vacation of this order.

6. A Certificate of Appealability is ISSUED as to the ***Court***'s resolution of claims 8, 59 and 61,

7. A Certificate of Appealability is DECLINED as to claims 1-7, 9-58, and 60, and as to the requests for evidentiary ***hearing*** and to preserve testimony,

8. Any and all scheduled dates are VACATED, and

Case 1:97-cv-06134-AWI-SAB Document 163 Filed 07/23/15 Page 212 of 213

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213

9. The Clerk of the ***Court*** is directed to substitute RON DAVIS, acting Warden of

San Quentin ***State*** Prison, as the Respondent warden in this action, and to enter judgment accordingly.

IT IS SO ORDERED.

Dated: July 22, 2015

SENIOR DISTRICT JUDGE

Case 1:97-cv-06134-AWI-SAB Document 163 Filed 07/23/15 Page 213 of 213



## Classification

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