> No abuse of discretion appears. [Petitioner's] application, consisting of little more than a bare assertion that second counsel was necessary, did not give rise to a presumption that a second attorney was required; he presented no specific, compelling reasons for such appointment. Nor does the fact that counsel became ill during the guilt phase of trial demonstrate error in denying the requests months earlier; the illness was not anticipated. Indeed, counsel, whose earlier application was denied without prejudice, did not renew the request for second counsel; his illness was accommodated by a brief continuance of the trial.

*Id.* In a footnote, the California Supreme Court noted that Petitioner further claimed that "the summary denial of his application for second counsel . . . violated his rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution . . .." *Id.*, at 448 n.1. The state court rejected this claim, holding that "[t]he points are lacking in merit. The superior court did not abuse its discretion; there is thus no predicate error on which to base the constitutional claims." *Id.*

As an initial matter, Petitioner has made no showing that the United States Supreme Court has recognized that the right to receive the assistance of two trial counsel in capital cases is a liberty interest protected by the Fourteenth Amendment. *See Carey v. Musladin*, 549 U.S. 70, 77 (2006) ("Given the lack of holdings from this Court regarding the [issue in dispute,] . . . the state court's decision was not contrary to or an unreasonable application of clearly established federal law."); *Brewer v. Hall*, 378 F.3d 952, 955 (9th Cir.) ("If no Supreme Court precedent creates clearly established federal law relating to the legal issue the habeas petitioner raised in state court, the state court's decision cannot be contrary to or an unreasonable application of clearly established federal law.") (citation omitted), *cert. denied*, 543 U.S. 1037 (2004). Further, no United States Supreme Court authority has clearly established Petitioner's

contention that the erroneous denial of second counsel in a capital case is structural error. (*See* Ptr's. Opp., at 112 (conceding that "the [United States] Supreme Court has not squarely confronted an assertion of structural error for failure to appoint a second counsel in a capital case . . .")).

In addition, Petitioner received all he was entitled to under state law. The California Supreme Court's factual findings that Petitioner's application "consist[ed] of little more than a bare assertion that second counsel was necessary," and that "he presented no specific, compelling reasons for such appointment," 24 Cal. 4th at 447, are reasonable in light of the state court record. (*See* 3 C.T. 901-05 (Petitioner's "Confidential Application fo Appointment of 2nd Counsel," including the conclusory declaration of Petitioner's trial counsel); 3 C.T. 906-910 (trial counsel's second application); 1 R.T. 31-32 (counsel's oral argument)). Thus, Petitioner was not entitled to invoke the state law "presumption that second counsel was necessary," 24 Cal. 4th at 447, and the trial court's action denying second counsel was proper under state law. *Cf. Harris v. Vasquez*, 949 F.2d 1497, 1523 (9th Cir. 1990) (petitioner was not entitled to effective psychiatric assistance under Cal. Pen. Code § 949.7: "Harris's application for funds to hire psychiatrists was granted in the state court. Thus, whatever due process productions are provided by section 987.9 were fulfilled. Harris cannot seek relief in his habeas petition on this ground."), *cert. denied*, 503 U.S. 910 (1992).

Petitioner contends in his opposition to Respondent's motion, without citation to evidence or the record, that his case "involved the arbitrary denial [of second counsel] based upon contractual exclusion and a desire to avoid depleting the county general fund without regard for considerations of fundamental fairness and need as is required by *Keenan* and §987(d)." (Ptr's. Opp., at 109; *see* Am. Pet., at 37, 43). Where, as here, the state statute "confer[s] a benefit 'beyond the minimum requirements'" of the Constitution, the state "retain[s] discretion to design and implement [its] own system[] . . .," *Rivera v. Illinois*, 556 U.S. 148, 157-58 (2009) (internal citations omitted), and may, therefore, include financial considerations as part of the calculus in deciding

whether to grant second counsel in capital cases. In any event, assuming such financial considerations are improper as a matter of state law, such a violation of the statute does not give rise to a federal Constitutional violation. *Id.*, at 158.

The California Supreme Court's rejection of Petitioner's federal due process claim based on the trial court's denial of his request for second counsel was neither contrary to nor an unreasonable application of *Hicks*. Claim 1 does not survive review under 28 U.S.C. § 2254(d) and must therefore be DENIED.

**(b) *Equal Protection (Claim 2)***

The California Supreme Court's denial on the merits of the state court analogue to claim 2, that the trial judge's denial of Petitioner's request for second counsel violate equal protection, was not contrary to or an unreasonable application of United States Supreme Court authority, nor did it depend upon an unreasonable finding of facts in light of the evidence presented to the state court. 28 U.S.C. § 2254(d).

"The Equal Protection Clause directs that 'all persons similarly circumstanced be treated alike.'" *Plyler v. Doe*, 457 U.S. 202, 216 (1982) (*quoting F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)). "But so too, '[t]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same.'" *Plyler*, 457 at 215 (*quoting Tigner v. Texas*, 310 U.S. 141, 147 (1940)).

Petitioner makes two equal protection arguments in Claim Two: First, he claims California law regarding the appointment of second counsel improperly discriminates between defendants with competent attorneys who make adequate showings in support of requests for second counsel, and defendants with incompetent attorneys who fail to make adequate showings. (Am. Pet. at 53-56). Petitioner contends entitlement to second counsel under state law "relies not upon the merits of the claimed need but upon the ability and skill of appointed counsel to analyze the circumstances of the case and to adequately articulate that need in writing such as to give rise to the Keenan presumption" and that this distinction between defendants with skilled and unskilled

attorneys bears no legitimate purpose and violates equal protection. (Am. Pet. at 54.)

Second, Petitioner contends California law violates equal protection by failing to furnish sufficient, specific standards on the appointment of second counsel. (Am. Pet. at 56). In his motion for evidentiary hearing, Petitioner argues that this creates disparities between the Pomona Judicial District and other districts of Los Angeles County. (Ptr's. Evid. H. Mot., at 32).

Petitioner has failed to identify any clearly established United States Supreme Court law which supports either of his arguments. What law exists suggests that neither of Petitioner's equal protection arguments has merit, especially where, as here, Petitioner's showing in state court of need for appointment of second counsel was conclusory. *Caldwell v. Mississippi*, 472 U.S. 320, 323 n.1 (1985) ("Given that petitioner offered little more than undeveloped assertions that the requested assistance would be beneficial, we find no deprivation of due process in the trial judge's decision" not to appoint "various experts and investigators" to assist the petitioner); *see also Bell v. Epps*, 2008 WL 2690311, at *10 (N.D. Miss. Jun. 20, 2008) ("[T]hough it may be practice to appoint two attorneys in a capital case, such is not constitutionally required.") (*citing Bell v. Watkins*, 692 F.2d 999, 1009 (5th Cir. 1982) (appointment of two attorneys not dictated by Constitution); *Hatch v. Oklahoma*, 58 F.3d 1447, 1456 (10th Cir.1995) (a petitioner's equal protection rights were not violated when he was denied appointment of second counsel at trial even though co-defendant was appointed co-counsel where "the judge's asserted justification for the discrepancy [was] perfectly legitimate and rational.") (overruled in part on other grounds by *Daniels v. United States*, 254 F.3d 1180, 1188 n. 1 (10th Cir.2001)), *cert. denied*, 517 U.S. 1235 (1996); *cf. Collins v. Algarin*, 1998 WL 10234, at *7-*9 (E.D. Pa. January 09, 1998) (limits on attorney's fees in the Prison Litigation Reform Act do not violate a prisoner's fundamental right of access to the courts).

Claim 2 does not survive review under AEDPA, 28 U.S.C. § 2254(d) and must be DENIED.

**B. Ineffective Assistance of Counsel (Claims 3, 7-10)**

In claims 3 and 7-10, Petitioner alleges ineffective assistance of counsel. (*See* Am. Pet., at 57-61 (claim 3: trial counsel's failure to present specific facts in support of request for second counsel)), 67-77 (claim 7: trial counsel's failure to investigate and present evidence of Petitioner's innocence and third party culpability), 77-79 (trial counsel's failure to object to evidence presented at trial), 79 (trial counsel's "tactical blunder" in moving to exclude evidence of Petitioner's gang affiliation), 79-80 (ineffective assistance of appellate counsel)).

To prevail on his ineffective counsel claims, Petitioner must demonstrate (1) "that counsel's representation fell below an objective standard of reasonableness" and (2) "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Williams v. Taylor*, 529 U.S. 362, 390-91 (2000); *Strickland v. Washington*, 466 U.S. 668, 690-93 (1984). When Petitioner's conviction became final in 1991, *Strickland* was "clearly established" under AEDPA. *Williams v. Taylor*, 529 U.S. at 390.

Under the first prong of the *Strickland* test, Petitioner must show counsel's performance was deficient, measured under a standard of "reasonably effective assistance." *Strickland*, 466 U.S. at 687. Courts "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* at 689 (internal quotation marks omitted). In assessing the effectiveness of counsel's strategy:

> [T]he gravity of the potential sentence in a capital trial and the proceeding's two-phase structure vitally affect counsel's strategic calculus. Attorneys representing capital defendants face daunting challenges in developing trial strategies, not least because the defendant's guilt is often clear. Prosecutors are more likely to seek the death penalty, and to refuse to

> accept a plea to a life sentence, when the evidence is overwhelming and the crime heinous. In such cases, 'avoiding execution [may be] the best and only realistic result possible.'

*Florida v. Nixon*, 543 U.S. 175, 190-91 (2004) (internal citations omitted).

To establish prejudice under *Strickland*, Petitioner must establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *Strickland*, 466 U.S. at 694; *see also Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993) (counsel's error must make result unreliable or trial fundamentally unfair).

Because failure to meet either prong is fatal to Petitioner's claim, the Court need not "address both components of the inquiry if the [petitioner] makes an insufficient showing on one." *Strickland*, 466 U.S. at 697.

When a petitioner raises a *Strickland* claim in a habeas petition governed by AEDPA, he must surmount two highly deferential standards. *Harrington v. Richter*, __ U.S. __, 131 S. Ct. 770, 778 (2011) ("Federal habeas courts must guard against the danger of equating unreasonableness under *Strickland* with unreasonableness under § 2254(d)."). In such a case, "the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied Strickland 's deferential standard." *Id.*

**1. Claim 3: IAC Based on Trial Counsel's Failure to Present a Sufficiently Specific Factual Showing to Support Petitioner's Request for Appointment of Second Counsel**

Petitioner contends in Claim 3 that his trial counsel's failure to present a more specific, factual showing of need in support of his requests for appointment of second counsel was ineffective in violation of the Sixth Amendment. (Am. Pet. at 57-61). Petitioner presented the state court analogue of this claim to the California Supreme Court as claim 3 of his second state habeas petition. (2d St. Hab. Pet., *supra*, at 73-79). That court denied the claim on the merits and on state law procedural grounds. (Order,

*In re Staten*, Cal. S. Ct. Case No. S121789 [Lodged Doc. # D4]). Petitioner seeks an evidentiary hearing on Claim 3. (Ptr's. Evid. H. Mot., at 32-33). Respondent seeks dismissal of this claim as procedurally defaulted and under Section 2254(d). (Rsp's. Mot. Dis., at 30-34).

**(a) *Factual Background***

Claim 3 arises out of the same operative facts, discussed above, that underpin claims 1 and 2. (*See* Am. Pet., at 57-59). Petitioner alleges:

(1) Trial counsel's "confidential application" on its face discloses that little, if any, effort was put into the pleading, and that no effort whatever was expended to make a specific factual showing concerning need for second counsel; and

(2) Trial counsel failed to familiarize himself with the law, investigate the facts, and analyze what would be required to fully prepare and defend both the guilt and penalty phases of Petitioner's case.

(Am. Pet., at 59-60).

**(b) *Legal Analysis***

Where, as here, the California Supreme Court did not articulate its reasons for denying the state court analogue to claim 3 on the merits, petitioner still must show "that 'there was no reasonable basis' for the California Supreme Court's decision." *Pinholster*, __ U.S. at __, 131 S. Ct. at 1402 (internal citations omitted). "This is so whether or not the state court reveals which of the elements in a multi-part claim it found insufficient, for § 2254(d) applies when a 'claim,' not a component of one, has been adjudicated." *Harrington v. Richter*, __ U.S. at __, 131 S. Ct. at 784.

Although the California Supreme Court did not explain the reasoning behind its denial, at least one possible basis for that denial clearly emerges from a review of the record. Independent review of the record does not disclose, and Petitioner does not allege, any basis for concluding that, had Petitioner's trial counsel provided more specific factual support for Petitioner's application for second counsel, those additional facts would have made any difference to the trial judge's decision to deny second

counsel. Furthermore, Petitioner does not allege any facts to show how appointment of a second attorney would have resulted in an outcome more favorable to Petitioner at either the guilt or penalty phase.

To prevail on this claim under *Strickland's* prejudice prong, Petitioner must demonstrate not only a reasonable probability that a more effective request for second counsel could have been made and would have been granted, but also a reasonable probability that the appointment of a second attorney would have resulted in a more favorable verdict. This is so because the *Strickland* prejudice prong requires "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; *see also Lockhart v. Fretwell*, *supra*, 506 U.S. at 369-70 (*Strickland* prejudice requires showing "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.")

The analysis employed is similar to that employed when a habeas petitioner alleges ineffective assistance based on counsel's failure to bring a particular motion. Such a petitioner must show not only that the omitted motion would have been granted, but also that the granting of the motion would have resulted in a more favorable outcome at trial. *See, e.g.*, *Kimmelman v.Morrison*, 477 U.S. 365, 375 (1986) (petitioner claiming ineffective assistance of counsel for failing to move to suppress evidence under the Fourth Amendment, must "prove that his Fourth Amendment claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excusable evidence in order to demonstrate actual prejudice."); *Styers v. Schriro*, 547 F.3d 1026, 1030 n.5 (9th Cir. 2008) ("Generally, a defendant claiming ineffective assistance of counsel for failure to file a particular motion must not only demonstrate a likelihood of prevailing on the motion, but also a reasonable probability that the granting of the motion would have resulted in a more favorable outcome in the entire case."), *cert. denied sub nom. Ryan v. Styers*, 558 U.S. 932 (2009);

*accord, Leavitt v. Arave*, 646 F.3d 605, 613 (9th Cir. 2011) (to establish ineffective assistance of counsel petitioner must show not only that omitted request for psychological testing would have been granted but also that such testing would have changed the outcome of sentencing), *cert. denied,* __ U.S. __, 132 S. Ct. 2379 (2012).

The trial judge noted that this case was not particularly complex—factually or legally—for a capital murder trial. Trial counsel also had the assistance of a team of investigators, at least one of whom was present at trial. (1 Under Seal C.T. 43, 50-51, 93-100, 133; RT 1103-04 [Lodged Doc. # A3]). Petitioner presents nothing which suggests that the trial judge's finding was unreasonable. Given that fact, it cannot be assumed that a more detailed showing would have persuaded the trial court to appoint second counsel. Furthermore, the state habeas petition, like the federal amended petition, made no specific factual showing that the presence of a second attorney would have made a difference in the outcome of either the guilt phase or penalty phase of trial. (2d St. Hab. Pet., at 78-79; Am. Pet., at 60-61 (both alleging in conclusory terms that "[b]ut for trial counsel's ineffective assistance, second counsel would have been appointed, and there is a reasonable probability the result of the trial would have been different.")). *See James v. Borg*, 24 F.3d 20, 26 (9th Cir.) ("Conclusory allegations which are not supported by a statement of specific facts do not warrant habeas relief."), *cert. denied sub nom. James v. White*, 513 U.S. 935 (1994).

Petitioner attempts to circumvent his inadequate showing of actual prejudice by alleging in his federal petition that trial counsel's ineffectiveness was structural error, an allegation which does not appear in his second state habeas petition, but does appear in his third. (*Compare* Am. Pet., at 61; 3d St. Hab. Pet., at 69-73 (alleging counsel's deficiency was structural error) with 2d St. Hab. Ptn., at 78-79 (omitting this allegation)). The California Supreme Court denied this claim as alleged in Petitioner's third state habeas petition on the merits, as well as procedural grounds. (Order, filed Dec. 20, 2006, *In re Staten*, Cal. S.Ct. Case No. S141678 [Lodged Doc. # E6]). United States Supreme Court law has not clearly established that counsel's failure to make an

adequate argument in support a request for second counsel, or even the denial of such a request, constitutes structural error.

Based on the record and evidence presented to the California Supreme Court, the state supreme court's rejection of Claim 3 on its merits did not contradict or unreasonably apply United States Supreme Court authority, nor rely upon an unreasonable finding of fact. 28 U.S.C. § 2254(d). Claim 3 must be denied under Section 2254(d), and Petitioner's request for an evidentiary hearing on that claim also must be denied.

**2. Claim 7: IAC Based on Trial Counsel's Failure to Investigate and Present Evidence and Argument Regarding Petitioner's Innocence and Third Party Culpability**

In Claim 7, Petitioner alleges his trial attorney was ineffective for failing adequately to investigate and present evidence in the guilt phase of trial. (Am. Pet., at 67-77). The claim "focuses primarily, although not exclusively," on counsel's failure to investigate and present three kinds of evidence: so-called "Time-Line Evidence," "Crime-Scene Evidence," and "Third Party Culpability" evidence. (Am. Pet., at 68-69).

Petitioner presented the various elements of claim 7 to the California Supreme Court in his first and second state habeas proceedings. Petitioner presented the "time line evidence" portion of claim 7, the contention that counsel was ineffective for failing to investigate and present evidence that the victims could not have arrived home by the time necessary to support the prosecution's theory of when the murders occurred (Am. Pet. at 69-71), as part of claim 7 of his second state habeas petition. (2d St. Hab. Pet., *supra*, at 89-92 [Lodged Doc. # D1]). The California Supreme Court denied claim 7 of Petitioner's second state habeas petition on the procedural grounds that "it is successive: it could have been, but was not, raised on habeas corpus previously" and that it "is barred as untimely," as well as on the merits "for failure to state a prima facie case for relief." (Order, filed Jul. 13, 2005, *In re Staten*, Cal. S. Ct. Case No. S121789 [Lodged Doc. # D4] (citations omitted)).

Petitioner presented the element of the "crime scene evidence" in which he alleges that trial counsel was remiss for not calling handwriting experts to testify that Petitioner could not have authored the graffiti at his parents' home as part of claim 2 of his first state habeas petition. (1st St. Hab. Pet., supra, at 32-33 [Lodged Doc. # Cl]). The California Supreme Court denied this claim on the merits and for lack of timeliness. (Order, filed Sept. 10, 2003, *In re Staten*, Cal. S. Ct. Case No. S107302 [Lodged Doc. # C7] (citations omitted)).

Petitioner then presented the "crime scene evidence" portion of claim 7 in its entirety, including a repetition of the allegations regarding counsel's failure to call handwriting experts, as part of claim 7 of his second state habeas petition. (2d St. Hab. Pet., *supra*, at 93-96 [Lodged Doc. # D1]). The California Supreme Court denied this claim on the grounds that "it is successive: it could have been, but was not, raised on habeas corpus previously" and that it "is barred as untimely." (Order, , filed Jul. 13, 2005, *In re Staten*, Cal. S. Ct. Case No. S121789 [Lodged Doc. # D4] (citations omitted)).

Petitioner first presented the "third party culpability evidence" portion of claim 7, Petitioner's allegations that trial counsel failed adequately to investigate and present evidence pointing to the East Side Dukes gang as the true murderers (Am. Pet., at 75-77), in claim two of his first state habeas petition. (1st St. Hab. Pet., at 29-34 [Lodged Doc. # C1]). The California Supreme Court denied the claim on the merits and found it to be "barred as untimely." (Order, filed Sept. 10, 2003, *In re Staten*, Cal. S. Ct. Case No. S107302 [Lodged Doc. # C7] (citations omitted)). Petitioner presented the claim again as part of claim 7 of his second state habeas petition. (2d St. Hab. Pet., at 96-99 [Lodged Doc. D1]). The California Supreme Court again denied it on the merits and found it "successive" and "barred as untimely." (Order, , filed Jul. 13, 2005, *In re Staten*, Cal. S. Ct. Case No. S121789 [Lodged Doc. # D4] (citations omitted)).

Petitioner has moved for an evidentiary hearing in this Court on Claim 7. (Ptr's. Evid. H. Mot., at 17- 27). In Respondent's motion to dismiss, Respondent contends the

claim is procedurally barred and that it does not survive Section 2254(d) review. (Rsp's. Mot. Dis., at 63-97).

**(a) *"Time Line Evidence"***

In the first section of claim 7, Petitioner alleges counsel ineffectively failed to investigate and present evidence that the victims could not have arrived home in the time necessary to support the prosecution's theory of when the murders occurred. (Am. Pet. at 69-71).

**(1) *Factual Background***

Petitioner presented no declarations or exhibits to the California Supreme Court which specifically addressed his contention that trial counsel was ineffective for failing to investigate and present "time line evidence." However, that court had before it the trial court record. At trial, the prosecution presented evidence at trial which showed that victims Arthur and Faye Staten returned to Los Angeles from their vacation in Egypt on October 11, 1990. (9 R.T. 1596, 1643). They went from the airport to the home of Faye's parents, the McKays, where they spent the night and most of the next day. (9 R.T. 1596, 1600). The evening of October 12 there was a family dinner gathering at the McKays' house, to which Petitioner was invited but did not attend, to welcome back Arthur and Faye. (9 R.T. 1509-10, 1635, 1643-45). Faye's sister Bobbye Williams estimated that Arthur and Faye left the McKays' house "approximately about between 11:20, a little before 11:25." (9 R.T. 1511). Judith McKay, another sister of Faye, estimated Bobbye Williams left "pretty close to approximately 11:23 or so," and that Arthur and Faye left "within two minutes of that time." (9 R.T. 1673).

According to Duane McKay, Faye's brother, Arthur Staten was a "fairly fast" driver. (9 R.T. 1600, 1603). Detective George Roberts testified that he test-drove the route from the McKays' house to the Statens' house. (14 R.T. 2406). The total distance was 28.4 miles, and it took Detective Roberts 25 minutes. (14 R.T. 2406-07). Roberts began his drive at 10:55 p.m. (14 R.T. 2407). Traffic was light, and Roberts tried to maintain a constant speed but was unable to do so. (14 R.T. 2407). Roberts' maximum

speed, which he was only able to maintain for about half the trip, was 65 miles per hour. (14 R.T. 2407). Defense counsel unsuccessfully objected on relevance grounds to Roberts' testimony about the time it took him to travel the route. (14 R.T. 2407). On cross-examination, defense counsel elicited testimony from Roberts that the Statens drove home on a Friday night, that Roberts did not know the traffic conditions the Statens encountered, the speed the Statens drove, or whether they stopped, and that Roberts did not determine whether any traffic accidents occurred on the freeway route on the night of the murders. (14 R.T. 2427-29).

Bertha Sanchez, who lived two houses down the street from the Statens, testified she saw the Statens' truck arrive about 11:40 p.m. (6 R.T. 916, 938-40). Between then and midnight, Sanchez and her husband watched "Nightline" on television, a program which ended at midnight. (6 R.T. 917, 925). Near the end of the last commercial, Sanchez heard what sounded like gunshots or firecrackers. (6 R.T. 917-24). On viewing a videotape of that night's "Nightline" provided by the TV station, the Sanchezes identified the moment when they heard the shots. (6 R.T. 923-24, 930-33; 7 R.T. 1031-36). A sales manager from the television station testified that the show aired from 11:30 to 11:59 p.m. (9 R.T. 1488-89). Local commercial breaks occurred at 11:37 to 11:38, 11:47 to 11:48, and 11:57 to 11:58. (9 R.T. 1489-90.)

At 12:04 a.m., according to telephone company records, Bobbye Williams telephoned Petitioner and asked if his parents had arrived. (9 R.T. 1513-16 (testimony of Williams); 10 R.T. 1699, 1701) (testimony of Pacific Bell representative)). Petitioner answered that they had not, and that he was getting ready to go out. (9 R.T. 1515-16, 1581-82). Sometime after midnight, Mrs. Sanchez heard the Statens' truck starting and driving away. (6 R.T. 925-26). About 20 minutes later she heard what sounded like the same truck return and park. (6 R.T. 926, 928-29, 942-44, 957).

In support of his "time line evidence" claim, Petitioner relies on the narrative of events he presented in his own testimony at trial, aspects of which he says are corroborated by other witnesses and evidence. (*See* Am. Pet., at 70 ("The time-line

posited by the defense was evidenced primarily by the testimony of petitioner, and corroborated by various witnesses and telephone records.")). Petitioner testified he was at home the evening of October 12, unable to attend the family gathering because his only form of transportation, his mother's Cadillac, was inoperable. (17 R.T. 2832, 2865-66; 18 R.T. 3017-18). Petitioner unsuccessfully paged his friend John Nichols numerous times in an attempt to get Nichols to pick him up. (17 R.T. 2853-54; 18 R.T. 3036-37, 3040). At 12:04 a.m., Petitioner received a telephone call from his aunt Bobbye inquiring whether Faye and Ray had arrived home safely, and Petitioner indicated they had not. (17 R.T. 2854; 18 R.T. 3022). A few minutes later, Petitioner's parents arrived, and he helped them unload their luggage. (17 R.T. 2864-65; 18 R.T. 3019-20). At 12:25 a.m., Petitioner placed yet another call to Nichols to see if he would come and pick him up, and at 12:31 a.m. Petitioner's aunt Bobbye called again to see whether Faye and Ray had arrived. Petitioner responded that they had. (17 R.T. 2854-55; 18 R.T. 3022, 3052). Petitioner's aunt Bobbye, Faye's sister, did not ask to speak directly with Arthur or Faye. (17 R.T. 2854-55). At 12:45 a.m. Petitioner borrowed his father's truck to go to a fast food store for something to eat, and returned to the house at about 1:00 a.m. (17 R.T. 2865-67; 18 R.T. 3022-26). It was then that he discovered his parents had been murdered. (17 R.T. 2867-69; 18 R.T. 3028-33).

In closing argument, defense counsel argued that Mrs. Sanchez' testimony that the victims arrived home at 11:40 and that she heard shots at 11:47 was not credible based essentially on the same time line argument Petitioner relies on in claim 7:

> So what I want to or how I want to start off this case is show you that on the night of November or October 12, there was testimony that at 11:25, Mr. and Mrs. Staten left the Mc Kay residence in downtown or in Los Angeles off of Florence, approximately two to three miles from the Los Angeles Forum.
>
> They drove to their home in La Puente and arrived there, if

you believe Mrs. Sanchez, at 11:40. Now, the reason we get to 11:40 is not only by her statement, but something about eight to ten minutes she was out in the garage prior to hearing these shots. And it was after the truck came in. It was eight to ten minutes fooling around in the garage.

Then if you believe that, then we have a fifteen minutes or 11:40, he got home. If you believe that, Mr. Staten averaged 114 miles an hour to get home.

That's very clear. Very simple.

If you do not believe that, then all of a sudden we have a problem with the evidence in this case. If you want to believe that they came home at 11:45, that means he averaged 86 miles an hour coming home.

The area that he traveled was down Florence Avenue onto the Harbor Freeway, past the new construction where the Harbor Freeway construction is going on on a Friday night, transitioned I'm sure onto the Santa Monica Freeway, took the 60 cut-off, took the 60 out to his exit, then took streets again out to his house.

Realistically in order to average 114 miles an hour, he probably had to do 120 miles an hour on the freeway.

And if he did 86 miles an hour, realistically it would be 95 miles an hour on the freeway.

If you do not believe that Mr. Staten drove either one of those speed limits, we have a more serious problem.

Bertha Sanchez could not and did not hear those shots at 11:47. It's physically impossible for that -- to have heard.

(21 R.T. 3473-75).

**(2) *Legal Analysis***

In light of the state court record, Petitioner's claim that trial counsel was ineffective for failing to investigate and present "time line" evidence boils down to the contention that competent counsel would have "investigated traffic conditions along the route traveled" by Mr. Staten on the night of October 12, 1990, and "would have retained experts who petitioner is informed and believes would have furnished an opinion that it is highly unlikely that Mr. Staten could have driven thirty miles on Los Angeles freeways and surface streets at speeds of 90 to 120 miles per hour while heavily intoxicated." (Am. Pet., at 71).

In state appellate and habeas proceedings, Petitioner presented no declarations or other expert opinion evidence to support the conclusions he is "informed and believes" (Am. Pet., at 71) a properly prepared expert could have furnished. Nor did Petitioner present any evidence as to what a reasonable investigation of "traffic conditions" along the relevant route on the night of October 12, 1990 would have uncovered.

Even assuming, however, such evidence was reasonably available to Petitioner's counsel at the time of trial, and that counsel was remiss for failing to discover and present it at Petitioner's trial, the California Supreme Court could reasonably have concluded that Petitioner suffered no prejudice as a result of trial counsel's omissions. Relying on the evidence that was presented at trial, Petitioner's trial counsel did raise in his closing argument to the jury the essence of the "time line" argument. The jury apparently chose either to discount it, or to conclude that it made no difference on the issue of Petitioner's guilt. Petitioner's calculations rely on the assumption that Bobbye Williams knew with certainty the exact time Petitioner's parents left the McKays' house on the night of the murders. Williams testified that the victims left at "approximately about between 11:20, a little bit before 11:25[, ¶] [b]etween 11:20, 11:25," hardly a statement of exactitude. (9 R.T. 1511). There was no testimony that Williams or anyone else at the McKays' house looked at a clock and recorded the exact time of the parents' departure. Exactly when they left the McKays' house was not central to the

prosecution's theory of how and when the murders occurred. The key facts were that the Statens arrived home before midnight, the neighbors heard gunshots before midnight, and Petitioner answered Bobbye Williams' phone call after midnight, as telephone company records confirmed. Under these circumstances, based on the record before it, the California Supreme Court could reasonably have concluded that was no reasonable probability that additional investigation of "traffic conditions" on the night of October 12 or testimony by an expert would have resulted in an outcome to the trial that was more favorable to Petitioner. *See Strickland*, 466 U.S. at 694 (The prejudice prong of the ineffective counsel test is not met unless petitioner shows there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different).

The "time line evidence" portion of claim 7 does not survive review under Section 2254(d) and must be DENIED.

**(b) *"Crime Scene Evidence"***

In the section of claim 7 titled "Crime Scene Evidence," Petitioner asserts that trial counsel failed to adequately investigate and present two types of "crime scene" evidence at trial: (1) expert testimony on the effect a "silencer" made from a potato or duct tape would have had on the trajectory of the bullets that killed the victims and the residue that such a "silencer" would have left behind; and (2) expert testimony that Petitioner could not have been the author of the spray-painted graffiti found at the crime scene. (Am. Pet., at 72-74).

**(i) *Failure to Present Expert Testimony About Silencers***

At trial, Petitioner's friends Vernon Burden and John Nichols testified for the prosecution that, a few nights before the murders, Petitioner asked Burden how to obtain a silencer for a gun. (7 R.T. 1175 (Nichols); 8 R.T. 1278-79 (Burden)). According to Nichols, Burden told Petitioner he could make one by wrapping duct tape around the gun barrel (7 R.T. 1176), while Burden said he discussed with Petitioner using a potato and duct tape. (8 R.T. 1280-81). According to Nichols, Burden told Petitioner the duct

tape would come loose after one shot. (7 R.T. 1176). Defense counsel cross-examined Burden about his knowledge of silencers and how they work, eliciting that much of what the witness claimed to know was guesswork, that the witness was not aware of the fact that, on the model of gun owned by Faye, the noise comes from the chamber rather than the barrel, and that he was only "guessing" that a silencer could be made for the model of gun used in the crimes. (8 R.T. 1291-94).

The record shows defense counsel consulted with ballistics expert Jim Warner in preparing for trial. (Suppl. Clerk's Transcript-Defense Funding Requests 32-33, 52-58, 77, 86-91 [Lodged Doc. # A3]). At trial, defense counsel questioned several witnesses to try to discredit the idea that Petitioner used a homemade silencer. Gun store employee Robert Johnson testified for the prosecution about records showing Faye Staten's purchase of a gun. (8 R.T. 1350-62). On cross-examination, defense counsel elicited from Johnson that silencers "are made" for that gun, but are "highly illegal," and that Johnson had seen them only in the movies. (8 R.T. 1362).

Los Angeles County Sheriff's Department firearm examiner Dwight Van Horn testified for the prosecution about bullet projectiles found at the crime scene. (8 R.T. 1435-57). He testified that it would be possible to put a silencer on the model of gun Faye Staten owned, but that it would not be very effective. (8 R.T. 1458-60). Duct tape or a potato over the barrel would muffle the sound somewhat, but only for one shot. (8 R.T. 1460-62). Nichols had testified for the prosecution that Petitioner told Nichols and Burden he had hollow-point bullets. (7 R.T. 1176). The three bullet projectiles Van Horn examined, consisting of two from the crime scene and one from the coroner, were hollow-point. (8 R.T. 1444). On cross-examination, defense counsel elicited Van Horn's testimony that a potato placed over the barrel of a gun might explode or disintegrate from the firing of a shot, and that fragments of either a potato or duct tape placed over the end of the barrel might be caught in the hollow point of the bullet and travel with the bullet when fired. (8 R.T. 1463-65). On redirect examination, Van Horn testified that a hypothetical potato or duct tape silencer would not leave very much

residue in the bullet tip, that it might not leave any residue at all, and that, even if it did, the minute amount of residue might be lost in the process of digging the bullet out of the victim's head. (8 R.T. 1475). On recross, Van Horn stated that even if the gun were fired from only two feet away, the potato residue might or might not remain on the bullet tip before striking the victim. (8 R.T. 1476). Van Horn did not specifically look for remains of potato or duct tape on the bullet which killed Arthur Staten, but it was his practice to look for and note any foreign material, other than the victim's blood and tissues, found on a bullet. (8 R.T. 1476). He found no such material, and did not know if there was any discoloration from potato acids, on the bullet in Petitioner's case. (8 R.T. 1476-77).

Defense counsel also elicited cross-examination testimony from prosecution witness Deputy Gary Lindenmeyer, who was among the first to arrive at the murder scene, and Detective George Roberts that they did not recall seeing potato fragments or duct tape at the house. (11 R.T. 1949 (Deputy Lindenmeyer); 16 R.T. 2510 (Detective Roberts)). Detective Roberts testified he did see a roll of duct tape while examining Faye Staten's beauty salon, but he did not recognize its significance at the time. (13 R.T. 2355, 2357).

The medical examiner, Dr. Susan Selser, testified on cross-examination by defense counsel that no foreign matter such as remnants of duct tape or potato were found in Arthur Staten's gunshot wound, nor, to her recollection, in any gunshot wound she had ever examined. (11 R.T. 1924). In an autopsy, Dr. Selser would normally look for any matter that might be present in a wound, although she acknowledged no specific tests for potato or duct tape remnants were done. (11 R.T. 1924-26). Defense counsel asked Dr. Selser if, hypothetically, a potato or duct tape had been placed over the end of a gun when it was fired, she would expect to find remnants of those items in the wound. (11 R.T. 1925). Dr. Selser was not sure she had the expertise to answer, but "imagine[d] it would be obliterated." (11 R.T. 1926).

In closing argument, defense counsel queried:

> If you believe that the first shot was muffled, then why if the first shot was from the master bedroom of the Staten residence, which is allegedly closer, did it not appear to be louder? [¶] If you believe there was a potato, or duct tape in this case, why was there no traces of it? Why was there nothing in the wound? [¶] It's just something they're trying to throw out to make you believe why this first sound was muffled.

(21 R.T. 3485-86).

The state court record therefore shows that defense counsel, after consulting with a ballistics expert, attempted, through witness cross-examination and closing arguments, to demonstrate to the jury the unlikelihood that the killer used a silencer made from a potato or duct tape. On this record, Petitioner's claim boils down to the claim that trial counsel could have presented testimony by an unspecified type of "expert" that a potato is not an effective gun silencer, and that shooting a bullet through a potato would have made a detectable difference in the nature and size of the victim's wounds and would have left potato remnants on the victim's person and the crime scene. (*See* Am. Pet. at 74; Ptr's. Evid H. Mot. at 22). On the first prong of the *Strickland* test, that of ineffectiveness, the California Supreme Court could reasonably have concluded that it is a reasonable defense strategy to rely on the shortcomings of the prosecution's experts rather than to call defense experts to rebut them, which would have risked focusing the jury's attention on the shortcomings and credibility of the defense experts. On the second part of the *Strickland* test, prejudice, it would have been reasonable for the California Supreme Court to have concluded that trial counsel's failure to present testimony by a "potato silencer" expert would not have aided the defense case because such testimony would have added little to the testimony on the issue already in the record and would not have exonerated Petitioner as the shooter.

**(ii)** ***Failure to Obtain and Present Handwriting Expert's***

***Testimony that Petitioner was not the Author of the Graffiti at his House***

In support of his state court analogue to claim 7, Petitioner submitted to the California Supreme Court a declaration of trial counsel Tyre, in which Tyre stated he did consult with two handwriting experts, both of whom told him in no uncertain terms that it would be "impossible to compare spray painting made by arm motion with my client's handwriting exemplars written only with the hand in order to resolve this issue, and therefore did not pursue this issue further." (Tyre Decl., ¶ 11, at 3, 1 Decls. & Exhs., *supra*, at 9 [Lodged Doc. # C2]]; *see also* Suppl. C.T.-Defense Funding Requests 34-42). Petitioner alleges that those consultations were "entirely inadequate" (Am. Pet., at 68), but he failed to explain to the California Supreme Court (or to this Court) why they were inadequate.

Petitioner proffered to the California Supreme Court a 1998 declaration from forensic document examiner Victoria Mertes, who stated she obtained handwriting samples from Petitioner in prison in 1998, eight years after the murders, compared them to digitalized images of the "ESD" graffiti found on the mirror wall and patio of the Staten house, and found "marked differences" in the way some of the letters were formed. (Declaration of Victoria Mertes, ¶¶ 7-10, at 2-4, 2 Decls. & Exhs., *supra*, at 239-41 [Lodged Doc. # C2]). Mertes was "virtually one hundred percent certain" Petitioner did not write the graffiti, although she acknowledges her opinion "might change" if she were given clearer pictures of the graffiti or additional handwriting exemplars. (*Id.*, ¶ 13, at 5, 2 Decls. & Exhs., *supra*, at 242.) Petitioner complains that "no expert evidence was presented by the defense [at trial] to attempt to eliminate petitioner as the author of the graffiti. (Am. Pet., at 73).

That Petitioner's habeas attorneys were able to find an expert, eight years after trial, willing to give a favorable opinion regarding authorship of the graffiti does not establish that trial counsel could have found such an expert in 1991, nor that he was remiss in relying on the adverse opinions of the two handwriting experts he did consult.

Indeed, relevant case authority is to the contrary: It was completely reasonable for trial counsel to rely on those two expert opinions, rather than waste time and resources consulting a third expert. *Wildman v. Johnson*, 261 F.3d 832, 838 (9th Cir. 2001) ("Trial counsel could reasonably rely on this initial expert investigation and Wildman did not show that the expert retained revealed that further investigation would be productive."); *Harris v. Vasquez*, 949 F.2d 1497, 1525 (9th Cir. 1990) ("It is certainly within the 'wide range of professionally competent assistance' for an attorney to rely on properly selected experts."), *cert. denied*, 503 U.S. 910 (1992). As the United States Supreme Court stated in *Strickland*:

> [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.

*Strickland*, 466 U.S. at 690-91. In light of this authority, the California Supreme Court could reasonably have concluded that trial counsel did not act deficiently in not pursuing further than he did the question of whether to call an expert witness to testify that Petitioner was not the author of the graffiti found at his house.

The California Supreme Court's denial of the state court analogue to the "crime scene evidence" part of claim 7 on its merits was not objectively unreasonable, and the claim does not survive review under 28 U.S.C. § 2254(d). The claim must be denied.

**(c) *"Third Party Culpability Evidence"***

In the prosecution and defense cases, the jury heard testimony that the East Side Dukes claimed territory to the north and west of Petitioner's street, including the row of houses behind the Statens' house, and the gang had painted graffiti in the neighborhood. (6 R.T. 844-45, 874-75, 893, 942, 948- 49; 7 R.T. 1070-71, 1137, 1213; 8 R.T. 1331-32, 1338, 1348; 10 R.T. 1720, 1722, 1724, 1734-35; 11 R.T. 1955). The East Side Dukes

had threatened African-Americans, and graffiti stating "ESD kills niggers" had appeared near Petitioner's neighborhood. (6 R.T. 901-02; 7 R.T. 1213; 10 R.T. 1758). The home of an African American family living in the heart of East Side Dukes territory was "shot up." (8 R.T. 1344-46). East Side Dukes members "maddogged" Nichols and other African-Americans on the street. (8 R.T. 1233, 1251-52). Members of the East Side Dukes once pointed a gun at Nichols in 1989 and threatened Nichols and Petitioner once in early 1990. (7 R.T. 1138-41; 8 R.T. 1233). The East Side Dukes twice threatened Nichols in the two months before the murders. (8 R.T. 1243-45).

Petitioner claims his trial counsel should have presented three categories of third party culpability evidence: (1) evidence that Petitioner and victim Arthur Staten allegedly sold drugs in East Side Dukes territory, providing the gang a motive for the murders; (2) evidence that the East Side Dukes claimed credit for the murders; and (3) the opinion testimony of a "gang expert" that the East Side Dukes likely committed the murders. (Am. Pet. at 75- 77; see also id., at 11-12, 30-31 (discussing "[e]vidence developed during the state habeas proceedings" on these issues)).

**(i) *Failure to Investigate and Present Evidence that Petitioner and his Father Sold Drugs in East Side Dukes Territory***

Petitioner's first contention in support of his claim that defense counsel was deficient for failing to investigate and present exculpatory evidence is his claim that counsel should have presented to the jury evidence that he and his father sold drugs in East Side Dukes territory, thereby earning the enmity of the East Side Dukes and providing them a motive for murder. (Am. Pet., at 75). In the California Supreme Court, to support this contention, Petitioner presented declarations by his friends or acquaintances Keith Taylor, Brian Ellis, and Quincy Murphy. (*See* Declaration of Keith Taylor, 1 Exhs. to 1st St. Hab. Ptn., Exh. 6 [Lodged Doc. # C2]; Declaration of Brian Ellis, 1 Exhs. to 1st St. Hab. Ptn., Exh. 7; Declaration of Quincy Murphy, 1 Exhs. to 1st St. Hab. Ptn., Exh. 8). Taylor states in his declaration that Petitioner knew and "hung

out" with a number of Crips gang members, but he was never actually initiated as a "member" of the Neighborhood Crips gang. (Taylor Decl. ¶ 2, 1 Exhs. to 1st St. Hab. Ptn., Exh. 6, at 17). Petitioner and Arthur Staten both sold "dope" in the same territory as the East Side Dukes, and Petitioner got his "dope" from his father. (*Id.*, ¶ 3, at 17). Arthur "advertised" his success as a drug dealer by wearing flashy jewelry and clothing, and going on long vacations. (*Id.*, ¶ 4, at 17). Taylor also states that the East Side Dukes once caught Petitioner selling drugs in a cul de sac behind Nogales High School, inside Dukes territory, and a "big fight" ensued. (*Id.*, ¶ 5, at 17-18).

Ellis states in his declaration that Arthur Staten sold cocaine in an apartment building in the neighborhood. (Ellis Decl., ¶ 2, 1 Exhs. to 1st St. Hab. Ptn., Exh. 7, at 19). Murphy's declaration states that Petitioner "ran with," but was not a formal member of, the Neighborhood Crips, a rival gang to the East Side Dukes, and that Petitioner and his "crew" sold drugs in competition with the Dukes, "screwing" with the Dukes' customers, and "short stopping" the Dukes' income. (Murphy Decl., ¶¶ 2-3, 1 Exhs. to 1st St. Hab. Ptn., Exh. 8, at 21). According to Murphy, "it was well known" that Arthur Staten had been associated with the Rolling Crips "back in the day," and "the word on the street" was that Arthur sold drugs "in order to finance his crack cocaine. habit." (*Id.*, ¶¶ 2-3, at 21).

The trial record and the exhibits to Petitioner's first state habeas petition establish that trial counsel investigated and interviewed each of these witnesses. (Declaration of John D. Tyre, ¶ 12, 1 Exhs. to 1st St. Hab. Ptn., Exh. 4, at 9 (trial counsel stating he and his investigator interviewed Taylor, Ellis, and Murphy); Ellis Decl., ¶ 5, at 20 (Ellis "informed [petitioner's] defense lawyer" about "comments made by the Dukes" on the morning of the killings, suggesting defense counsel interviewed him)). Ellis and Murphy each testified for the defense in the guilt and penalty phases of Petitioner's trial. (17 R.T. 2788-2807 (guilt phase testimony of Ellis); 17 R.T. 2809-20 (guilt phase testimony of Murphy); 23 R.T. 3695-3700 (penalty phase testimony of Ellis), 3701-05 (penalty phase testimony of Murphy)). Trial counsel Tyre claims in the same paragraph

in which he discloses these interviews that he "was never told about numerous confrontations between the East Side Dukes and the Statens, or that the Dukes had a strong motive for wanting to kill the Statens because both Deondre and Ray were competing with them in selling drugs during the crack cocaine epidemic in the late 1980's and early 1990's." (Tyre Decl., ¶ 12, at 9).

Thus, had Petitioner's trial counsel wished to do so, he could have had these witnesses testify about the drug dealing activities of Petitioner and Petitioner's father. However, Petitioner's counsel did not do so. In fact, Petitioner's counsel successfully moved *in limine* to exclude "[a]ny reference to [petitioner] as a gang member," "[a]ny statements or insinuations that [petitioner] was ever dealing narcotics," and "[w]ithout an offer of proof as to its relevance, any evidence that [petitioner] did drugs." (3 C.T. 608, 610, 651; 3 R.T. 428-35). From all of these facts, the California Supreme Court could reasonably have concluded that trial counsel made a tactical decision not to present evidence which would have depicted Petitioner as a gang associate, or which would have depicted Petitioner and Petitioner's father as drug dealers, and that such a tactical decision was reasonable. *See Pinholster*, __ U.S. at __, 131 S. Ct. at 1407 ("The Court of Appeals was required not simply to 'give [the] attorneys the benefit of the doubt,' but to affirmatively entertain the range of possible 'reasons Pinholster's counsel may have had for proceeding as they did'.") (internal citations omitted); *Staten*, 24 Cal. 4th at 456 (noting in the context of a different claim that petitioner's trial counsel had "obvious tactical reasons" not to renew attempt to offer evidence which was "damaging to defendant's own credibility, to the extent that it identified him as a drug user and dealer"). Presenting evidence that the East Side Dukes had a motive to kill the Statens because Petitioner and Petitioner's father were dealing drugs in their territory would obviously have been inconsistent with such a strategy.

The drug-dealing evidence, if credited, would have presented Petitioner in a very negative light before the same jury which would later decide his fate in the penalty phase. It would also have revealed an additional reason for strife between Petitioner and

his parents, and would have shown Petitioner to be willing to resort to crime and to place the lives and safety of his parents in danger for financial gain. At the penalty phase, such evidence would have undermined any efforts to evoke sympathy and would have undermined the defense strategy of portraying Petitioner as a loving son and brother who tried to steer neighborhood youths away from drugs and gangs, and who tried to be a musician. *See Staten*, 24 Cal. 4th at 446 (summarizing penalty phase evidence). Had Petitioner proffered evidence that Petitioner's father was a drug dealer, it would have opened the door to allowing the prosecution to show that Petitioner, too, was a drug dealer, that he, in fact, learned the trade from his father, and that he got the drugs he sold from his father. In fact, the very declarations on which Petitioner relies show that the testimony that Arthur was a drug dealer in competition with the East Side Dukes was intertwined with testimony that Petitioner was a drug dealer himself and that he associated with a Crips gang which rivaled the Dukes. (*See, e.g.*, Taylor Decl., ¶ 3, 1 Exhs. to 1st St. Hab. Ptn., Exh. 6, at 17).

**(ii)** ***Failure to Investigate and Present Evidence That the East Side Dukes Claimed Credit for the Murders***

Petitioner contends that his trial counsel was ineffective for failing to investigate and present evidence that the East Side Dukes claimed credit for the murders shortly after they occurred. (Am. Pet., at 76).

In support of this theory, Petitioner presented in the California Supreme Court the declarations of Robert Oseguera and Keith Taylor, stating that on the morning of October 13, 1990, they were standing by the intersection of Faxina Avenue and Northam Street along with Robert's wife, Pat Oseguera, Brian Ellis and Quincy Murphy, when a car drove up. (Declaration of Robert Oseguera, ¶ 2, 1 Exhs. to 1st St. Hab. Ptn., Exh. 3, at 5; Taylor Decl., ¶ 6, 1 Exhs. to 1st St. Hab. Ptn., Exh. 6, at 18). The occupants of the car, whom the declarants believed to be East Side Dukes members, said, "Yeah we got them." (R. Oseguera Decl., ¶ 2, at 5; Taylor Decl., ¶ 6, at 18). When Taylor tried to confront them, the Dukes drove off. (R. Oseguera Decl., ¶ 2, at 5; Taylor

Decl., ¶ 6, at 18). Ellis says he, the Osegueras, Taylor and Murphy were present, but claims "several carloads" of East Side Dukes members drove by, stared at Ellis and the others and laughed, and that one of them said, "Yeah we got them." (Ellis Decl., ¶ 4, Exhs. to 1st St. Hab. Ptn., Exh. 7, at 19). Pat Oseguera states in her declaration that one carload of people she recognized as East Side Dukes drove up, and that someone in the car "shouted something at Quincy Murphy" which she could not hear, and "seemed to be bragging about something." (Declaration of Pat M. Oseguera, ¶ 4, Exhs. to 1st St. Hab. Ptn., Exh. 2, at 3). Unlike the others, Murphy indicates he was not present when the "yeah we got them" remark was made; the Osegueras and Taylor "informed" him about it after the car had already left. (Declaration of Quincy Murphy, ¶ 6, Exhs. to 1st St. Hab. Ptn., Exh. 8, at 22).

Again, Petitioner's own exhibits show that trial counsel knew about and investigated the Dukes' alleged statements. Ellis "informed [petitioner's] defense lawyer" about "comments made by the Dukes" on the morning of the killings, although, according to Ellis, "the lawyer appeared not interested in what I had to say." (Ellis Decl., ¶ 5, Exhs. to 1st St. Hab. Ptn., Exh. 7, at 20). Pat Oseguera states that "[b]efore [petitioner's] trial, I spoke with his lawyer, John Tyre by telephone and in person and told him all of this," including the Dukes' drive by. (Pat Oseguera Decl., ¶ 5, Exhs. to 1st St. Hab. Ptn., Exh. 2, at 3). Trial counsel Tyre states in his declaration that he and his investigator interviewed Robert Oseguera, Taylor, Murphy, and Ellis. (Tyre Decl., ¶ 12, Exhs. to 1st St. Hab. Ptn., Exh. 4, at 9).

The comments attributed to the East Side Dukes who allegedly drove by the morning after the shooting were ambiguous and of limited probative value. It is unclear what the statement, "Yeah we got 'em" was referring to. Two of the declarants, Pat Oseguera and Quincy Murphy, apparently either did not hear it at all (Pat Oseguera Decl., ¶ 4, Exhs. to 1st St. Hab. Ptn., Exh. 2, at 3 ("A carload of guys I recognized as 'East Side Dukes' drove by and shouted something at Quincy Murphy"; "I was unable to catch what they were shouting but they seemed to be bragging about something."), or

only heard about it second-hand. (Murphy Decl., ¶ 6, Exhs. to 1st St. Hab. Ptn., Exh. 8, at 22 ("The group then informed me that a car load of the East Side Dukes had just drove by and were yelling 'Yah we got them,' . . ."). Quincy Murphy claims in his declaration that the East Side Dukes were "bragging about how they had killed the Statens, and giving them hard stares, and throwing gang signs." (Murphy Decl., ¶ 6, Exhs. to 1st St. Hab. Ptn., Exh. 2, at 22). However, Murphy was not present when the incident occurred and only heard about it second-hand. (*Id.*). It is not at all clear that the occupants of the car even knew about the murders at the time, let alone that the comment was an admission of the Dukes' guilt. Indeed, it is unclear from the declarations how any of the declarants actually know that the people in the car were in fact East Side Dukes. Given the trial testimony that the East Side Dukes frequently harassed Petitioner and his friends in the neighborhood, the California Supreme Court might reasonably have concluded that Petitioner's evidence merely showed one more such incident, not a confession of guilt to a double murder. Thus, that Court might reasonably have concluded that, in this instance, Petitioner had failed to show that further investigation of the comments would have uncovered evidence helpful to the defense. *See Bragg v. Galaza*, 242 F.3d 1082, 1088 (9th Cir.) ("When the record clearly shows that the lawyer was well-informed, and the defendant fails to state what additional information would be gained by the discovery she or he now claims was necessary, an ineffective assistance claim fails."), *amended on other grounds on denial of rehearing*, 253 F.3d 1150 (9th Cir. 2001).

**(iii) *Failure to Call a "Gang Expert"***

Finally, Petitioner contend his trial counsel was ineffective for failing to call a "gang expert" to testify at trial that the murders of Petitioner's parents were "very typical of gang-related murders, including those committed by the East Side Dukes." (Am. Pet., at 75-76).

In support of the state court analogue to this claim, Petitioner submitted to the California Supreme Court the declaration of Armando Morales, DSW, a clinical social

worker who specializes in the study of Hispanic criminal street gangs and gang and drug related homicides. (Declaration of Armando T. Morales DSW, ¶ 1, Exhs. to 1st St. Hab. Ptn., Exh. 9, at 23 [Lodged Doc. # C2] (hereafter "Morales Decl.")). Morales states in his declaration that he reviewed various materials, including the California Supreme Court's opinion on direct appeal, "relevant portions" of the parties' appellate briefs, a transcript of the tape recording of the conversation between Petitioner and John Nichols on November 3, 1990, portions of the reporter's transcript, various declarations and exhibits presented with the first state habeas petition, and an interview he conducted with Petitioner on August 18, 1998. (Morales Decl., ¶ 13, Exhs. to 1st St. Hab. Ptn., Exh. 9, at 26-30). Based on his experience and his review of these materials, Morales formed the "opinion that there is a very high probability that the Statens were murdered by the East Side Dukes." (*Id.*, ¶ 14, at 30 (emphasis in original deleted); *see id.*, ¶¶ 15-21, at 31-34 (setting forth Morales' reasons for this opinion)).

Regardless of whether trial counsel was ineffective for failing to put Morales, or another gang expert, on the stand to testify along the lines Morales outlines in his declaration, the California Supreme Court could reasonably have concluded that Petitioner's ineffective counsel claim based on counsel's failure to do so fails because Petitioner cannot satisfy *Strickland's* prejudice requirement. The evidence showing that Petitioner, not the East Side Dukes, was the actual killer is voluminous. That evidence, which Morales' declaration does not discuss, includes: the trail of Petitioner's own blood, as confirmed by DNA testing, found throughout the house; Petitioner's hand print on the mirrored wall immediately below the "ESD" graffiti which Morales believes could have been genuine; the security locks on all entrances to the house, which showed no sign of forcible entry; the fact no money was apparently taken even though Faye had a large amount of cash in her purse on the dining table near where her body was found; the fact Petitioner had discussed the killing of his parents several times with friends, had a troubled relationship with his father, and was aware that he would receive a large sum of life insurance benefits if his parents died at the same time; the telephone calls from

Petitioner's aunt to the Staten house shortly after the murders in which Petitioner did not mention the killings; and Petitioner's tape-recorded statement to Nichols after the murders, the contents of which Morales does not discuss, that so long as the police did not find the gun, Petitioner would continue to blame the killings on the East Side Dukes.

In addition, while his parents were away on vacation, Petitioner brought home the .38 caliber gun his mother kept at her beauty supply shop. Only a few hours before the killings, Petitioner had the gun in his waistband and decided to wait at home for his parents rather than go to a family gathering at his grandparents' house. Petitioner warned Nichols there would likely be trouble with his father that night. He was wearing his trademark 501 blue jeans at the time. Before midnight, when Petitioner was home, Arthur's truck arrived at the Statens' house and three gunshots were fired. At 12:04 a.m., Petitioner's aunt telephoned the Statens and Petitioner answered, telling her that his parents were not home. When she called back at 12:31 a.m., Petitioner nervously said his parents were home but did not put them on the line. Between midnight and 1:00 a.m., Arthur's truck drove away from the house and returned. About 1:00 a.m., when Petitioner ran to a neighbor's house, he was wearing shorts, and his blue jeans were missing. The bullets found in Arthur's head and in the wall behind Faye's body were of the same caliber as the gun Petitioner had taken from Faye's store and was carrying a few hours earlier, which gun was never found. *See generally People v. Staten*, *supra,* 24 Cal. 4th at 441-45.

Given this state of the evidence, it is extremely unlikely a reasonable juror would have been persuaded, at the guilt phase, that there is a reasonable doubt as to whether Petitioner committed the shootings, or, at the penalty phase, that a lingering doubt exists as to Petitioner's guilt so that sentence of life imprisonment without parole, rather than death, was the appropriate punishment.

In sum, claim 7 of the amended petition does not survive review under Section 2254(d) and must be denied.

**(d) *"Blood Test Claim"***

In his July 10, 2007, Motion for Evidentiary Hearing, under the heading of Claim Seven and the subheading of "Crime Scene Evidence," Petitioner asserted for the first time in any court that his trial attorney was ineffective for failing to have a defense expert examine the blood drops found at the crime scene. (Ptr's. Evid. H. Mot., at 21-22). Petitioner stated that he is "informed and believes" that a defense expert could have testified that none of the blood at the crime scene came from Petitioner. (*Id.*).

Respondent contends this is a separate claim which is unexhausted and barred by the AEDPA statute of limitations. (Rsp's. Mot., at 158-160). Of course, if Petitioner were attempting to allege a separate claim, he would need to seek leave to amend the petition to do so, as listing the claim for the first time in his motion for evidentiary hearing will not suffice. *Park v. California*, 202 F.3d 1146, 1155 (9th Cir.) ("We do not consider either ineffective assistance of counsel arguments because Park did not properly raise them as claims in the instant petition."), *cert. denied sub nom. California v. Park*, 531 U.S. 918 (2000).

However, Petitioner states he is not attempting to allege a new claim, but merely seeks to test the blood samples and present the results to this Court as additional support for claim 7. (Ptr's Opp., at 158-60). The problem for Petitioner is that his request runs head-long into the prohibitions of Section 2254(d) and *Pinholster*. Unless claim 7 survives review under Section 2254(d) based on the evidence presented in state court, that statute and case prohibit Petitioner from obtaining the discovery and evidentiary hearing he seeks here with respect to the blood evidence. 28 U.S.C. § 2254(d)(2) (habeas relief may not be granted as to any claim adjudicated in state court unless the state court decision "was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding."); *Pinholster*, __ U.S. at __, 131 S. Ct. at 1400 (extending the same limitation to Section 2254(d)(1)). Because Claim 7 does not survive review under Section 2254(d)'s high threshold, Petitioner's request for discovery and an evidentiary hearing to develop new evidence regarding the blood drops found at the crime scene must be denied.

### 3. Claim 8: IAC Based on Trial Counsel's Failure to Object to Certain Testimony

In Claim 8, Petitioner contends his trial attorney provided ineffective assistance by failing to object to seven specific portions of trial testimony which Petitioner claims were inadmissible. (Am. Pet. at 77-79). Petitioner presented the state court analogue to claim 8 as claim 8 of his second state habeas petition. (*See* Petition for Writ of Habeas Corpus, filed May 30, 2002, *In re Staten*, Cal. S. Ct. Case No. S121789, at 100-02 [Lodged Doc. # D1]). The California Supreme Court denied the claim on the merits and on procedural grounds in an unreasoned decision. (Order, filed Sept. 10, 2003, *In re Staten*, Cal. S. Ct. Case No. S121789 [Lodged Doc. # D4]).

#### (a) *Craig Hartman's Testimony About Gang Graffiti*

Petitioner's neighbor, Craig Hartman (hereafter "Craig"), testified for the prosecution that the "ESD" graffiti depicted in a photograph of the mirrored wall in the Statens' living room did not appear to him to be East Side Dukes gang writing, and did not look like any East Side Dukes writing he had ever seen. (6 R.T. 876).

Before eliciting this testimony, the prosecutor elicited that Craig testified that he had lived in the same house for 22 years, pretty much his entire life, that he had gone to elementary school, junior high school, and high school in the same neighborhood, that he was familiar with the local gangs including the East Side Dukes, that he personally knew members of that gang, and that he had seen East Side Dukes graffiti "hundreds" of times. (6 R.T. 873-75). He was able to describe the East Side Dukes graffiti as "like Puente block writing." (6 R.T. 876).

Defense counsel did not object to any of this testimony. In fact, Petitioner's counsel cross-examined Craig extensively about this subject, establishing before the jury weaknesses and flaws in his conclusions about the graffiti. (6 R.T. 883-88, 900-01). Defense counsel also elicited Craig's testimony that some of the East Side Dukes graffiti he had seen in the neighborhood was particularly threatening to African American residents (6 R.T. 901-02), using Craig's expertise to aid the defense.

Petitioner claims trial counsel should have objected on foundational grounds to Craig's testimony that the graffiti in the photo did not appear to be that of the East Side Dukes. (Am. Pet. at 77). However, on this record, the California Supreme Court could reasonably have concluded that such an objection would have been over-ruled based on the extensive foundation the prosecutor laid when he elicited Craig's testimony about having grown up in the neighborhood and having known about the Dukes and seen their graffiti, so that counsel's failure to make it was neither ineffective nor prejudicial.

Further, the California Supreme Court might reasonably have concluded that any error by counsel was harmless, since prosecution gang expert David Watkins of the Los Angeles County Sheriff's Department gave more detailed testimony expressing the same conclusion, namely that the graffiti in the house did not appear to be genuine East Side Dukes graffiti. (10 R.T. 1747-48, 1779-80 1753-55, 1797-1800, 1808).

**(b) *Craig's Testimony About Petitioner's Post-Crime Behavior***

Craig was Petitioner's next-door neighbor. (6 R.T. 827 (testimony of Michael Hartman)). Craig testified, without objection, that in the early morning hours just after the murders, Petitioner was running around, crying hysterically, but:

> At first I thought [petitioner] might have been carrying on a little bit too much.
>
> But at the time I thought how are you supposed to act when your parents have been murdered.
>
> So I just brushed it off.

(6 R.T. 876-77). When the prosecutor first asked Craig if Petitioner "was seriously upset or if he was just carrying on," Petitioner's trial counsel did object on grounds of lack of foundation, at which point, the trial judge sustained the objection and the prosecutor laid a foundation by having Craig establish how long he had known Petitioner. (6 R.T. 877-79). Craig had attended sixth grade, junior high school and high school with Petitioner, and played football, basketball, and baseball with him; they often played together when they were younger, and though they spent less time together as

they grew older, they remained friendly and would stop and talk to each other on the street; Craig described Petitioner as "a real friendly guy" and said he had observed Petitioner at times in the past when he was genuinely upset about something. (6 RT 877-79). After this foundation was laid, the prosecutor elicited that, only 15 minutes before the sheriff's deputies arrived, Petitioner was talking "pretty easy" to Craig and Craig's father Michael Hartman, but that, when the deputies arrived and tried to talk to Petitioner, he just sat silently with his feet against the garage "in a daze. In his own little world." Craig thought Petitioner was "faking it." (6 R.T. 879-82).

Defense counsel cross-examined Craig about the basis for his opinion, eliciting testimony that Craig was not completely sure about his opinion, that he had never before seen Petitioner's emotional response to a situation as traumatic as finding his parents murdered that evening, that Craig would not know what to expect from Petitioner under those circumstances, that Petitioner did seem very upset when he came to the Hartmans' house that early morning, and that Craig walked away shortly after the deputies started to talk to Petitioner. (6 R.T. 882, 889, 892). As with the gang graffiti issue, trial counsel attempted to turn Craig's familiarity with Petitioner's behavior to defense advantage, eliciting testimony that Petitioner had a good relationship with his mother, Faye Staten, was close with her, that Petitioner did not always wear blue jeans, and that he frequently wore shorts (6 R.T. 889-90), this latter testimony to minimize the impact of prosecution evidence that Petitioner often wore his characteristic blue jeans, that he was wearing them when he was last seen that evening before the murders, that he was wearing shorts after the murders, and that his blue jeans had not been found since. *See Staten*, 24 Cal. 4th at 443 (summarizing this evidence).

Petitioner contends his trial attorney was incompetent for failing to object, on grounds of lack of foundation, to Craig's "opinion testimony" that Petitioner "might have been carrying on a little bit too much." (Am. Pet. at 77). However, based on the record summarized above, the California Supreme Court could reasonably have concluded that Petitioner's counsel's conduct was neither unreasonable nor prejudicial

under the *Strickland* test.

Under California law, "[o]ne of the fundamental theories of the law of evidence is that witnesses must ordinarily testify to facts, not opinions." *People v. Williams*, 3 Cal. App. 3d 1326, 1332 (Cal. App. Dist. 5 1992) (*citing* 1 Witkin, Cal. Evidence § 447, at 421 (3d ed. 1986)). An exception exists for expert witnesses. Cal. Evid. Code § 801. Non-experts are allowed to state opinions in limited situations. Cal. Evid. Code § 800. "Lay opinion testimony is admissible where no particular scientific knowledge is required, or as 'a matter of practical necessity when the matters . . . observed are too complex or too subtle to enable [the witness] accurately to convey them to court or jury in any other manner.'" *People v. Williams*, 44 Cal. 3d 883, 915 (Cal.), *cert. denied sub nom. Williams v. California*, 488 U.S. 900 (1988). "[L]aypersons may testify to their observations of a witness' behavior outside the therapeutic setting that is relevant to the overall question of the witness's mental state." *People v. Gurule*, 28 Cal. 4th 557, 622 (2001), *cert. denied sub nom. Gurule v. California*, 538 U.S. 964 (2003).

The California Supreme Court might reasonably have concluded that Craig's "opinion testimony" that Petitioner "might have been carrying on a little bit too much" (Am. Pet. at 77) would have been fully admissible under state law. Furthermore, Petitioner's counsel did object to part of Craig's testimony for lack of foundation, which merely resulted in the prosecutor curing the defect by laying a foundation. The California Supreme Court could reasonably have concluded on this record and given this state of the law that any further objection for lack of foundation would have been futile, so that Petitioner's counsel's conduct in this regard was neither unreasonable nor prejudicial under *Strickland*.

**(c) *James Bailey's Testimony About Spray Paint***

Criminalist and forensic chemist James Bailey, whom the parties stipulated was "an expert in the area of paint and making chemical analysis and comparisons between different items that have been painted and paint samples" (8 R.T. 1310) testified for the prosecution. He testified that he analyzed the paint from the graffiti found on the rocks

in the Statens' backyard and the paint from the graffiti on the mirrored wall of the Statens' living room and found they were of the same type. (8 R.T. 1314-15). He also analyzed the paint from four cans of spray paint found in the Statens' closet. (8 R.T. 1314-15, 1318). One of them had the same chemical formula as the paint used in the graffiti and "could have" been used to paint the graffiti in the patio and on the living room mirror. (8 R.T. 1314-15). In the First Amended Petition, Petitioner faults his trial counsel for failing to object to Bailey's testimony as irrelevant and improper speculation. (Am. Pet. at 77-78). Petitioner has withdrawn this portion of Claim 8. (Ptr's. Opp., at 167). The sub-claim is therefore DENIED.

**(d)** ***Bobbye Williams' Testimony That The Victims Would Have Been Upset To See The Messy Condition Of The House***

Faye Staten's sister, Bobbye Williams, viewed photographs of the crime scene and testified for the prosecution that Arthur and Faye Staten would have been "highly upset" and "angry" to see the messy condition of their house on their arrival home on the night of the murders. (9 R.T. 1537). Trial counsel objected at sidebar to this entire line of inquiry on relevance grounds, arguing that, because the sheriff's deputies had already started to search the house, they may have made the mess. (9 R.T. 1533-35). The trial judge overruled that objection, stating it was up to the trier of fact to decide who made the mess. (9 R.T. 1535-36).

Petitioner complains now that his trial counsel failed to object to, or move to strike, this testimony as "rank speculation." (Am. Pet. at 78). Had trial counsel made it, such an objection likely would have been overruled. As Faye Staten's sister, Williams presumably knew her for her entire life. She likewise would have known Faye's husband, and her brother in law, for many years. Williams was very familiar with the house and with her sister's housekeeping habits, and knew that Faye liked to keep her home very tidy. (9 R.T. 1536-37). Williams demonstrated her familiarity by describing the normal condition and use of each and every room in the house. (9 R.T. 1538-46). She was competent to testify about how Faye and Arthur felt about keeping their house

claim. Even if the trial judge had sustained such an objection, all the prosecutor had to do was to cure it by laying a further foundation for the testimony. Thus, the California Supreme Court might reasonably have concluded that trial counsel's failure to make this objection was neither ineffective nor prejudicial within the meaning of *Strickland*.

**(e) *Sergeant David Watkins' Testimony About The East Side Dukes***

Los Angeles County Sheriff's Sergeant David L. Watkins testified for the prosecution as a gang expert. (10 R.T. 1716-1843). He stated on direct examination that the style and location of the graffiti in the Statens' back yard and living room were inconsistent with the graffiti of the East Side Dukes, and that, in his opinion the East Side Dukes did not write it and did not commit the crimes. (10 R.T. 1747, 1779-82, 1785-87). According to Watkins, "that type of writing is consistent with Black gangs and the way that they write their gang graffiti on the wall." (10 R.T. 1754).

Petitioner claims his trial counsel was ineffective for failing to object to two statements in Watkins' testimony on the grounds they were speculative, lacked foundation, and were an impermissible opinion that Petitioner was guilty. (Am. Pet., at 78). First, Petitioner says, counsel should have objected to Watkins' statement on direct examination that the writing on the Statens' mirrored living room wall was consistent with Black gangs. (Am. Pet., at 78; 10 R.T. 1754). Second, Petitioner contends that his trial counsel should have objected to the statement Watkins made in response to the prosecutor's question on redirect examination, "If it wasn't an East Side Dukes gang member, do you have a feeling that it was somebody who wanted to make it look exactly like an East Side Dukes member?," that "They did a very good job." (Am. Pet., at 78; 10 R.T. 1829-30).

The California Supreme Court could reasonably have the objections Petitioner now proffers lack merit, so that counsel's failure to raise them was neither ineffective nor prejudicial. There was an ample foundation for Watkins' testimony as an expert on local gangs and the types of graffiti they produced. (10 R.T. 1717-22, 1726-27, 1734,

1744-46, 1760, 1774-76). In fact, the trial court later expressly found there was a sufficient foundation for portions of Watkins' testimony after defense counsel raised an objection and the prosecutor provided the necessary foundation. (10 R.T. 1759-61 (testimony about meaning of writing contained in a photograph), 1762-64 (prosecutor pointed out, in response to foundational objection that Watkins would testify that he has seen the same graffiti many times)). Thus, an objection on the ground Watkins' testimony lacked foundation would have been pointless. Further, Watkins' testimony was not based on "speculation," but rather on his experience over many years and his expert comparisons of the crime scene graffiti with actual East Side Dukes graffiti. (10 R.T. 1747-58). Finally, Watkins' opinion was limited to the claim that the East Side Dukes did not write the graffiti found in the Statens' home. Although Watkins' opinion testimony certainly undermined the defense theory of the case, at no point did Watkins offer an opinion on the ultimate issue of Petitioner's guilt.

During cross-examination, trial counsel challenged the foundational and other aspects of Watkins' testimony, while at the same time attempting to turn Watkins' expertise to defense advantage. (10 R.T. 1792-1829, 1841-42). This further supports a conclusion by the California Supreme Court that trial counsel's conduct with respect to prosecution witness Watkins was neither ineffective nor prejudicial under *Strickland.*

**(f)** ***Elizabeth Watts' Testimony That Arthur and Faye Would Have Been Upset To See The Messy Condition Of The House***

Prosecution witness Elizabeth Watts was Faye Staten's close friend. (11 R.T. 1964-65). Ms. Watts viewed photographs of the Statens' house as it looked when sheriff's deputies entered after the murders. (11 R.T. 1978-80). When asked how Arthur and Faye would likely have reacted had they come home to find the house in that condition, Watts testified, without objection from Petitioner counsel, that "It probably would have been a war." (11 R.T. 1980).

Now, Petitioner contends his trial counsel was ineffective for failing to object to,

or moving to strike, this testimony as "rank speculation." (Am. Pet., at 78). The California Supreme Court could reasonably have concluded that counsel's failure in this regard was neither ineffective nor prejudicial because such an objection would have been meritless. Watts testified she was Faye Staten's' best friend, that she had known the Statens for over ten years, that the Statens christened Watts's baby, that Faye was Watts' maid of honor at her wedding, that she would speak to Faye often, and that she had been to the Statens' house so often it was impossible to estimate the number of visits. (11 R.T. 1965-66). She would discuss intimate things with Faye, was close to Arthur Staten and Petitioner, and had discussed personal family matters and problems with both Faye and Petitioner. (11 R.T. 1966, 1974-77). She had spent the night at the Statens' house and house-sat for them when they went on a previous vacation. (11 R.T. 1966, 1971). Watts was familiar with Faye's housekeeping habits, and had even helped Faye with her house cleaning. (11 R.T. 1978-80). Thus, Watts's conclusion was based on intimate knowledge of the Statens, their housekeeping habits, and their emotions.

**(g)** ***Bobbye Williams's Testimony About How Long It Would Take To Drive To The Statens' House***

Bobbye Williams testified that it would normally take up to half an hour, but more likely 20 to 25 minutes, for Arthur Staten to drive from the McKays' house to his house. (9 R.T. 1513). Petitioner's trial counsel objected to this testimony on relevance grounds (9 R.T. 1513), but Petitioner claims his counsel was ineffective for failing also to object on grounds the testimony constituted "impermissible opinion and speculation on the part of the witness." (Am. Pet., at 79).

The incident on which Petitioner's claim of ineffective counsel is based follows repeated objections to this line of inquiry on foundational grounds by Petitioner's trial counsel. When the prosecutor asked Williams whether Arthur was normally a slow, medium, or fast driver, defense counsel objected based on "lack of foundation," and the trial judge sustained it. (9 R.T. 1511). After laying a further foundation, the prosecutor asked Williams if she knew what Arthur's normal driving pattern was. (9 R.T. 1512).

Trial counsel again objected for "lack of foundation," the trial judge overruled the objection, and Williams testified that "Arthur was considered a fast driver." (9 R.T. 1512). The prosecutor then asked how long it would have taken Arthur to drive from the McKays' house to the Statens' house on October 12, 1990, "being in the late evening hour like it was, in the condition of traffic as you left the house." Defense counsel made another objection based on "lack of foundation," which the trial judge sustained. (9 R.T. 1512). When the prosecutor rephrased the question ask approximately how long it would "normally" take Arthur to get home, thereby deleting references to traffic conditions on that date and time, defense counsel objected on relevance grounds. (9 R.T. 1513). This time, the trial judge overruled the objection, and Williams answered as described above. (9 R.T. 1513).

The California Supreme Court could reasonably have concluded that trial counsel's failure to object on the basis that Williams' testimony was impermissible opinion and speculative, in addition to the relevancy objection counsel did raise, was neither ineffective nor prejudicial. An objection to the prosecutor's last question on such grounds would have been pointless and could, in any event, have been cured by the prosecutor. The trial judge had already overruled a previous foundational objection to Williams' testimony about Arthur Staten's "normal" driving habits (9 R.T. 1512), suggesting he did not believe her testimony on the subject would have been speculative. Williams had been to her parents' (the McKays') house and the Statens' house many times and therefore knew how to get to both locations. Based on Williams' knowledge of the driving distance between her parents' house and the Staten residence and of Arthur Staten's driving habits, the California Supreme Court could reasonably have concluded that she was competent to testify how long it would have "normally" taken him to drive there. Even if a "lack of foundation" objection were sustained, the prosecutor would likely have cured it by laying a sufficient foundation in response. Thus, the California Supreme Court's conclusion that this aspect of Claim 7 is without merit does not survive review under 28 U.S.C. § 2254(d).