APPENDIX A. 1

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RODNEY BERRYMAN, SR., Petitioner-Appellant, v. JEANNE S. WOODFORD, Warden, Respondent-Appellee.	No. 02-80106 D.C. No. CV-95-05309-AWI E.D. Cal. ORDER

Before: WALLACE, McKEOWN, and FISHER, Circuit Judges

We construe Berryman's "Excerpts of Record Filed Under Seal with Court" as a motion for leave to file said excerpts under seal. So construed, the motion is granted. The Clerk shall file under seal the excerpts of record submitted by Berryman.

In his pro se "Petition for Permission to File Interlocutory Appeal Pursuant to 28 U.S.C. § 1292(a)(1); and Appeal in Light of Final Ruling by Lower Court" ("Berryman's Petition"), Berryman asserts that the district court erred in refusing to file his pro se motion for reconsideration objecting to the district court's procedure for determining whether substitution of counsel was necessary. Because Berryman will be able to raise on appeal from a final judgment the issue of whether he was prejudiced by the district court's refusal to file his pro se motion, immediate appeal is not available under either the collateral order doctrine

or 28 U.S.C. § 1292(a)(1). *See Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978) (order is not immediately appealable under collateral order doctrine unless effectively unreviewable on appeal from final judgment); *Gamboa v. Chandler*, 101 F.3d 90, 91 (9th Cir. 1996) (en banc) (order that can be effectively challenged after final judgment is not immediately appealable under 1292(a)(1)).

Nor is there is any basis for an interlocutory appeal pursuant to 28 U.S.C. § 1292(b). *See* 28 U.S.C. § 1292(b) (order appealed from must involve a controlling question of law as to which there is substantial ground for difference of opinion and, even then, it is fully within the discretion of the court of appeals to deny permission). Although Berryman cites two cases from other circuits addressing substitution of appointed counsel in 28 U.S.C. § 2254 capital proceedings, neither of these cases addresses whether a district court is required to accept pro se filings when the petitioner asserts an irreconcilable conflict with appointed counsel.[1]

As immediate appeal is unavailable, we construe Berryman's Petition as a petition for writ of mandamus. Because a district court may require a petitioner to communicate with the court through appointed counsel even when the petitioner

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[1] *See Johnson v. Gibson*, 169 F.3d 1239, 1253-54 (10th Cir. 1999); *Hunter v. Delo*, 62 F.3d 271, 273-76 (8th Cir. 1995).

asserts an irreconcilable conflict with appointed counsel,[2] the district court did not err, let alone clearly err, when it refused to file Berryman's pro se motion for reconsideration. Accordingly, the extraordinary writ of mandamus is denied. *See Bauman v. United States Dist. Court*, 557 F.2d 650, 654-55 (9th Cir. 1977). We need not, and do not, rule on the issue of whether new counsel should be appointed.

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[2] There is no evidence in the record -- sealed or unsealed -- suggesting that appointed counsel have refused to present Berryman's complaints to the district court.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RODNEY BERRYMAN, SR.,

Petitioner-Appellant,

v.

JEANNE S. WOODFORD, Warden, of California State Prison at San Quentin,

Respondent-Appellee.

No. 02-80106

D.C. No. CV-95-05309-AWI
E.D. Cal.

ORDER

Before: WALLACE, McKEOWN, and FISHER, Circuit Judges

Judges McKeown and Fisher have voted to reject the petition for rehearing en banc and Judge Wallace recommends rejection. The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to hear the matter en banc. *See* Fed. R. App. P. 35. The petition for rehearing en banc is rejected.

APPENDIX A. 2

Office of the Clerk
United States Court of Appeals for the Ninth Circuit
Post Office Box 193939
San Francisco, California 94119-3939
415-355-8000

Molly C. Dwyer
Clerk of Court

May 01, 2014

No.: 10-99004
D.C. No.: 1:95-cv-05309-AWI
Short Title: Rodney Berryman, Sr. v. Robert Wong

Dear Appellant:

This court filed your recent transmittal to this office. However, because you are represented by counsel, this court declines to entertain your filing. The court has served your filing on your counsel.

APPENDIX A. 3

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

DEC 18 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

RODNEY BERRYMAN, Sr., Petitioner-Appellant, v. ROBERT K. WONG, Respondent-Appellee.	No. 10-99004 D.C. No. 1:95-cv-05309-AWI Eastern District of California, Fresno ORDER

Before: McKEOWN, CHRISTEN, and WATFORD, Circuit Judges.

The court is in receipt of Appellant's pro se motions. Dkt. Nos. 329, 330. The Clerk shall serve copies of the pro se motions on Appellant's counsel of record. Because Appellant is represented by counsel, only counsel may submit filings, and this Court therefore declines to entertain the submissions.

Appellant is advised that counsel is vested with the authority to determine which issues should be raised on appeal. *See Jones v. Barnes*, 463 U.S. 745, 751–53 (1983).

The Clerk shall serve this order on Appellant individually at Reg. No. E-03500, San Quentin Prison, San Quentin, California 94964.

APPENDIX A. 4

TIM BROSNAN
ATTORNEY AT LAW
P.O.B. 2294
Mill Valley, CA 94941
Telephone (415) 962-7967

ATTORNEY - CLIENT COMMUNICATION: CONFIDENTIAL

May 14, 2019

MR. RODNEY BERRYMAN, E-03500
CSP-SQ
San Quentin, CA 94974

RE: *Berryman v. Warden*;

Dear Rodney:

Greetings. Gail left a voice mail, forwarding your request that we provide a copy of the clerk's Docket Text document. I apologize for any confusion - there is no "Docket Text" document. A "Docket Text" is not a document, it is simply an entry in the docket which the Clerk makes.

The Clerk's Office automatically sends an email notice to all counsel in your case whenever there is a filing in your case. When your April 9, 2019, filing was filed, the email notice from the Court stated:

> Docket Text:
> Filed Appellant Rodney Berryman, Sr. pro se motion to grant new trial under People v. Eddy. Served on 04/07/2019. Deficiency: party has CJA counsel. PANEL [11258280] (CW)

As stated above, there is no "Docket Text" document. "Docket Text" merely means that the Clerk made an entry in the Court's docket, which is the Court's file for your case.

I also checked the Clerk's docket itself; all it states is:

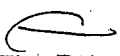
> 04/09/2019 348 Filed Appellant Rodney Berryman, Sr. pro se motion to grant new trial under People v. Eddy. Served on 04/07/2019. Deficiency: party has CJA counsel. PANEL [11258280] (CW) [Entered: 04/09/2019 03:00 PM]

You will notice that the language, "Deficiency: party has CJA counsel. PANEL," contained in the docket is exactly the same as that contained in the email which the Clerk's Office sent, announcing that your April 9, 2017, pleading was filed.

There have been no related filings since then.

Best wishes.

Very truly yours,



Tim Brosnan

cc: Saor Stetler
Enclosures
TB/tb

APPENDIX A. 5

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RODNEY BERRYMAN, SR., *Petitioner-Appellant*, v. ROBERT K. WONG, *Respondent-Appellee.*	No. 10-99004 D.C. No. 1:95-cv-05309-AWI OPINION

Appeal from the United States District Court
for the Eastern District of California
Anthony W. Ishii, District Judge, Presiding

Argued and Submitted January 30, 2019
University of San Diego, California

Filed March 27, 2020

Before: M. Margaret McKeown, Morgan Christen, and Paul J. Watford, Circuit Judges.

Per Curiam Opinion

SUMMARY*

Habeas Corpus

The panel affirmed the district court's denial of Rodney Berryman, Sr.'s federal habeas corpus petition challenging his California state murder conviction and death sentence.

In Claim 65, as to which the district court granted a certificate of appealability, Berryman alleged that he was denied his Sixth Amendment right to counsel at the penalty phase because his lawyers failed to present additional evidence of his family history and social background. The panel held that fairminded jurists could conclude that the California Supreme Court's conclusion that Berryman failed to show that he was prejudiced by any deficiency in his counsel's performance was correct.

The panel granted Berryman's motion to expand the COA as to four additional claims.

In Claims 15 and 16, Berryman alleged that his trial lawyers were ineffective in (a) failing to present expert psychological and psychiatric testimony at the guilt phase to support his argument that the killing was not premeditated or intentional and (b) failing to seek out and develop social history evidence and additional expert testimony to establish Berryman's brain disease and mental state for use at the guilty phase. The panel held that the California Supreme Court's determination that Berryman was not prejudiced by

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

counsel's failure to seek out or present mens rea evidence at the guilty phase was reasonable.

In Claims 63 and 64, Berryman asserted that his lawyer was ineffective at the guilt and penalty phases for failing to obtain the trial court's transport order and funding authorization for neurological tests. The panel held that the California Supreme Court's conclusion that the tests lacked the capacity to produce results that might have moved a juror to vote to acquit or to vote for life in prison was reasonable, and that it was therefore reasonable for the California Supreme Court to conclude that Berryman suffered no prejudice from his defense counsel's failure to seek out these tests and press this argument.

COUNSEL

Saor E. Stetler (argued), Mill Valley, California; Tim Brosnan, Mill Valley, California; for Petitioner-Appellant.

Brian R. Means (argued), Deputy Attorney General; Kenneth N. Sokoler and Brian G. Smiley, Supervising Deputy Attorneys General; Michael P. Farrell, Senior Assistant Attorney General; Xavier Becerra, Attorney General; Office of the Attorney General, Sacramento, California; for Respondent-Appellee.

OPINION

PER CURIAM:

A California jury sentenced Rodney Berryman, Sr., to death for the 1987 murder of Florence Hildreth. The California Supreme Court affirmed his conviction and sentence on direct appeal, *see People v. Berryman*, 864 P.2d 40, 48 (Cal. 1993), and summarily denied his state habeas petition. This is the appeal from the district court's denial of Berryman's federal petition for a writ of habeas corpus. We affirm.

I. Background

A. Guilt Phase

Berryman was convicted of murder with special circumstances: felony-murder-rape with the use of a dangerous weapon. *Id.* at 47. The jury heard that Hildreth, the victim, was a 17-year-old high school student. *Id.* at 48. She and Berryman were acquaintances. *Id.* Around 10:45 p.m. on the night of her death, Hildreth left one aunt's house to walk to another's. *Id.* She never reached her destination, and her body was found the next morning sprawled on a nearby dirt road. *Id.* at 48–49. Her clothes had been pulled partly off, and forensic evidence suggested that she had been sexually assaulted. *Id.* at 49. Her death was caused by a shallow stab wound in her neck, which had nicked her carotid artery. *Id.* A mark on her right cheek had evidently been left by the sole of a shoe, pressing down on her head for several minutes as she died. *Id.*

Shoe prints in the dirt at the crime scene were similar to those of Berryman's shoes, and nearby tire tracks were similar to the tracks left by the tires of Berryman's truck. *Id.*

A blood stain on his shoe was consistent with Hildreth's blood but not his own; it would have matched only 1 in 1,470 people who, like Hildreth, were African-American. *Id.* Small golden chain links found at the scene were consistent with a broken necklace found in Berryman's truck. *Id.*

Berryman told the police that Hildreth had never been in his truck, but her thumb print was found inside the passenger-door window. *Id.* He also said that he had not been on a nearby road the night of her death, but a witness saw his truck in that location. *Id.* at 48–49. Berryman appeared to know that Hildreth had been stabbed before that information was made public. *Id.* at 49.

Berryman's lawyer, Charles Soria, argued that the government's timeline did not add up and that Berryman could not possibly have been present to commit the crime. Although he argued at length that the prosecution had charged the wrong person, Soria briefly argued in the alternative that Berryman might have lost his temper after consensual sex and was guilty only of voluntary manslaughter.

B. Penalty Phase

After the jury's guilty verdict, the State offered additional aggravating evidence at the penalty phase. The jury heard that Berryman had previously been convicted of marijuana transportation and grand theft. *Id.* at 50. Two other witnesses testified to uncharged misconduct. One witness had been in a fight with Berryman in which he alleged that Berryman struck him with a tire iron. *Id.* The other witness, Berryman's father-in-law, recounted a scuffle during which Berryman hit him on the nose. *Id.*

Berryman's lawyers called twenty-one witnesses in mitigation. Many of the witnesses were friends and relatives, including Berryman's wife, siblings, and mother. Family and friends testified that Berryman was warm and loving and always peaceful with women. *Id.* at 51. The jury heard that Berryman's parents had a bad marriage and that his father was violent with his mother. *Id.* at 50. The witnesses testified that Berryman was not given enough attention and affection as a child. *Id.* The family moved often, and Berryman struggled in school. *Id.* As a teenager, he began to abuse alcohol and, after a work-related injury to the head, he began experiencing disabling headaches. *Id.*

After Berryman got married in 1986, his life improved. He and his wife had a son, and Berryman was an active participant in his father-in-law's church. *Id.* But after he lost his job, he began drinking heavily again, leading to "a precipitous downward spiral." *Id.* He and his wife separated shortly before Hildreth's murder. *Id.* at 50–51.

Two expert witnesses testified about Berryman's mental health and development. Dr. William Pierce, a clinical psychologist, diagnosed Berryman with an "alcohol induced organic disorder." *Id.* at 51. On psychological tests, he saw "consistent signs of organicity"—a term then used to describe psychological disorders with apparent physical origins, such as brain damage. Based on his observations, Dr. Pierce opined that further neurological testing was required to "confirm or disconfirm the presence of an organic mental syndrome." But he explained that he had been unable to administer the necessary tests because the Kern County hospitals would not grant him permission.

Dr. Samuel Benson, a psychiatrist, agreed that Berryman exhibited signs of "organicity." *Id.* He opined that Berryman "does, in fact, suffer from an organic mental

syndrome, that it's probably alcohol induced, but [that] other factors in addition to his consumption of alcohol" also contribute, among them "head trauma." *Id.* He testified that Berryman had sustained head trauma on other occasions, including a work-related fall from a crane or forklift, and once when he was hit with a pipe. Dr. Benson agreed with Dr. Pierce that additional testing was necessary—in particular, an electroencephalogram (EEG). This test would measure Berryman's brain activity to determine whether he was suffering from seizures. Drs. Benson and Pierce testified that these seizures could have caused Berryman to become violent and disoriented and experience blackouts. Dr. Benson would also have administered an alcohol-induced EEG, which looks for seizures specifically brought on by alcohol. He, too, testified that local hospitals refused to allow the tests.

On cross-examination, Dr. Benson agreed that he had no information that Berryman had ever experienced a blackout or a seizure or that Berryman had ever become lost or disoriented. He explained that because he was unable to perform the EEG tests, he did not know whether Berryman had a seizure disorder. He also conceded that, while an individual might be violent during a seizure episode, it would not be possible for him to commit rape.

During closing arguments, the prosecutor criticized the defense for failing to have the EEG tests performed. He offered one possible explanation for that failure: "Because as it stands, they have something to talk about. . . . They don't want that test to be performed because it will rule out [brain damage] and then they wouldn't have anything to talk about." The prosecutor argued that even if there had been tests showing brain damage, they would not have made a

difference. The experts' hypothesis, he argued, did not fit the rape-murder facts of the case.

The jury returned a sentence of death. *Id.* at 47.

C. Postconviction Proceedings

In state habeas proceedings, Berryman's new counsel presented additional mitigating evidence about Berryman's early life. This evidence included declarations from Berryman's mother and sister, who offered more details about Berryman's childhood and stated that they would have provided this information at the penalty phase if they had been asked or adequately prepared.

Berryman's lawyers also offered new evidence about trial counsel Soria's failure to obtain the scientific tests his experts had requested. Dr. Pierce stated in a declaration that he had told Soria that "further neurological testing was required to determine whether Mr. Berryman suffered from organic brain damage." Dr. Pierce suggested several tests, including an EEG and alcohol-induced EEG. He "told Mr. Soria that if further testing confirmed the existence of brain damage, this information should be used in the guilt part of the trial in addition to the penalty part of the trial."

Dr. Benson agreed that confirmation of his diagnosis required further testing—specifically, an EEG, an alcohol-induced EEG, and a Positron Emission Tomography (PET) scan. He explained that after learning the local hospitals would not perform the tests, he suggested to Soria that they have the tests performed in a different part of the State. Soria, however, told him that the court would not authorize such expensive tests to be performed outside of Kern County. Without the testing, Dr. Benson was unable to conclude with certainty that Berryman had brain damage.

Like Dr. Pierce, Dr. Benson told Soria that his testimony, especially if confirmed by testing, could be used at the guilt phase to diminish Berryman's "culpability for the killing."

Soria explained in his own declaration that he never requested a transfer order to take Berryman out of Kern County for testing. This was because he "believed at the time the court would not issue such an order." In a case two years after Berryman's, however, Soria successfully obtained transfer orders from the same trial judge to get an out-of-county EEG and PET scan for another client. Soria conceded there was "no reason why a similar order would not have issued in [Berryman's] case" had Soria sought one.

Berryman's postconviction counsel asserted ineffective assistance of counsel claims, both on direct appeal and in a state habeas petition. Berryman's conviction and sentence were affirmed on direct appeal in a reasoned opinion by the California Supreme Court. *See Berryman*, 864 P.2d at 48. The same day, the California Supreme Court summarily denied his habeas petition on the merits.

Berryman filed a federal petition for a writ of habeas corpus asserting numerous claims of error, all of which the district court denied. The district court granted a certificate of appealability (COA) as to Claim 65, Berryman's allegation of penalty-phase ineffective assistance of counsel for failure to present additional evidence of his family history and social background. On appeal, Berryman presses that issue and requests that we expand the COA to encompass fourteen other claims. We expand the COA to include four additional claims, discussed below, but otherwise deny Berryman's request. *See Hedlund v. Ryan*, 854 F.3d 557, 565 (9th Cir. 2017).

II. Discussion

Because the California Supreme Court rejected each of the claims at issue here on the merits, the Antiterrorism and Effective Death Penalty Act of 1996 applies. *See* 28 U.S.C. § 2254(d). The parties disagree whether the relevant decision is the California Supreme Court's opinion on direct appeal, as Berryman asserts, or its summary denial of his state habeas petition, as the State contends. We need not resolve that dispute because, even accepting Berryman's argument, he still cannot prevail on any of his claims.

Under § 2254(d), we must defer to a state court's decision unless it "was contrary to, or involved an unreasonable application of, clearly established Federal law," or "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). For ineffective assistance of counsel claims, the clearly established federal law is *Strickland v. Washington*, 466 U.S. 668 (1984). To succeed, Berryman must show that his counsel's performance "fell below an objective standard of reasonableness," *id.* at 688, and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *id.* at 694.

We may grant Berryman habeas relief only if the California Supreme Court's application of *Strickland* was "objectively unreasonable." *Williams v. Filson*, 908 F.3d 546, 563 (9th Cir. 2018) (internal quotation marks omitted). That means we may issue the writ only if "there is no possibility fairminded jurists could disagree that the state court's decision conflicts with [the Supreme] Court's precedents." *Harrington v. Richter*, 562 U.S. 86, 102 (2011).

A. Claim 65

Berryman alleges that he was denied his Sixth Amendment right to counsel at the penalty phase because his lawyers failed to present additional evidence of his family history and social background. The California Supreme Court held that Berryman failed to show that he was prejudiced by any deficiency in his counsel's performance. The state court concluded that Berryman did not "establish ineffective assistance in defense counsel's asserted failure to further investigate his background and character .... He [did] not demonstrate that such further investigatory efforts would have yielded favorable results. Hence, he cannot demonstrate that their omission adversely affected the outcome within a reasonable probability." *Berryman*, 864 P.2d at 78.

Fairminded jurists could conclude that the California Supreme Court's application of *Strickland* was correct. Nearly all of the "new" evidence that Berryman argues the jury should have heard was not new at all. The rest of the evidence, a fairminded jurist could conclude, would not have been sufficient to make a different result reasonably probable.

We begin with a discussion of the "new" evidence that was cumulative of evidence the jury previously heard. First, Berryman argues that his lawyers should have presented evidence that Berryman's mother "showed him little love and affection during his early formative years." But during the penalty phase the jury heard evidence concerning the emotional deficits in Berryman's relationship with his mother. Witnesses testified that his mother was largely absent, that her children did not get "the attention that [they] should have," and that Berryman was left with "a hole in the

bucket around mothering and nurturance" that continued to affect his relationship with women in adulthood.

Second, Berryman maintains that his lawyers should have presented evidence concerning his turbulent childhood. But the jury heard that Berryman's family moved often; that his father drank heavily; that Berryman developed problems with alcohol; and that he was devastated by his father's death and, for some period of time, refused to accept that his father had died.

Third, Berryman faults his lawyers for not presenting evidence that his father beat his mother in front of him and his siblings, including an incident in which his mother escaped by running into the street and was nearly hit by a car. Although Berryman's mother did not provide the specifics of any particular incident, she did testify during the penalty phase that Berryman's father was violent toward her.

Finally, Berryman contends that his lawyers should have introduced evidence that he did poorly in school, was frequently placed in special education classes, and in the third grade had an IQ score of 75, which is in the borderline intellectually disabled range. But the jury heard repeatedly during trial that Berryman had a learning disability and intellectual deficiencies, and that he did poorly in school and was placed in specialized classes.

Berryman's habeas petition does offer some new evidence that was not presented at trial. The jury did not hear that he was born prematurely, that he spent the first month of his life in an incubator, or that his father was a

womanizer.[1] This new evidence, we will assume, should have been discovered and presented to the jury. And we will assume that Berryman's lawyers should have presented some of the additional details not fully captured above, such as the details concerning his low IQ score and his father's abuse of his mother. Nonetheless, even if this evidence had been presented to the jury, it would not have significantly altered the character of the evidence supporting mitigation. Reasonable jurists could therefore conclude that admission of this evidence would not have led to a reasonable probability of a different sentence. *See Cullen v. Pinholster*, 563 U.S. 170, 200–02 (2011) (affirming a state court's finding of no prejudice notwithstanding new mitigation evidence of roughly the same strength as that presented here).

B. Claims 15 and 16

Berryman requests that we expand the COA to encompass Claims 15 and 16. Claim 15 alleges that Berryman's trial lawyers were ineffective in failing to present expert psychological and psychiatric testimony at the guilt phase to support his argument that the killing was not premeditated or intentional. Claim 16 alleges that his trial lawyers were further ineffective in failing to seek out and develop social history evidence and additional expert testimony to establish Berryman's brain disease and mental state for use at the guilt phase. We conclude that "jurists of reason could disagree" with the district court's denial of

[1] Berryman also presents affidavits from his mother and sister, both of whom state that he told them after his arrest that he was molested by two of his uncles when he was about eight years old. This evidence, however, is inadmissible hearsay. *See* Fed. R. Evid. 801(c), 802–805. The district court therefore did not consider it, and neither do we. *See* Fed. R. Evid. 1101(a)–(b).

these claims, and therefore expand the COA to cover them. *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003); *see* 28 U.S.C. § 2253(c)(2). Ultimately, though, we agree with the district court that the claims must be denied.

In rejecting these closely related claims, the California Supreme Court concluded:

> Neither does defendant establish ineffective assistance in defense counsel's asserted failure to investigate his mental state at the time of the crime or to introduce evidence thereon. Here as well, he does not demonstrate that the investigation would have yielded favorable results and hence cannot demonstrate that its omission adversely affected the outcome within a reasonable probability.

Berryman, 864 P.2d at 61 (footnote omitted). In other words, the state court determined that Berryman was not prejudiced by counsel's failure to seek out or present mens rea evidence at the guilt phase. That decision was reasonable.

Berryman argues that his lawyers should have presented expert testimony supporting the theory that, although he killed Hildreth, he did so without premeditating or forming the specific intent to kill. In support, he points to Dr. Pierce's and Dr. Benson's testimony at the penalty phase, in which they offered their diagnosis of possible organic brain syndrome, as well as both doctors' affidavits on state habeas review, in which they stated that they told Soria their findings could be helpful at the guilt phase of trial.

Trial counsel's failure to present this evidence could have prejudiced Berryman only if the argument it supported had the potential to sway a jury. But presenting this evidence during the guilt phase would have required admitting to the jury that Berryman was present at the scene, had sex with Hildreth, and delivered the fatal cut to her neck. And because the expert testimony was that it would have been impossible for Berryman to have had sex during a seizure, his counsel would have been forced to argue that he and Hildreth engaged in consensual sex and that he had the seizure only afterward. It is reasonable to assume that this argument would likely have been greeted with extreme skepticism. The fact that Hildreth was found left on a dirt road with her clothes in disarray and a shoe imprint on her face would have made it seem frivolous to argue that her killing had occurred during a seizure, or was otherwise the product of unintentional conduct. The evidence was inconsistent with the shoeprint on her face being inflicted in a momentary outburst or by accident. *Berryman*, 864 P.2d at 49 (estimating the mark took "more than one minute and perhaps as long as three to five" to make).[2]

The difficulty of persuading a jury of this theory would have been compounded by the lack of any case-specific evidence in support of it. Although his experts could have opined that it was possible for Berryman to have had a seizure and a fit of violence after consensual sex, Berryman does not suggest that he would have taken the stand to testify that that is what happened. Nor is there any physical evidence to back up the account. Berryman argues that "the absence of vaginal trauma and the victim's shoe being off

[2] The fact that Soria briefly posited the possibility of an unintentional killing as an alternative argument did not mean that he should have pursued it more vigorously.

established there was no rape, (i.e., the assault occurred after consensual intercourse, the disarranged clothing being equally consistent with hurried voluntary sexual interaction as with rape)." But the absence of vaginal trauma "establishes" nothing of the kind, especially considering that Hildreth had pelvic abrasions and a knife wound in her neck, suggesting that the knife may have been held to her throat. Whether or not the state of her shoes and clothing was "equally consistent" with rape and consensual sex, it did nothing to *support* the theory that Berryman killed her unintentionally or without premeditation.

By adopting this far-fetched theory, Berryman's lawyers would have lost the ability to argue the more straightforward theory that the police had arrested the wrong person. The circumstantial evidence tying Berryman to the scene was not insurmountable. The strongest piece of evidence was the drop of blood on Berryman's shoe, consistent with only 1 in 1,470 unrelated African-Americans. *Berryman*, 864 P.2d at 49. But Berryman had a ready reply: The blood could have come from any of Hildreth's relatives, with whom he frequently had contact. As for the fingerprint in his truck, his lawyers also had a response prepared: Even though Hildreth had never ridden in his truck, she still could have left a print by leaning against the car while talking. The straightforward innocence argument that Berryman's lawyers pursued was not a lost cause.

The California Supreme Court reasonably concluded that a mens rea defense theory would not have been reasonably probable to persuade the jury to acquit. *See* 28 U.S.C. § 2254(d)(1). Even if we assume that counsel rendered deficient performance in failing to conduct further investigation, it was eminently reasonable for the court to conclude that Berryman failed to show that the omission of

this argument adversely affected the outcome, as counsel was more likely to succeed in arguing that Berryman had not killed Hildreth at all.

C. Claims 63 and 64

Berryman also requests that we expand the COA to encompass Claims 63 and 64, which together assert that his lawyer was ineffective at both the guilt and penalty phases for failing to obtain the trial court's transport order and funding authorization for the EEG tests and PET scan. Berryman argues the tests "were necessary to support the defense experts' conclusion" that he had brain damage, including a possible seizure disorder. We again conclude that "jurists of reason could disagree" with the district court's denial of these claims, and therefore expand the COA to encompass them. *Miller-El*, 537 U.S. at 327; 28 U.S.C. § 2253(c)(2).

In denying relief as to Claims 63 and 64, the California Supreme Court stated as follows:

> [D]efendant does not establish ineffective assistance in defense counsel's asserted failure to pursue neurological testing to determine whether and to what extent he suffered from an organic mental syndrome or disorder. He does not demonstrate that such testing would have yielded favorable results. Hence, he cannot demonstrate that its omission adversely affected the outcome within a reasonable probability.

Berryman, 864 P.2d at 78. As Berryman reads this decision, the California Supreme Court denied his claim because he could not show what the results of the various tests would

have been. And because the state court had denied his requests for funding to have those tests performed, he argues that he was left in an "unreasonable catch-22," penalized for not knowing what the state court would not let him find out.

Although we agree with Berryman that a ruling on the circular ground he describes would have been unfair, the state court's use of the words "favorable results" is best understood more broadly. In the guilt-phase context, we read the California Supreme Court's reference to "favorable results" to mean test results that could help convince a juror to acquit. And in the penalty-phase context, we read "favorable results" to mean test results that could help convince a juror to vote for life—that is, results whose absence could have "affected the outcome within a reasonable probability." *Id.*

The California Supreme Court's conclusion that the tests lacked the capacity to produce results that might have moved a juror to vote to acquit (or to vote for life in prison) was reasonable. *See* 28 U.S.C. § 2254(d)(1). Berryman had been convicted of the rape and murder of a teenage girl. In the best-case scenario, the tests his experts wanted to conduct would have confirmed their diagnosis that he had brain damage. (The jury did hear Berryman's experts opine that he suffered from organic brain disease.) This argument hinges on Berryman's assumption that the tests could have confirmed that he had a seizure disorder, and that those seizures could have caused him to become violent. Even assuming the efficacy and admissibility of the testing, the tests were not capable of showing that Berryman had actually experienced seizures at any time in the past, much less that he was having a seizure when he killed Florence Hildreth. *See Pizzuto v. Arave*, 280 F.3d 949, 964 (9th Cir. 2002), *as amended*, 385 F.3d 1247 (9th Cir. 2004).

What's more, as Dr. Benson acknowledged, it would not have been possible for Berryman to commit rape if he were having a seizure. This theory therefore would have required a jury to believe that Berryman first engaged in sex with Hildreth and then had a seizure that caused him to lose control and kill her. The evidence showed, however, that she was killed by a relatively shallow cut, not by "thrashing out" or other especially violent activity that Dr. Benson described as possible in the course of a seizure. *Berryman*, 864 P.2d at 49. As discussed above with respect to Claims 15 and 16, Berryman's lawyers would likely have had great difficulty persuading the jury to accept this version of events, no matter what the test results showed. It was reasonable for the California Supreme Court to conclude that Berryman suffered no prejudice from his defense counsel's failure to seek out these tests and press this argument, either at the guilt phase or during the penalty phase.

As for the argument that obtaining conclusive proof of Berryman's alleged brain injuries might have persuaded the jury to show Berryman more leniency in sentencing, Berryman's lawyers would have faced similar challenges. The fact remains that neither Berryman nor anyone else reported that he had ever suffered a seizure, a blackout, or disorientation. And while brain damage could have manifested itself in other ways, the jury was already well acquainted with Berryman's trouble in school, alcohol abuse, head trauma, and other difficulties. Jurors knew that he had areas of relative strength: He had married, held jobs, and had a year-long period of stability in which he functioned as a good father, good husband, and dedicated member of his church. The state court reasonably concluded that, even if testing could have made the expert diagnoses invulnerable to attack by the prosecution, the fact of brain damage without further evidence of actual manifestations or

identifiable impact on Berryman's life was not reasonably likely to have made a difference in the jury's sentence.

Claims 63 and 64 are further undermined by the neurological testing that Berryman eventually obtained in 2001. In the course of his federal habeas proceeding, the district court granted permission for Berryman to receive the specialized neurological testing that Drs. Pierce and Benson requested. The 2001 test results confirm our conclusion that the California Supreme Court did not unreasonably determine that Berryman was not prejudiced by the omission of these tests at trial. First, it is unclear whether the test results would have been admissible under the then-prevailing standard for scientific evidence. In its opposition to the request for this testing in the district court, the government strenuously argued that the tests were not generally accepted in the scientific community for the purposes that Berryman's experts advocated. The government argued the tests should not be performed for that reason. In its order denying Berryman's habeas petition, the district court acknowledged the controversy regarding the admissibility of the tests and did not decide whether the test results would have met the standard for admissibility.

Second, even if the neurological test results would have been admissible, Berryman cannot establish a reasonable probability that they would have changed the outcome. Berryman's experts stated that the test results reinforced their penalty-phase testimony that Berryman had an organic brain disorder, but the state's experts strongly disagreed with their interpretation. Dr. Waxman stated that the PET scan results did not indicate temporal lobe epilepsy and went on to suggest that Berryman's expert had presented an interpretation designed to "mislead the reader." Dr. Nuwer stated that the EEG tests indicated "normal EEG brainwaves

as seen in someone who is intoxicated and drowsy." The disputed results from these neurological tests reinforce our conclusion that Berryman was not prejudiced by his counsel's failure to authorize these tests during the guilt or penalty phase.

* * *

We therefore affirm the district court's denial of Berryman's habeas petition as to each of his claims. Berryman's requests for judicial notice (Dkt. Nos. 190, 256) are GRANTED.

AFFIRMED.

APPENDIX "B"

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IN THE UNITED STATES DISTRICT COURT FOR THE

EASTERN DISTRICT OF CALIFORNIA

RODNEY BERRYMAN, Sr., Petitioner, vs. ROBERT K. WONG, as Acting Warden of San Quentin State Prison, Respondent	Case No. 1:95-cv-05309-AWI DEATH PENALTY CASE ORDER DENYING CLAIM 18; DENYING PETITION FOR WRIT OF HABEAS CORPUS; AND GRANTING CERTIFICATE OF APPEALABILITY

This matter is before the Court following further evidentiary development and briefing by the parties concerning the merits of Claim 18. Having considered all the evidence presented by Petitioner Rodney Berryman, Sr. ("Berryman") in support of Claim 18 as well as the parties' respective points and authorities in support of and in opposition to Claim 18, the Court denies relief. With the resolution of Claim 18, there are no unresolved claims remaining in Berryman's First Amended Petition (the "Petition") (Doc. 147) and therefore the Court denies Berryman's petition for a Writ of Habeas Corpus. With the denial of the writ, the Court grants a certificate of appealability on Berryman's allegations that trial counsel provided constitutionally ineffective representation at penalty proceedings for failure to develop and present mitigating evidence, as alleged in Claim 65 of the Petition.

I. Background

This case arises from Berryman's conviction and death sentence for the rape and murder of 17 year old Florence Hildreth. On July 10, 2007, the Court issued a 272-page Memorandum Order (Doc. 351) denying relief and Berryman's request for an evidentiary hearing on all claims and allegations with the exception of Claim 18, which alleged one of his two trial attorneys, Charles Soria, slept during

crucial portions of the trial. The controlling authority on the issue of a sleeping attorney is *Javor v. United States*, 724 F.2d 831, 833 (9th Cir. 1984), which holds that "when an attorney for a criminal defendant sleeps through a substantial portion of the trial, such conduct is inherently prejudicial and thus no separate showing of prejudice is necessary." Although the Court was not convinced from reviewing the record and the supporting declaration of Juror David Armendariz that Mr. Soria actually did sleep for "a substantial portion of the trial," further development was authorized as to Mr. Soria's trial conduct, demeanor, and attentiveness, with permitted inquiries directed to actual jurors (in addition to Mr. Armendariz), the trial judge, the trial prosecutor, any reliable spectators, and any other trial participants. Doc. 351: 272. The Court left open the possibility that the presence of Mr. Soria's co-counsel, George Peterson, may have undermined the existence of inherent prejudice discussed in the *Javor* holding, since *Javor* involved only one counsel for the defendant whereas Berryman had two attorneys. No further evidentiary development was authorized on this collateral inquiry.

Thereafter, the parties conducted informal discovery on the issue of whether Mr. Soria slept during a substantial portion of the trial. The result of these informal discovery and investigative efforts were presented to the Court in a Joint Status Report filed April 7, 2008 (Doc. 364). The parties interviewed jurors Marilyn Newbles, Mary Moon, Steven Greenwood, Gene Bibb, and David Armendariz. Jurors Newbles, Moon, Greenwood, and Bibb were interviewed by telephonic conference call on January 25, 2008. A fifth former juror, Michael Carr, failed to answer his telephone on that day, although the interview was pre-arranged.[1] Attempts to locate and contact other jurors (not including Mr. Armendariz) were unsuccessful. Mr. Armendariz was interviewed separately by telephonic conference on February 21, 2008. Berryman's federal habeas corpus co-counsel, Jessie Morris, Jr., obtained a supplemental declaration from Mr. Soria, which Mr. Soria executed on February 16, 2008. Efforts to contact former Deputy District Attorney (now retired Judge) Romero Moench initially were unsuccessful, but the Warden was able to secure Judge Moench's declaration on September 25, 2008 and present it with his opposition points and authorities. The presiding trial judge, Judge Arthur

[1] Neither party indicated whether Mr. Carr was re-contacted.

Wallace, consented to be interviewed on March 6, 2008. One of the court reporters,[2] Minnal Humman, consented to be interviewed by Deputy Attorney General Brian Means, counsel of record for Respondent Robert K. Wong, as Acting Warden of San Quentin State Prison (the "Warden"). The other court reporter, the bailiff, and the court clerk were not located. No testimony from Mr. Peterson was developed from Mr. Peterson because Berryman's litigation team was not successful in getting him to return telephone calls.

Despite having been given permission to conduct discovery on the issue of Mr. Soria's somnolence pursuant to Rule 6 of the Rules Governing § 2254 Cases in the July 10, 2007 Order, Berryman requested leave of the Court to conduct depositions on this subject as well as on the issue of the extent of Mr. Soria's participation during the penalty phase trial proceedings. Berryman proposed to depose Mr. Armendariz and Mr. Peterson on the subject of Mr. Soria's attentiveness. He proposed to depose Mr. Soria, trial investigator Ed Beadle, and Mr. Peterson on the extent of Mr. Soria's participation during Berryman's penalty phase proceedings. The Court denied leave for Berryman to explore the extent and scope of Mr. Soria's participation in the penalty phase trial proceedings through the testimony of Mr. Soria, Mr. Beadle, or Mr. Peterson, but reconfirmed Berryman's entitlement to depose Mr. Armendariz and Mr. Peterson on the issue of Mr.Soria's attentiveness or somnolence.

Depositions of Mr. Armendariz and Mr. Peterson were conducted on January 16, 2009 and January 22, 2009, respectively. Berryman filed his points and authorities in support of Claim 18 on April 1, 2009. The Warden's opposition and offer of Judge Moench's declaration were filed on April 15, 2009. Berryman's reply points and authorities were filed on May 12, 2009.

II. Summary of the Facts Relevant to Claim 18

Claim 18 in the Petition alleges simply that Berryman's conviction, death eligibility, and death sentence are unlawful and unconstitutional because Mr. Soria was asleep during "crucial portions" of his trial. As a result, Berryman claims he was denied effective assistance of counsel, his right to confrontation and his right to cross-examination. Doc. 147: 33. The evidence pertaining to this claim

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[2] It's not clear from the Joint Statement whether there were two or three court reporters; both numbers are given.

consists of statements elicited from Mr. Armendariz, other jurors, the trial judge, one of the two court reporters, Mr. Soria, Mr. Peterson, and the prosecutor, retired Judge Moench.

A. David Armendariz

Berryman's initial offer of proof supporting Claim 18 was a declaration signed by Mr. Armendariz and filed with the Court on October 10, 2001. Mr. Armendariz averred:

> . . . I noticed that Soria had a tendency to nod off at times. His arm resting on the table occasionally slid off. It didn't happen all the time, usually when the Deputy DA was talking. I don't believe this fact had an impact on the jury's deliberations or their confidence in what Soria told us, but we all noticed it.

Armendariz Decl., ¶ 3.

The April 7, 2008 Joint Status Report provides a summary of Mr. Armendariz's statements during his February 21, 2008 telephonic conference with the parties' attorneys:

> Mr. Armendariz reiterated that he observed Soria with his hand on his chin, and his arm would slip off the table. This happened several times. His eyes were not fully shut, but not fully open. When asked whether he could be certain whether Soria was asleep, Mr. Armendariz responded, "no." Mr. Armendariz was not certain what parts of the trial this occurred in, but he associated at least one occurrence with the penalty phase of the trial. He remembers that the subject was discussed with other jurors.

Doc. 364: 2

At his deposition, under questioning by Berryman's counsel, Mr. Armendariz admitted there could have been four to seven times he might have observed Mr. Soria with this head on his hand and possibly with his eyes closed. Mr. Soria's conduct was a topic of discussion among the jurors during breaks in the proceedings, but not during deliberations. Armendariz Depo: 10-11. Later, he said that the discussion with other jurors about Mr.Soria really consisted merely of passing comments to two female jurors. *Id.*: 36. Both of these jurors agreed with Mr. Armendariz that Mr. Soria appeared to have nodded off. *Id* at 37.

Mr. Armendariz could not remember whether Mr. Soria's somnolence occurred during the guilt phase or the penalty phase of the trial. *Id.*: 13. He clarified, however, that Mr. Soria did not appear to be in a state of somnolence for more than a "couple of seconds" at a time. Mr. Soria appeared fatigued or tired. *Id.*: 14. Later Mr. Armendariz testified: "It's my personal opinion that he [meaning Mr. Soria] at times was somewhat - - for some short periods of - - like he [Mr. Soria] said, a fleeting moment

inattentive, I would say." *Id.*: 17. In this passage, Mr. Armendariz was referring to Mr. Soria's declaration (summarized below). Mr. Armendariz agreed with Berryman's counsel that Mr. Soria was "at least a little inattentive," but could not say whether he was asleep or even if his eyes were closed for more than a fleeting moment, if his eyes were closed at all. *Id.* He attributed the appearance of Mr. Soria's eyes possibly being closed on his (Mr. Soria's) husky, chubby frame. *Id.* 24-25. On cross examination, he clarified that when Mr. Soria leaned his chin on his had, it appeared his eyes were shut for "a little nanosecond or whatever." *Id.*: 27.

During examination by the Warden's counsel, Mr. Armendariz testified he thought Mr. Soria's head on the hand poses occurred three to five times rather than six to seven times. *Id.*: 22. Mr. Armendariz's recollection of the length of the entire trial is inconsistent with the actual length of the proceedings. Whereas Mr. Armendariz testified he thought the entire trial was conducted "within a week," *id.*: 24, in fact, opening statements at the guilt phase commenced on September 26, 1988, a guilt verdict was returned on October 18, 1988, the penalty phase evidence was given from October 24 through 27, 1988, and deliberations proceeded from October 27 through 28, 1988.

B. Other Jurors

According to the April 7, 2008 Joint Status Report, none of the other jurors contacted and telephonically interviewed, Marilyn Newbles, Mary Moon, Steven Greenwood, and Gene Bibb, "remembered seeing anyone sleeping or nodding off during the trial." Doc. 364: 2.

C. The Trial Judge

The parties reported in the Joint Status Report that the trial judge, the Honorable Arthur E. Wallace, consented to an interview. "Ask if he observed Mr. Soria or any other attorney sleeping or nodding off, Judge Wallace stated that he 'certainly didn't notice that.' Had he noticed it, he stated he would have called the attorney's attention to such conduct, and made sure that he was awake." Doc. 364: 4.

D. One of the Trial Court Reporters

The court reporter located spoke with the Warden's counsel. She reported "she did not see anyone asleep during the trial, including defense counsel. She commented, however, that she would not

necessarily have seen anyone sleeping since she frequently looks down when she is reporting." Doc. 364: 4.

E. Romero Moench

Judge Moench averred in his declaration (attached to Doc. 405) he "did not observe Mr. Soria sleeping, or appearing to fall asleep, at any time during the penalty phase of trial." Moench Decl.: 2. He added that he was sitting in a position throughout the trial that had Mr. Soria fallen asleep, he would have been aware of that fact. *Id.*

F. Charles Soria

In Mr. Soria's declaration, appended to the Joint Status Report, he avers he was appointed as lead counsel in Berryman's case on September 11, 1987, and that on April 6, 1988, George Peterson was appointed as co-counsel. He avers that he and Mr. Peterson "divided tasks for the trial," with Mr. Soria taking "responsibility for the guilt phase of the trial," and if that phase resulted in a guilty verdict with special circumstances, "attorney Peterson would then proceed with presentation of the penalty phase." Regarding the allegation of his somnolence, Mr. Soria avers: "I deny falling asleep." To bolster his position he states: "I was fully engaged in the trial proceedings, particularly the guilt phase." Doc. 364: 5. He explains that during the penalty phase: "Peterson was the active participant, and I adopted the passive role of second chair during his presentation." He explains, "[t]here were no assigned tasks for me during the penalty phase presentation, [as] George Peterson handled that portion." Because he was angry with the jury members after the guilt proceedings resulted in a guilty verdict, Mr. Soria states he avoided eye contact with the jurors, but the "change in eye contact and [his] change in activity was not inattention during the trial." *Id.*: 7.

Although Mr. Soria was tired during the penalty phase trial, he "never fell asleep," and any allegation that his headed nodded as it rested on his hand "would have been nothing more than a flicker of fatigue with instantaneous alertness." Continuing, he avers, "Any momentary head nod during the penalty phase would have been so fleeting it never approached inattention or sleep. [He] did not fall asleep during the trial in spite of any observed fatigue." *Id.* He feels that his presence really was unnecessary at the penalty phase proceedings and that reading the daily transcripts would have sufficed,

but he was present and ready to assist as necessary. He concludes: "The fact of my inactivity is not inattention on my part. I was attentive." *Id.*: 8.

G. George Peterson

Mr. Peterson testified that he may have seen Mr. Soria lean his chin on his hand during the trial, but he could not say how many times he observed this and he never observed that Mr. Soria's eyes were closed. Peterson Depo: 8. Later, he testified he could not honestly say whether Mr. Soria rested his head on his hand during the trial. *Id.*: 15. He was never aware Mr. Soria was asleep or might be asleep during the trial proceedings or that Mr. Soria's eyelids might be drooping. *Id.*: 16. He conceded, however, that Mr. Soria's "dozing," as described by Mr. Armendariz, could have occurred without his (Mr. Peterson's) awareness. *Id.*: 19. On cross examination, Mr. Peterson further clarified that he was under the impression Mr. Soria was attentive throughout the trial. The idea that Mr. Soria fell asleep or became inattentive during any portion of the trial is inconsistent with Mr. Peterson's observations of Mr. Soria's trial performance. *Id.*: 21.

In Berryman's case, Mr. Soria was lead counsel. Mr. Peterson was associated in as second counsel. *Id.*: 9, 17. Mr. Soria was involved in all the decision-making for the case from start to finish. *Id.*: 17. When Mr. Peterson was asked to come into a death penalty case as second counsel, he generally handled the penalty phase. *Id.*: 10. He believes this arrangement for dividing the labor is likely the way the Berryman case was handled. *Id.*: 10-11. Mr. Soria' custom for communicating with Mr. Peterson while Mr. Peterson was trying the case was to be very discreet, tapping Mr. Peterson on the arm and making suggestions or providing Mr. Peterson with various objects. Mr. Soria did not interrupt Mr. Peterson when Mr. Peterson was introducing exhibits or questioning witnesses. *Id.*: 12, 18.

III. The Parties' Respective Arguments

The parties agree on neither the import of the foregoing evidence nor the application of controlling law.

A. Berryman's Contentions

Berryman argues the foregoing evidence establishes that Mr. Soria did sleep during portions of the trial, based on his own admission in his declaration and in Mr. Armendariz's observation. The somnolence would have occurred during the penalty phase (while Mr. Peterson was trying the case) and

possibly also during the guilt phase while the prosecutor was engaged in cross examination (or talking). Berryman contends that the statements of other witnesses at the trial should be discounted because they were not actually looking at Mr. Soria. Since Mr. Soria appeared to Mr. Armendariz to be dozing off and Mr. Soria, himself, admitted that his conduct may have given the appearance he was sleeping, a dereliction of duty at a capital trial occurred. Berryman argues that an awake attorney does not appear to be dozing.

Berryman compares Mr. Soria's conduct with that of the defense lawyers in *Javor v. United States*, 724 F.2d 831 (9th Cir. 1984), *Tippins v. Walker*, 77 F.3d 682 (2d Cir. 1996), and *Burdine v. Johnson*, 262 F.3d 336 (5th Cir. 2001), where the lawyers were asleep or appeared to be asleep during portions of the trials. Because an attorney's somnolence essentially deprives a defendant of counsel guaranteed under the Sixth Amendment, the conduct amounts to structural error under *Arizona v. Fulminante*, 499 U.S. 379, 407 (1991), requiring no prejudice analysis. *Javor*, 724 F.2d at 834; *Tippins*, 77 F.3d at 686-86; *Burdine*, 262 F.3d at 349.

He argues that the duration of sleep in *Javor* was only momentary.

B. The Warden's Contentions

In contrast, the Warden maintains there is no evidence that Mr. Soria fell asleep at Berryman's trial and that even if Mr. Soria was inattentive to the proceedings at times, Berryman was not prejudiced as a result. The Warden also urges the Court to reject Claim 18 because the California Supreme Court previously denied the same allegations on the merits and on procedural grounds and Berryman has not demonstrated that the state court adjudication was contrary to or an unreasonable application of clearly established United States Supreme Court precedent, 28 U.S.C. § 2254(d)(1). Finally, the Warden argues that because the Supreme Court has not "squarely addressed" whether presumed prejudice for one sleeping attorney in a case like *Javor* applies where the defendant is represented by two attorneys, relief is not available, citing *Knowles v. Mirayance*, ___ U.S. ___, 129 S.Ct. 1411 (2009)

IV. Analysis

In a case such as this, where the evidence in support of the petitioner's claim was adduced during federal habeas corpus proceedings, AEDPA deference under 28 U.S.C. § 2254(d)(1) does not apply.

Killian v. Poole, 282 F.3d 1204, 1208 (9th Cir. 2002).[3] The only factual issue to be resolved is whether Mr. Soria was asleep "through a substantial portion of the trial." *Javor*, 724 F.3d at 833. If so, "such conduct is inherently prejudicial and thus no separate showing of prejudice is necessary." *Id.* If not, Berryman's Claim 18 reverts to a standard ineffective assistance of counsel claim under *Strickland v. Washington*, 466 U.S. 668 (1984), and he must establish both deficient performance and prejudice. *Id.* at 687.

Berryman posits that because no one can be sure Mr. Soria actually was asleep during portions of the trial, since at the very least he gave the appearance of being asleep on three to five occasions, his case comes within the holding of *Javor*, prejudice is presumed and relief must be granted. This negative inference approach discards Berryman's burden of presenting evidence showing that Mr. Soria was asleep during a substantial portion of the trial. Whether Mr. Soria admits that his fatigued appearance could have given an onlooker the impression he was asleep is beside the point. He adamantly denied being asleep at all during the trial. Mr. Armendariz's observations of fleeting inattentiveness in Mr. Soria also do not come close to demonstrating somnolence during "a substantial portion of the trial" let alone any portion of the trial. Observing Mr. Soria's eyes partially closed three to five times during a trial that lasted from September 18 to October 28, 1988 does not meet the "substantial portion" threshold. Berryman has not met his burden. The presumed prejudice standard under *Javor*, does not apply;[4] Berryman must satisfy both the deficient performance and prejudice requirements of *Strickland*.

In the July 10, 2007 Order the Court previously chronicled omissions in the trial performance of Messrs. Soria and Peterson, but was not able find any of those omissions singularly or cumulatively prejudicial.

1. Failure of trial counsel to note guilt phase pre-instructions that the rape death eligibility special circumstances could be predicated on attempted *or* completed rape (Claims 19 and 52);

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[3] The Warden acknowledges this controlling authority in his opposition brief and still presses his case for AEDPA deference.

[4] Because of this finding, the Court is not called upon to determine whether Mr. Peterson's presence and participation had an impact on the presumed prejudice standard.

2. Failure of trial counsel to object to Mr. Moench's summation at the guilt and penalty phases that the pathologist opined Berryman stood on Ms. Hildreth's face for three to five minutes as she lay bleeding to death (when in fact the pathologist testified Ms. Hildreth's survival time after being stabbed was three to five minutes) (Claims 8, 29, 75);

3. Failure of trial counsel to object to Mr. Moench's misstatement about the order of deliberations on degrees of murder during guilt phase summation (Claims 8, 37);

4. Failure of trial counsel to object during penalty proceedings to testimony elicited from Berryman's older brother Ronald Berryman, Jr., and other character witnesses during Mr. Moench's cross examination about the facts leading to Berryman's prior felony conviction for transporting marijuana (i.e., that Ronald, Jr. and Berryman were selling marijuana to high school students) (Claims 8, 14);

5. Failure of trial counsel to object to testimony of David Perez during penalty proceedings that while he was being assaulted by Berryman and others, someone yelled "L.A. Cryps"(Claims 8, 61);

6. Failure of trial counsel to object to Mr. Moench's cross examination of Berryman's character witnesses during penalty proceedings that Berryman forced Ms. Hildreth to orally copulate him (Claims 8, 54);

7. Failure of trial counsel to object to testimony about Berryman's extra-marital affairs during cross examination of Berryman's character witnesses (Claim 14);

8. Failure of trial counsel to object to Mr. Moench's references to Charles Manson and Sirhan Sirhan during his cross examination of psychologist expert Dr. William Pierce (Claim 58);

9. Failure of trial counsel to object to Mr. Moench's repeated reference to ascending and descending degrees of psychological impairment (suggesting that Berryman was not impaired) during penalty phase cross examination of Dr. Pierce (Claim 16);

10. Failure of trial counsel to object to Mr. Moench's penalty summation that Berryman's psychologist expert, Dr. William Pierce, opined that Berryman was amoral (when in fact Dr. Pierce testified Berryman had exhibited *asocial* behavior) (Claim 8);

11. Failure of trial counsel to object to Mr. Moench's penalty summation that Berryman's philandering was a factor in aggravation of his sentence (Claim 8).

12. Failure of trial counsel to object to Mr. Moench's penalty summation that Berryman struck Mr. Perez with a tire iron while others were holding him (when in fact there was no evidence any of Mr. Perez's attackers were holding him when Berryman struck him) (Claims 95, 96)

One additional missed objection to alleged prosecutorial misconduct mentioned in Claim 18 but not discussed in connection with other claims involved Mr. Moench's argument on penalty summation that Berryman obtained a gun after Ms. Hildreth's death was announced and intended to shoot up the house of a family friend (of Ms. Hildreth) to create a diversion. *See* July 10, 2007 order, Part III.B., pp. 29-30. The Court previously observed there was no evidence supporting Mr. Moench's statement in this regard. Although the argument grossly overstated the evidence (that Berryman had asked a friend for a gun, but didn't in fact obtain one), it was not the linchpin of the prosecution case and was mentioned only once. Far more emphasized by Mr. Moench and damaging to Berryman were the arguments documenting his escalating violence towards others and determination to get his way, even when confronted with Ms. Hildreth's ultimately ineffectual resistance to his sexual advances. None of the omissions potentially or actually attributable to Mr. Soria's appearance of sleepiness and admitted tiredness at the penalty phase, either singularly or cumulatively satisfy the prejudice prong of the *Strckland* analysis. Had Mr. Soria and Mr. Peterson made every objection Berryman argues they should have made the result of the trial proceedings, both at guilt and at penalty, would not have been different. Claim 18 is denied on the merits.

V. Certificate of Appealability

Effective December 1, 2009, Rule 11(a) of the Rules Governing § 2254 Cases charge district courts with issuing or denying a certificate of appealability ("COA") when entering a final order adverse

to a petitioner for a writ of habeas corpus. The standard for granting a COA under 28 U.S.C. § 2253(c)(2) is a "substantial showing of the denial of a constitutional right." This, in turn, requires a "showing that reasonable jurists could debate whether . . . the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *Sassounian v. Roe*, 230 F.3d 1097, 1101 (9th Cir. 2000). Meeting this standard is not onerous. Rather, the standard "is relatively low." *Jennings v. Woodford*, 290 F.3d 1006, 1010 (9th Cir. 2002); *Beardslee v. Brown*, 393 F.3d 899, 901-02 (9th Cir. 2004). For the Court to issue a COA, Berryman "need not show that he should prevail on the merits," *Barefoot v. Estelle*, 463 U.S. 880, 893, n. 4 (1983), but must meet the threshold requirement of showing that reasonable jurists could debate whether the claims should have been resolved differently or that the issues presented deserve encouragement to proceed further. *See Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003).

The Court has carefully reviewed the July 10, 2007 Order to determine which if any of Berryman's claims meet this standard. Except for Claim 65 alleging ineffective assistance of counsel failure to uncover evidence of Berryman's dysfunctional family history, Berryman has not met the "relatively low standard" for issuance of a COA. As advanced in these federal proceedings, Berryman claims extensive mental impairments and deficiencies. He is said to suffer from permanent pre-existing mental disorders, severe mental and emotional impairments, the pervasive effects of organic brain disease with resulting limited intellectual and cognitive capacity, overwhelming developmental trauma including neglect, abandonment, emotional abuse, sexual abuse, plus, from the death of his father, post-traumatic stress disorder, depression, paranoia, and substance abuse. The Court has accepted as true evidence that Berryman was born pre-maturely, the second child of teenage parents who were unprepared and unqualified for parenthood. The Court recognized that the instability of the parental relationship, the moving around, the joblessness of the father, the violence between the parents, and their ultimate separation would take a toll on the children. Berryman's father, in particular was a poor role model with his substance abuse and womanizing. The Court found that Berryman's poor academic achievements also must have had a role in his failures in the employment world as well as in his inter-personal relations. His past injuries, including from an industrial accident and the incident where his

wife struck him on the head with a metal flashlight also likely left him with residual headaches, perhaps coupled with his well-documented excessive drinking. The Court's impression of Berryman is that he was a young man with a poor social foundation who made bad choices and then made more bad choices escalating into violent outbursts occasioned by those choices, including the assault on motorist David Perez, punching his father-in-law in the nose, continued drinking, not getting help, not obtaining regular employment, trying to maintain multiple simultaneous intimate relationships, and running away from his problems. The Court considered proffered, contested evidence from both Berryman and the Warden that he (Berryman) suffered from a seizure disorder caused by either excessive alcohol consumption, his injuries (particularly his head injury), or both. However, the Court rejected the notion that Berryman suffered a seizure, or that a jury fully informed of all the evidence would have found he suffered a seizure at the time of his fatal sexual assault on Ms. Hildreth. The Court further rejected Berryman's allegation that the penalty case was "close." Neither the length of the deliberations nor any juror conduct supported this allegation. Finally, the Court rejected the contention that Berryman had been sexually abused by two of his mother's younger brothers when he (Berryman) was a child. The foundational evidence supporting this contention was derived from his mother's and sister's respective declarations. Berryman was said to have revealed the fact of this childhood molestation while he was in the Kern County Jail awaiting trial for the present offence. The declaration testimony of his mother and sister lacked reliability, corroboration, and first-hand personal knowledge. It also was based on unexcepted hearsay.

The COA as to Claim 65 is granted based on the Court's rejection of Berryman's alleged childhood molestation, which Berryman has alleged contributed to his compromised mental state the night he assaulted Ms. Hildreth. The Warden did not object to the sister's or mother's respective declarations and some members of the Ninth Circuit Court of Appeals believe "[t]here is something very wrong with the [district] court sua sponte – and selectively – raising an objection that both parties have bypassed." *Ayers v. Pinholster*, ___ F.3d ___, ___, n. 12, 2009 WL 4641748, *51, n. 12 (9th Cir. Dec. 9, 2009) (Kozinski, J., dissenting). The COA further is granted in light of 9th Circuit pronouncements that sentencers must not be precluded from considering, and district courts must not reject, mitigating evidence even though the crime is not attributable to that mitigating evidence. *Schad v. Ryan*, 581 F.3d

1019, 1036 (9th Cir. 2009);, *Lambright v. Schriro*, 490 F.3d 1103, 1114-16 (2007); *Hamilton v. Ayers*, 583 F.3d 1100, 1132 (2009); *but compare, Boyde v. California*, 494 U.S. 370, 382 (1990) ("Evidence regarding social background and mental health is significant, as there is a 'belief, long held by this society, that defendants who commit criminal acts that *are attributable* to a disadvantaged background or to emotional and mental problems, may be less culpable than defendants who have no such excuse'" (emphasis added)).

VI. Judgment

The Clerk is directed to enter judgment forthwith.

IT IS SO ORDERED.

DATE: January 15, 2010

/s/ Anthony W. Ishii
Anthony W. Ishii
United States District Judge

APPENDIX "C"

FILED

AUG 20 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RODNEY BERRYMAN, Sr., Petitioner-Appellant, v. ROBERT K. WONG, Respondent-Appellee.	No. 10-99004 D.C. No. 1:95-cv-05309-AWI Eastern District of California, Fresno ORDER

Before: McKEOWN, CHRISTEN, and WATFORD, Circuit Judges.

The panel unanimously votes to deny the petition for panel rehearing and the petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc, and no judge requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for panel rehearing and rehearing en banc, filed July 8, 2020, is DENIED.