For all of these reasons, the California Supreme Court's rejection of Claim Eight on the merits was not contrary to or an unreasonable application of United States Supreme Court authority, and it did not involve an unreasonable determination of the facts. 28 U.S.C. § 2254(d).

4. Claim 9: IAC For Alleged "Tactical Blunder" in Bringing Motion in Limine

Before trial, Petitioner moved *in limine* under Cal. Evid. Code § 402 to exclude from trial various types of evidence, including "[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. 610 [Lodged Doc. # A1]). The trial judge granted the motion and barred the prosecution from presenting such evidence. (3 C.T. 651; 3 R.T. 428-35). The trial judge initially ruled that the prosecution would be permitted to present evidence that a baggie of something resembling marijuana was left in plain sight on the dining room table on the night of the murders. (3 R.T. 433-34.) The judge later revisited the issue and excluded this evidence. (5 R.T. 709-11; 9 R.T. 1535).

In Claim 9, Petitioner now alleges that his trial attorney rendered ineffective assistance by successfully moving *in limine* to exclude evidence that Petitioner was a member of a gang or that he used or sold illegal drugs, a move Petitioner characterizes as a "tactical blunder" because the excluded evidence would have demonstrated a motive for the East Side Dukes to have committed the murders, thereby bolstering Petitioner's third party culpability defense. (Am. Pet., at 79). Petitioner brought the state court analogue to claim 9 as claim 9 of his second state habeas corpus petition. (*See* Petition for Writ of Habeas Corpus, filed Jan. 8, 2004, *In re Staten*, Cal. S. Ct. Case No. S121789, at 102-03 [Lodged Doc. # D1]). The California Supreme Court rejected 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," as well as "on the merits for failing to state a prima facie case." (Order, filed Jul. 13, 2005, *In re Staten*,

Cal. S. Ct. Case No. S121789 [Lodged Doc. # D4] (citations omitted)).

The California Supreme Court could reasonably have found that trial counsel's decision to move to exclude that evidence fell within the broad range of reasonable professional assistance, and could also reasonably have found that decision was not prejudicial. *Strickland*, 466 U.S. at 687-95. As the United States Supreme Court has repeatedly recognized, trial attorneys have "wide latitude" in "making tactical decisions." *Pinholster*, __ U.S. at __. 131 S. Ct. at 1406; *Strickland*, 466 U.S. at 689; *Tomlin v. Myers*, 30 F.3d 1235, 1244 (9th Cir. 1994) ("While we may disagree with counsel's tactics, such tactics do not fall outside the wide ambit of reasonably representation merely because their wisdom is subject to second-guessing.") (citing cases); *see also Richter*, __ U.S. at __. 131 S. Ct. at 785 ("A state court must be granted a deference and latitude that are not in operation when the case involves review under the *Strickland* standard itself."); *cf. id.* at 789 ("Rare are the situations in which the wide latitude counsel must have in making tactical decisions will be limited to any one technique or approach.").

In the present case, the California Supreme Court could reasonably have concluded that counsel's tactical decision to keep evidence of Petitioner's gang membership and drug use from the jury was reasonable even though such evidence might have supported counsel's third party culpability theory. The California Supreme Court had previously found on Petitioner's direct appeal that trial counsel "had obvious tactical reasons" not to renew efforts to present an alleged hearsay statement by "Randy" regarding Petitioner's selling of "bunk" cocaine to gang members, as "the evidence would have been damaging to [petitioner's] own credibility, to the extent it identified him as a drug user and dealer." *Staten*, 24 Cal. 4th at 456.

In addition, trial counsel, in formulating his trial strategy, had to remain cognizant of the fact that Petitioner was death eligible, and that counsel therefore had an obligation during the guilt phase to preserve his ability to argue convincingly to the jury in the penalty phase that Petitioner deserved a sentence of life without parole rather than death.

Florida v. Nixon, 543 U.S. 175, 190-91 (2004) ("[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.'") (internal citations omitted). Evidence that Petitioner was a gang member and drug user would have undermined both of these objectives.

In the penalty phase of any capital trial, evidence that the defendant is a gang member and drug user would seriously undermine any attempt to present the defendant in a sympathetic light to the jury. In the present case, these considerations were especially acute. The defense presented evidence that Petitioner often counseled friends, family members, and neighborhood youth to avoid drugs and keep out of gangs, and that he wrote rap songs with anti-gang and anti-drug messages. (23 R.T. 3665-66, 3669-70, 3675, 3679, 3697, 3702-05, 3707, 3712-13, 3715-16, 3720). One friend, Brian Ellis, testified for the defense in the penalty phase that he never saw Petitioner use drugs. (23 R.T. 3699). A psychiatrist testified, among other things, that Petitioner could be a beneficial influence on others in prison if given a life sentence. (23 R.T. 3757). *See People v. Staten,* 24 Cal. 4th at 446 (summarizing these facts). Evidence of Petitioner's gang membership and drug use would have wholly negated the defense efforts to engender sympathy with this evidence.

In sum, Claim 9 does not survive review under 28 U.S.C. § 2254(d) and must be DENIED.

5. Claim 10: IAC on Direct Appeal to the California Supreme Court

In Claim 10, his claim of ineffective assistance of appellate counsel on direct appeal to the California Supreme Court, Petitioner faults appellate counsel for failing to

raise the following five claims on appeal:
(1) ineffective of assistance of trial counsel for making an inadequate showing in support of his request for second appointed counsel (the state court analogue to Claim 3 of his operative amended federal petition);
(2) failure to instruct on lesser included offenses (the state court analogue to his federal Claim 5);
(3) error in admitting the photograph of the knife found in Petitioner's dresser drawer (the state court analogue to Claim 6);
(4) ineffective assistance of trial counsel for failing to object to allegedly "inadmissible" testimony (the state court analogue to Claim 8); and
(5) ineffective assistance of trial counsel for moving in limine to exclude evidence that Petitioner was a gang member or drug dealer (the state court analogue to Claim 9). (Am. Pet., at 79-80).

Petitioner raised the state court analogue to claim 10 as claim 10 of his second state habeas petition. (Petition for Writ of Habeas Corpus, filed Jan. 8, 2004, at 103-04, *In re Staten*, Cal. S. Ct. Case No. S121789 [Lodged Doc. # D1]). The California Supreme Court denied this claim on the merits and on procedural grounds in an unreasoned "postcard" denial. (Order, filed Jul. 13, 2005, *In re Staten*, Cal. S. Ct. Case No. S171789 [Lodged Doc. # D4]).

Claim 10 Does Not Survive Section 2254(d) Review. Petitioner's claim of ineffective assistance of appellate counsel is governed by the same standards of deficient performance and prejudice which govern claims of ineffective assistance of trial counsel. *Smith v. Robbins*, 528 U.S. 259, 285 (2000) (applying *Strickland* to a claim of attorney error on appeal); *Smith v. Murray*, 477 U.S. 527, 535-536 (1986) (same); *Cockett v. Ray*, 333 F.3d 938, 944 (9th Cir. 2003) (same); *Miller v. Keeney*, 882 F.2d 1428, 1433 (9th Cir.1989) (same).

Deficient performance is especially difficult to demonstrate in the appellate context. *Jones v. Barnes*, 463 U.S. 745, 751 (1983) (The Sixth Amendment does not

require an attorney to raise every nonfrivolous issue on appeal.). As the California Supreme Court has recognized, it is strategically rational for an appellate attorney to present only the strongest issues, rather than every conceivable issue, in order to focus the reviewing court's attention on those claims. *See In re Reno*, 55 Cal. 4th 428, 466 (2012) ("As noted, ethical and diligent counsel may winnow the available claims so as to maximize the likelihood of obtaining relief.") (*citing Jones v. Barnes*, 463 U.S. at 751-54). An appellate attorney's assessment of which issues to present is a matter of tactics and professional judgment which should not lightly be second-guessed in hindsight. Here, the California Supreme Court might reasonably have denied relief on the state Court analogue to claim 10 because Petitioner has alleged no specific facts showing his appellate counsel did not have sound strategic reasons for not raising the above-listed claims on direct appeal. (*See* 2d St. Hab. Pet., at 103-04).

Furthermore, the California Supreme Court might reasonably have denied relief on the state Court analogue to claim 10 on the basis that Petitioner cannot demonstrate prejudice. Petitioner received the merits review to which effective presentation of each of the claims would have entitled him. In Petitioner's second state habeas corpus proceeding, after briefing by both parties on the state court analogues to current federal Claims 3, 5, 6, 8, and 9 (Lodged Docs. D1 at 73-79, 84-87, 100-03, D2 at 14-17, 22- 36, 42-55), the California Supreme Court denied each of the claims on the merits in an alternative holding. (Order, *In re Staten*, Cal. S. Ct. Case No. S 171789 [Lodged Doc. # D4]). Because Petitioner has received merits review by the California Supreme Court of the omitted appellate claims, and that court denied the claims on the merits, he cannot establish that appellate counsel's alleged ineffectiveness prejudiced him. *Mayo v. Henderson*, 13 F.3d 528, 534 (2d Cir.) ("To establish prejudice in the appellate context, a petitioner must demonstrate that 'there was a "reasonable probability" that [his] claim would have been successful before the [state's highest court].'") (*quoting Claudio v. Scully*, 982 F.2d 798, 803 (2d Cir. 1992), *cert. denied*, 508 U.S. 912 (1993)), *cert. denied*, 513 U.S. 820 (1994); *see also Featherstone v. Estelle*, 948 F.2d 1497, 1507(9th

Cir. 1991) ("[P]etitioner was not prejudiced by appellate counsel's decision not to raise issues that had no merit.").

Furthermore, Petitioner is not entitled to relief at all if the claims in question could only have been raised in state habeas corpus proceedings, since he has no federal constitutional right to effective assistance of state habeas counsel. *See Cook v. Schriro*, 538 F.3d 1000, 1027 (9th Cir. 2008) ("There is no constitutional right to counsel . . . in state collateral proceedings after exhaustion of direct review.") (*citing Pennsylvania v. Finley*, 481 U.S. 551, 556 (1987)), *cert. denied*, __ U.S. __, 129 S. Ct. 1033 (2009).

Claim 10 must be DENIED.

C. Claims Alleging Trial Court Error (Claims 4-6)

1. Claim 4: Claim that the Trial Court's Decision to Instruct on Aiding and Abetting Violated Petitioner's Sixth Amendment Right to Notice

In Claim 4, Petitioner contends that he was denied notice that the trial court would instruct the jury on aiding and abetting as an alternative to the theory that Petitioner was a direct perpetrator of the murders, which he claims violated the Sixth Amendment. (Am. Pet., at 61-65). Petitioner raised the state court analogue to claim 4 on direct appeal and as claim 4 of his second state habeas petition. (*See* App. Op. Br., filed Oct. 17, 1997, at 101-02 [Lodged Doc. # B1]; Petition for Writ of Habeas Corpus, filed Jan. 8, 2004, at 79-84, *In re Staten*, Cal. S. Ct. Case No. S121789 [Lodged Doc. # D1]). The California Supreme Court denied this claim on the merits on direct appeal and on the merits and on procedural grounds in an unreasoned "postcard" denial in response to his second state habeas petition. *People v. Staten*, 24 Cal. 4th at 459 n.7 (Petitioner's "additional claim that the erroneous instruction regarding aiding and abetting violated his federal constitutional rights under the Fifth and Fourteenth Amendments is also without merit . . .") (Order, filed Jul. 13, 2005, *In re Staten*, Cal. S. Ct. Case No. S121789 [Lodged Doc. # D4]).

(a) *Background*

Following his arraignment on the information in the Los Angeles County Superior Court, Petitioner moved under California Penal Code section 995 to dismiss the information, arguing among other things that it would have been impossible for one person acting alone to have killed both victims in the time frame testified to in the preliminary hearing. (Notice of Motion for Dismissal Under Section 995 P.C., filed May 21, 1991, at 4, 2 C.T. 519). On May 30, 1991, the prosecution filed written opposition to that motion, stating:

> It is not necessary to prove that the defendant was the actual killer of either parent so long as he was either a co-conspirator or an aider and abettor to the crimes (citations omitted). Based upon the facts presented the only logical conclusion is that [Petitioner] either did the crimes himself or with assistance thereby making him guilty of two counts of first degree murder.

(People's Response to Defendant's Motion to Set Aside Information Pursuant to Penal Code Section 995, filed May 30, 1991, at 4, 2 C.T. 540).

In his opening statement, the prosecutor told the jury that the circumstantial evidence:

> . . . will lead you to the conclusion that [Petitioner] was involved in these murders. And I use the term involved because I do not necessarily expect to prove to you that [Petitioner] killed those people himself or by himself. But he was involved in the planning and commission of those killings which as you will ultimately be instructed in the law, still makes him responsible for those killings.

(6 R.T. 810). Later in the opening statement, the prosecutor commented on the anticipated evidence regarding the East Side Dukes gang, stating:

> I think what you will see is that [Petitioner] saw this as an

> opportunity to commit the murder of his parents or have it committed with somebody else and implicate or point to the East Side Dukes since they're in that areas in this particular manner.

(6 R.T. 821).

After the close of evidence in the guilt phase of trial, the trial judge and counsel for both parties discussed the proposed jury instructions. (18 R.T. 3129). The prosecutor requested CALJIC Nos. 3.00, 3.01, and 4.51. (3 C.T. 721, 722, 726; 18 R.T. 3140, 3144; 20 R.T. 3191-92). As given at trial, CALJIC No. 3.00, titled "Principals Defined," stated:

> The persons concerned in the [commission] of a crime who are regarded by law as principals in the crime thus [committed] and equally guilty thereof include:
> 1. Those who directly and actively [commit] the act constituting the crime, Or
> 2. Those who aid and abet the [commission] of the crime.

(3 C.T. 721; 20 R.T. 3260). CALJIC No. 3.01 ("Aiding and Abetting Defined"), stated as given:

> A person aids and abets the [commission] of a crime when he or she, with knowledge of the unlawful purpose of the perpetrator and with the intent or purpose of committing, encouraging, or facilitating the commission of the crime, by act or advice aids, promotes, encourages or instigates the commission of the crime.
> [A person who aids and abets the [commission] of a crime need not be personally present at the scene of the crime.]
> [Mere presence at the scene of a crime which does not itself assist the commission of the crime does not amount to aiding

and abetting.]

[Mere knowledge that a crime is being committed and the failure to prevent it does not amount to aiding and abetting.]

(3 C.T. 722; 20 R.T. 3260-61). CALJIC NO. 4.51, ("Alibi—Aider and Abettor or Co-Conspirator"), stated as given:

[If] the evidence establishes beyond a reasonable doubt that the defendant [aided and abetted the commission of] the crime charged in this case, the fact, if it is a fact, that [he] was not present at the time and place of the commission of the alleged crime for which [he] is being tried is immaterial and does not, in and of itself, entitle the defendant to an acquittal.

(3 C.T. 726; 20 R.T. 3263).

Immediately preceding CALJIC 4.51, the trial judge gave CALJIC No. 4.50 regarding alibi at Petitioner's request. (CT 725; 20 R.T. 3191, 3261). The "Use Note" by the Committee on Standard Jury Instructions recommends that the two instructions be given together whenever the defense presents evidence of an alibi and the prosecution theory is either that the defendant is present or, if not present, was an alder and abettor or conspirator. (California Jury Instructions, Criminal 214, 216 (6th ed. 1996) (Use Notes accompanying CALJIC Nos. 4.50 and 4.51)).

As the trial judge and the prosecutor explained, the prosecution was pursuing a theory that Petitioner was a direct perpetrator of the murders, but were requesting this instruction in the event the jury had a reasonable doubt that Petitioner was the killer. (18 R.T. 3141). Petitioner objected or declined to join the prosecutor's requests for these instructions. (18 R.T. 3140-41, 3144). Petitioner's trial counsel expressed concern that the jury might be misled to believe it could convict Petitioner even if only some jurors believed he was the actual perpetrator while other jurors believed he was an aider and abettor. (18 R.T. 3142). The prosecutor countered that there was no legal requirement that all jurors agree on the theory of liability as a principal (i.e. direct

perpetration or aiding and abetting), so long as the jurors unanimously found that Petitioner was guilty. (18 R.T. 3143). The trial judge agreed with the prosecution's position and stated he would give the aiding and abetting instructions. (18 R.T. 3143-45; 20 R.T. 3194-99).

In closing argument, the prosecutor argued that the evidence clearly established Petitioner's guilt for the murder, either as an actual perpetrator or as an aider and abettor. (20 R.T. 3301-03). He explained:

> I told you initially in opening statement that this case would not bring forward to you the proof that [Petitioner] was the actual killer. I submit to you that the evidence points in that direction, but you may find otherwise. However, I submit to you that there is no way that you can find that he was not involved. A person is guilty of a crime as a principal in the commission of that offense and equally guilty, if they actively commit the offense, or if they aid and abet in the commission of that offense. Twelve of you who will make a decision in this particular case as to the guilt or innocence are going to have to decide whether he was involved. And it is possible that some of you may be convinced beyond a reasonable doubt that he actively committed the crime. It is possible that some of you will not be so convinced, but are otherwise convinced that he aided and abetted the crime.

(20 R.T. 3301).

In its verdicts, the jury made findings that the allegations that Petitioner personally used a firearm in the murder of Arthur Staten within the meaning of California Penal Code section 12022.5(a) and personally used a deadly weapon, a knife, in the murder of Faye Staten within the meaning of California Penal Code section 12022, were true. (3 C.T. 801-02; 23 R.T. 3621-22).

On direct appeal to the California Supreme Court, Petitioner argued that the evidence did not support giving aiding and abetting instructions. (App. Op. Br., at 101-03 [Lodged Doc. # B1]). He claimed he had been denied his due process right to notice under the Fifth and Fourteenth Amendments that the jury would be instructed on aiding and abetting. (App. Op. Br., at 98, 101-02 [Lodged Doc. # B1]). Petitioner did not refer expressly to the Sixth Amendment as a basis for his claim on direct appeal, but he cited *Sheppard v. Rees*, 909 F.2d 1234 (9th Cir. 1990) and *Givens v. Housewright*, 786 F.2d 1378, 1380 (9th Cir. 1987), both of which were based on the Sixth Amendment. (App. Op. Br., at 98, 101-02 [Lodged Doc. # B1]). In its published opinion on direct appeal, the California Supreme Court found the prosecution had asserted an alternative theory of aiding and abetting "at pretrial proceedings." *People v. Staten*, 24 Cal. 4th at 458-59. The state supreme court held Petitioner's claim that instructing the jury on aiding and abetting violated his federal constitutional rights under the Fifth and Fourteenth Amendments was "without merit." *Id.* at 459 n.7.

Petitioner later presented the state court analogue to Claim 4, in its current Sixth Amendment incarnation relying on Sheppard, to the California Supreme Court as Claim 4 of his second state habeas petition. (Petition for Writ of Habeas Corpus, filed Jan. 8, 2004, *In re Staten*, Cal. S. Ct. Case No. S121789, at 79-84 [Lodged Doc. # D1]). The California Supreme Court denied the state court analogue to Claim 4 on the ground that it had previously been raised and rejected on appeal, that it was successive, and that it was untimely. (Order, filed July 13, 2005, *In re Staten*, Cal. S. Ct. Case No. S121789 [Lodged Doc. # D4]). Alternatively, the state supreme court denied it "on the merits for failure to state a prima facie case for relief." (*Id.*).

(b) *Discussion*

Claim 4 must be denied because it does not survive review under 28 U.S.C. § 2254(d). Under California law "a person aids and abets the commission of a crime when he or she, acting with (1) knowledge of the unlawful purpose of the perpetrator, and (2) the intent or purpose of committing, encouraging, or facilitating the commission

of the offense, (3) by act or advice aids, promotes, encourages or instigates, the commission of the crime." *People v. Beeman*, 35 Cal. 3d 547, 560 (1984).

Under clearly established federal law as determined by the United States Supreme Court, a criminal defendant has a fundamental right to be clearly informed of the nature and cause of the charges to permit adequate preparation of a defense. *See Cole v. Arkansas*, 333 U.S. 196, 201 (1948) ("No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal."); *see also Gray v. Raines*, 662 F.2d 569, 571 (9th Cir. 1981) ("'A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense-a right to his day in court-are basic in our system of jurisprudence . . .'" (*quoting In re Oliver*, 333 U.S. 257, 273 (1948))."

However, Petitioner has not cited, nor can he cite, any United States Supreme Court case which established, at the time his conviction became final, the proposition he advances here: that the right to notice includes the right to be advised, in the information or other charging document, that he is being charged as a principal on an aiding and abetting theory, in addition to the theory that he personally committed the crimes. Because Petitioner cannot show that denial of the state court analogue to claim 4 is contrary to, or involves an unreasonable application of, clearly established United States Supreme Court authority, or that it was based on an unreasonable determination of the facts in light of the evidence presented in state court proceedings, claim 4 does not survive review under 28 U.S.C. 2254(d).

Even if there were Constitutional error, the California Supreme Court could reasonably have concluded that any error was harmless. On federal habeas review, the federal court must analyze a state court's harmless error determination to determine whether the state court "applied harmless-error review in an 'objectively unreasonable' manner." *Mitchell v. Esparza*, 540 U.S. 12, 18 (2003) (per curiam); *see also Inthavong*

v. Lamarque, 420 F.3d 1055, 1058–59 (9th Cir. 2005) (Under AEDPA, "we must defer to [the California Court of Appeal's harmless error] holding unless it was in conflict with the reasoning or the holdings of [United States Supreme Court] precedent or if it applied harmless-error review in an objectively unreasonable manner.") (internal quotation marks and citations omitted), *cert. denied*, 547 U.S. 1059 (2006).

In the present case, any such determination by the California Supreme Court passes muster under AEDPA. In the present case, the record conclusively shows the jury did not rely on an aiding and abetting theory to convict Petitioner. Here, after the trial judge instructed the jury that both enhancements required that Petitioner personally use each weapon himself and that the prosecution prove this beyond a reasonable doubt (3 C.T. 748-50; 20 R.T. 3276-78), the jury returned verdicts finding that Petitioner personally used a firearm in the commission of the murder of his father and personally used a knife in the commission of the murder of his mother. (3 C.T. 801-02, 805-06; 23 R.T. 3621-22). Thus, the jury necessarily found, beyond a reasonable doubt, that Petitioner was the actual killer in both counts. Thus, the California Supreme Court could reasonably have concluded that the jury did not rely on an aiding and abetting theory, and that any error in failing to afford the defense adequate notice of the prosecution's reliance on an aiding and abetting theory was therefore harmless beyond a reasonable doubt.

Petitioner contends that Section 2254(d) does not apply to claim 4 because the California Supreme Court "did not address petitioner's claim of lack of notice in its decision." (Ptr's Opp., at 180-81). This argument is without merit. The California Supreme Court expressly denied the claim on the merits in its order denying Petitioner's second state habeas petition. (*Compare* 2d St. Hab. Pet., at 79-84 [Lodged Doc. # D1] (alleging state court analogue to claim 4) with Order, filed Jul. 13, 2005, *In re Staten*, Cal. S. Ct. Case No. S121789 [Lodged Doc. # D4] (denying "[e]ach claim and subclaim . . . on the merits for failure to state a prima facie case for relief.")).

Petitioner relies on the Ninth Circuit case of *Sheppard v. Rees*, 909 F.2d 1234

(9th Cir. 1990). (Ptr's Opp., at 179-80). However, in *Sheppard*, the State conceded that the notice of the charges given in that case was not adequate "not because California's murder pleading practice furnishes inadequate notice, but because a pattern of government conduct affirmatively misled the defendant, denying him an effective opportunity to prepare a defense," *id.*, at 1236 (citations omitted), a concession, and a pattern of conduct, which are not present here. Therefore, the Ninth Circuit's discussion in *Sheppard* focused on whether the admitted Sixth Amendment violation was subject to harmless error analysis, finding it was not because "[w]here two theories of culpability are submitted to the jury, one correct and the other incorrect, it is impossible to tell which theory of culpability the jury followed in reaching a general verdict." *Id.*, at 1237-38; *see also id.*, at 1238 n.4 ("The holding in this case pertains only to situations involving multiple legal theories and general verdicts. Had the jury returned a special verdict identifying the precise theory used to reach its result, our analysis would differ."). However, in the present case, unlike in *Sheppard*, the jury's findings made it abundantly clear that the jury here found that Petitioner personally committed the crimes and that the jury was not relying on a theory of aider and abettor liability. (3 C.T. 891-02; 23 R.T. 3621-22 (finding true the allegations that, in killing his parents, Petitioner used a firearm and a knife)). Thus, *Sheppard's* holding that harmless error analysis did not apply in that case does not apply here.

Claim 4 does not survive review under 28 U.S.C. § 2254(d) and must be DENIED.

2. Claim 5: Trial Judge's Alleged Failure to Instruct on Lesser Included Offenses

In claim 5, Petitioner contends the trial judge violated his Fifth and Fourteenth Amendment rights by failing to instruct the jury on second degree murder and manslaughter as lesser included offenses of murder. (Am. Pet. at 65-66). Petitioner presented the state court analogue to claim 5 to the California Supreme Court as claim 5 of his second state habeas corpus petition (2d St. Hab. Pet., at 84-85), and the California

Supreme Court denied it on the merits and on procedural grounds in an unreasoned decision. (Order, filed Jul. 13, 2005, *In Re Staten*, Cal. S. Ct. Case No. S121789). Respondent contends, and Petitioner concedes, that the jury instructions given in this case comported with the requirements of *Beck v. Alabama*, 447 U.S. 625 (1980). (*See* Rsp's. Mot. Dis., at 51-56; Ptr's. Opp., at 184; *see also* 3 C.T. 727-30, 20 R.T. 3263-67 (CALJIC 8.10, 8.11 and 8.20 (defining murder, premeditation and deliberation, and first degree murder)); 3 C.T. 731-32, 734-36; 20 R.T. 3267-69 (CALJIC 8.30, 8.31, 8.70, 8.71 and 8.74 (defining and discussing second degree murder))). Claim 5 must, therefore, be DENIED.

3. Claim 6: Admission into Evidence of Knife Found in Petitioner's Dresser Drawer

In claim 6, Petitioner contends the trial judge violated his Constitutional rights when he admitted into evidence a knife the sheriff's deputies found in Petitioner's bedroom dresser drawer when they search his home after the killings. (Am. Pet., at 66-67). Petitioner presented the state court analogue to claim 6 to the California Supreme Court as claim 6 of his second state habeas corpus petition (2d St. Hab. Pet., at 85-86), and that court denied it on the merits and on procedural grounds in an unreasoned decision. (Order, filed Jul. 13, 2005, *In Re Staten*, Cal. S. Ct. Case No. S121789).

(a) *Background*

Los Angeles County Sheriff's Detective George Roberts testified for the prosecution that he arrived at the crime scene at about 3:00 a.m. on October 13, 1990 and walked through the house with his partner, Detective Joe Seeger, and Deputies Reynolds and Andrade. (13 R.T. 2234-35, 2281). In Petitioner's bedroom, the detectives found a black handled knife with a thin blade in a dresser drawer. (13 R.T. 2348-49). There were no fingerprints, blood, or anything else on the knife to indicate it had been used in the killings. (14 R.T. 2482, 2519). Detective Roberts testified that the knife was not consistent with the depth of the wounds found in the autopsy of Faye Staten. (14 R.T. 2520). Detective Roberts identified two photographs of the knife, one

showing the knife still in the dresser drawer (People's Exhibit 102) and one against a different background after the deputies had removed it from the drawer (People's Exhibit 107). (13 R.T. 2348-49, 2376-77).

In the northwest bedroom, used as a den and computer room, they saw a large knife on a coffee table, along with a book of historic newspaper articles, open to an article on the 1969 "Manson family" murders. (13 R.T. 2280-86). Roberts testified that, although he initially did not know, he concluded at some point that the knife found in the den was not involved in the killings (13 R.T. 2286-87), and the knife found in the den is not the knife at issue in claim 6.

Medical examiner Susan Selser testified that Faye Staten's wounds were three to four-and-one-half inches deep and three-eighths of an inch to half an inch wide, and that the blade that caused them was probably four inches or longer and could not have been wider than half an inch. (11 R.T. 1929-30). It was possible for a single knife to have produced all of the wounds. (11 R.T. 1930). The detectives later made another search of the house, garage, backyard, and the Statens' vehicles, for weapons but found none. (13 R.T. 2298-99, 2347-50; 14 R.T. 2444-45, 2452-54, 2478, 2488, 2511).

At the close of the prosecution's case-in-chief, the prosecutor moved the prosecution's exhibits into evidence. (15 R.T. 2591-92). Petitioner's trial counsel objected on relevance grounds and under Evidence Code section 352 to admission of People's Exhibits 102 and 107, the photographs of the knife found in Petitioner's bedroom. (15 R.T. 2606-07). Petitioner's counsel argued that, because the knife was not used in the murders, it was irrelevant or had little probative value, and that its admission into evidence posed the risk of misleading the jury that this knife was the murder weapon. (15 R.T. 2607, 2609-10). The prosecutor proffered two theories for why the trial judge should admit the exhibits: First, they showed Petitioner had access to a knife and kept one in his room. (15 R.T. 2607). Second, the prosecutor argued that, although the knife was in Petitioner's dresser drawer, giving rise to an inference that he had handled it and put it there, there were no fingerprints on it, thereby showing it was

possible for an object evidently handled by Petitioner not to bear his fingerprints. (15 R.T. 2607). The prosecutor stated that he believed the defense would argue that, because a paint can found in the hall closet did not have Petitioner's fingerprints on it, that fact showed that Petitioner never handled the paint can. (15 R.T. 2607). The prosecutor argued that, just as the absence of fingerprints on the knife found in Petitioner's dresser drawer did not mean that Petitioner did not handle it, so the absence of Petitioner's fingerprints on the spray paint can found in the house did not mean Petitioner could not have handed it. (15 R.T. 2607).

The trial judge ruled that he would admit People's Exhibit 102, showing the knife still in Petitioner's dresser drawer, but not exhibit 107, showing the knife outside the drawer. (15 R.T. 2608). The trial judge agreed with the prosecutor that the first exhibit would support an inference that an object in Petitioner's possession could nevertheless lack his fingerprints, and, as an additional basis for admission, the judge noted "there are some inferences can be drawn from the fact that as to a person who would possess a knife as part of his personal possessions just as there are inferences that can be drawn from people who would own guns, and maybe fired guns." (15 R.T. 2608-10). The judge stated that the photograph, standing alone "as a circumstance without anything else" would probably be more prejudicial than probative, but, the judge explained, the photograph takes on greater relevance, and becomes admissible, when considered together with a "series" of other circumstances in the case. (15 R.T. 2608-09, 2611).

(b) *Discussion*

Claim 6 must be denied because it does not survive review under 28 U.S.C. § 2254(d). Errors of state law do not warrant federal habeas relief. *Estelle v. McGuire*, 502 U.S. 62, 67 (1991). "The issue for [the federal habeas court], always, is whether the state proceedings satisfied due process; the presence or absence of a state law violation is largely beside the point." *Jammal v. Van de Kamp*, 926 F.2d 918, 919-20 (9th Cir.1991). Even under a de novo standard of review, "[t]he admission of evidence does not provide a basis for habeas relief unless it rendered the trial fundamentally unfair in

violation of due process." *Johnson v. Sublett*, 63 F.3d 926, 930 (9th Cir.) (*citing Estelle*, 502 U.S. at 67-68), *cert. denied*, 516 U.S. 1017 (1995).

Under AEDPA, Petitioner's burden is even greater:

> Under AEDPA, even clearly erroneous admissions of evidence that render a trial fundamentally unfair may not permit the grant of federal habeas corpus relief if not forbidden by 'clearly established Federal law,' as laid out by the Supreme Court. In cases where the Supreme Court has not adequately addressed a claim, this court cannot use its own precedent to find a state court ruling unreasonable.

Holley v. Yarborough, 568 F.3d 1091, 1101 (9th Cir. 2009) (internal citations omitted). At the time Petitioner's conviction became final, the United States Supreme Court had not clearly established that the Due Process Clause prohibits the admission of irrelevant evidence at trial. *See Estelle v. McGuire*, 502 U.S. 62, 70 (1991) ("Concluding, as we do, that the prior injury evidence was relevant to an issue in the case, we need not explore further the apparent assumption of the Court of Appeals that it is a violation of the due process guaranteed by the Fourteenth Amendment for evidence that is not relevant to be received in a criminal trial. We hold that McGuire's due process rights were not violated by the admission of the evidence."). As the Ninth Circuit summarized the state of the law more recently:

> The Supreme Court has made very few rulings regarding the admission of evidence as a violation of due process. Although the Court has been clear that a writ should be issued when constitutional errors have rendered the trial fundamentally unfair, it has not yet made a clear ruling that admission of irrelevant or overtly prejudicial evidence constitutes a due process violation sufficient to warrant issuance of the writ.

Holley v. Yarborough, 568 F.3d at 1101 (finding that a trial court's admission of

irrelevant pornographic materials was "fundamentally unfair" under Ninth Circuit precedent but not contrary to, or an unreasonable application of, clearly established Federal law under § 2254(d)); *see also Morgan v. Swarthout*, 2012 WL 5389720, at *10 (N.D. Cal. Nov. 2, 2012) (same; *citing Holley*).

As the prosecutor argued, the absence of Petitioner's fingerprints on the knife found in his dresser drawer is relevant to show that the absence of his fingerprints on a can of paint used in committing the crimes does not mean that he did not touch it. As the trial judge pointed out, "there are some inferences can be drawn from the fact that as to a person who would possess a knife as part of his personal possessions just as there are inferences that can be drawn from people who would own guns, and maybe fired guns." (15 R.T. 2608). However tenuous these lines of reasoning may appear, they provide no basis for granting habeas relief under AEDPA. Claim 6 must be DENIED.

D. Claim Alleging Conflict of Interest Arising from PCLA Contract (Claim 11)

In claim 11, Petitioner alleges that, because of his trial counsel's appointment under a contract between the Pomona Contract Lawyers' Association and Los Angeles County for the provision of representation to indigent criminal defendants, Petitioner's counsel, John Tyre, had a conflict of interest in that he was compelled to represent Petitioner in Petitioner's capital case, without the assistance of a second counsel, for only $991.67, and that, if Tyre refused the appointment, he and his fellow PCLA members would have breached the contract, and would have been contractually required to reimburse the County for the cost of retaining one or more lawyers to represent Petitioner under Cal. Penal Code § 987.3. (Am. Pet., at 80-85). Petitioner submitted the state court analogue to this claim as claim 2 of his third state habeas petition, which the California Supreme Court denied on the merits and on procedural grounds in an unreasoned decision. (Petition for Writ of Habeas Corpus, filed Mar. 8, 2006, *In re Staten*, Cal. S. Ct. Case No. 141678 [Lodged Doc. # E1]; Order, filed December 20, 2006, *In re Staten*, Cal. S. Ct. Case No. 141678 [Lodged Doc. # E6]).

1. Background

Petitioner alleges in support of claim 11 that a group of nine lawyers, known as the Pomona Contract Lawyers Association (PCLA) formed a contract with the County of Los Angeles to represent criminal defendants in Pomona with whom the Public Defender's Office had a conflict of interest. (Am. Pet., at 81). Petitioner's trial attorney, John Tyre, was a member of the PCLA, and was appointed to represent Petitioner pursuant to that contract. (*Id.*). The terms of the contract provided for an annual flat fee of $495,833 for up to 500 cases calculated at $991.67 per case, plus a bonus of $991.67 per case for each case in excess of 500, which amounted to an average of $55,000 per year for each PCLA lawyer, excluding bonuses for additional cases. (*Id.*). The contract did not provide for additional compensation for the appointment of second counsel, nor did it distinguish between capital and non-capital cases. (*Id.*). Under the contract, PCLA members was required to accept appointment in all cases unless the court made a written finding that a conflict of interest or other legal disability precluded a member from being appointed. (*Id.*). To insure compliance with the contract, if the PCLA refused appointment to a case, its members were liable to the County for fees paid to a non-PCLA attorney retained to take the case. (*Id.*).

Petitioner claims this arrangement violated his Constitutional rights in two ways: (1) by "creating a *per se* conflict" between Petitioner and his trial attorney, John Tyre, in violation of the Sixth Amendment; and (2) by creating a disparity of treatment between Petitioner and other capital defendants whose attorneys were more fairly compensated, in violation of the Fourteenth Amendment Equal Protection Clause. (*Id.*, at 83-84). Petitioner alleges he need not show prejudice arising from this arrangement because the contract between the County and the PCLA led to a complete breakdown of the adversarial process in his case in violation of *United States v. Cronic*, 466 U.S. 648, 658-69 (1984), and because the error was a "structural defect in the constitution of the trial mechanism" within the meaning of *Arizona v. Fulminante*, 499 U.S. 279, 309 (1991). (*Id.*, at 84).

2. Discussion

(a) ***Equal Protection***

In support of his equal protection claim, Petitioner alleges on information and belief that "petitioner received representation inferior to that of capital defendants in other districts in Los Angeles County where conflicts counsel were compensated on a wholly different and infinitely more fair and adequate basis" (Am. Pet., at 83), and that, because of this disparity in his attorney's pay, "petitioner was treated disparately from others facing the death penalty in courts throughout the State of California and Los Angeles County . . .." (*Id.*, at 84).

The equal protection element of Claim 11 (*see* Am. Pet., at 83-84) does not survive review under 28 U.S.C. § 2254(d). Although Petitioner cites a number of state court cases to support his argument (*see* Ptr's. Opp., at 89-94), he does not cite any United States Supreme Court authority which clearly establishes his entitlement to relief under the equal protection theory he espouses. Nor has Petitioner identified any factual findings by the California Supreme Court which are unreasonable in light of the evidence presented in state court.

(b) *Conflict of Interest*

The United States Supreme Court has established that a criminal defendant has a Sixth Amendment right to representation by counsel free of conflicts of interest. *Wood y. Georgia*, 450 U.S. 261, 271 (1981). Under clearly established federal law as determined by the United States Supreme Court, a defendant is entitled to a presumption of prejudice if he can demonstrate that his attorney "actively represented conflicting interests" and that "an actual conflict of interest adversely affected his lawyer's performance." *Cuyler v. Sullivan*, 446 U.S. 335, 348, 350 (1980); *Earp v. Ornokski*, 431 F.3d 1158, 1183 (9th Cir. 2005), *cert. denied*, 547 U.S. 1159 (2006). An "actual conflict of interest" means "a conflict that affected counsel's performance--as opposed to a mere theoretical division of loyalties." *Mickens v. Taylor*, 535 U.S. 162, 172 n.5 (2002); *Earp*, 431 F.3d at 1183. A mere showing that counsel's "representation of the

defendant somehow implicates counsel's personal or financial interests" is insufficient to establish an "actual conflict of interest." *Mickens*, 535 U.S. at 174-75. Other claims of ineffective counsel based on a conflict of interest which do not meet the *Cuyler* test are evaluated under the traditional *Strickland* standards of ineffectiveness and prejudice. *See Nix v. Whiteside*, 475 U.S. 157, 175-76 (1986) (analyzing alleged "conflict" which did not amount to an "actual conflict" under *Cuyler* as a claim of ineffective assistance of counsel, using the *Strickland* requirements of deficient performance and actual prejudice); *Earp*, 431 F.3d at 1184 (Noting that the United States Supreme Court has "cautioned that its own conflict jurisprudence had not yet reached beyond joint representation: 'the language of *Sullivan* itself does not clearly establish, or indeed even support, such expansive application . . ..'") (*quoting Mickens*, 535 U.S. at 175); *United States v. Moore*, 159 F.3d 1154, 1157 (9th Cir.1998) ("If, however, there is only a possibility of conflict, Moore must meet the 'performance and prejudice' standard of *Strickland v. Washington* [citation]").

Here, the California Supreme Court could reasonably have found that Petitioner's allegations, even if true, failed to show attorney Tyre "actively represented conflicting interests" within the meaning of *Cuyler*, by, for example, representing another client with divergent interests, *see, e.g.*, *Holloway v. Arkansas*, 435 U.S. 475, 478-80 (1978), or possessing a personal or financial stake in seeing Petitioner convicted, or in obtaining an adverse ruling on any matter or issue in Petitioner's case, or that such an actual conflict, even if it existed, had an adverse impact on counsel's performance. *Mickens*, 535 U.S. at 174 (an "actual conflict" under *Cuyler* cannot be predicated on allegations that representation of the defendant somehow implicates counsel's personal or financial interests"); *Earp v. Ornoski*, *supra*, 431 F.3d at 1184 ("The *Mickens* Court . . . concluded that [*Cuyler v.*] *Sullivan* was limited to joint representation, and that any extension of [*Cuyler v.*] *Sullivan* outside of the joint representation context remained, 'as far as the jurisprudence of [the Supreme Court was] concerned, an open question.'") (*quoting Mickens*, 535 U.S. at 176); *see also Schwab v. Crosby*, 451 F.3d 1308, 1324-28

(11th Cir. 2006) (discussing the split in the circuits on this issue), *cert. denied sub nom. Schwab v. McDonough*, 549 U.S. 1169 (2007).

Petitioner has alleged that his attorney agreed to represent him for a low fee and that his attorney's contractual arrangements through the PCLA with the County of Los Angeles affected how the attorney represented Petitioner. However, he does not allege that his attorney's representation of multiple defendants with actively conflicting interests affected how he represented Petitioner which is the only relevant "clearly established federal law" in this area. *Earp*, *supra*, 431 F.3d at 1184; 28 U.S.C. § 2254(d)(1).

Under *United States v. Cronic*, 466 U.S. 648 (1984), prejudice is presumed "if the accused is denied counsel at a critical stage of his trial" or "if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing." *Id.*, 466 U.S. at 659. Petitioner likewise cannot meet this test. The trial record overall demonstrates that Petitioner's trial attorney was well prepared, conducted extensive and effective cross-examinations of the prosecution witnesses, presented several defense witnesses in the guilt and penalty phases, delivered sound closing arguments, and was an effective advocate for Petitioner. For a federal habeas petition in a death penalty case, the current amended petition raises relatively few claims of ineffective assistance of counsel at trial, none of which have merit. *Cronic* only applies "'if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing.' Here, Respondent's argument is not that his counsel failed to oppose the prosecution throughout the . . . proceeding as a whole, but that his counsel failed to do so at specific points." *Bell v. Cone*, 535 U.S. 685, 697 (2002) (*quoting Cronic*, 466 U.S. at 659). Petitioner is not entitled to the presumption of prejudice created under *Cronic*.

Petitioner's case also does not involve structural error under *Fulminante*. There, the United States Supreme Court identified "the total deprivation of the right to counsel at trial" and "a judge who was not impartial," "unlawful exclusion of members of the defendant's race from a grand jury," "the right to self-representation at trial," and "the

right to public trial" as "structural defects in the constitution of the trial mechanism, which defy analysis by 'harmless-error' standards." 499 U.S. at 309. Here, by contrast, trial counsel's errors are easily analyzed under the harmless error rule.

Having failed to satisfy *Cuyler*, *Cronic*, or *Fulminante*, Petitioner may, nevertheless prevail on this claim if he can make the showing of ineffectiveness and prejudice required under *Strickland v. Washington*, *supra*. *Nix*, *supra*, 475 U.S. at 175-76. Applying that test, the California Supreme Court might reasonably have concluded that the state court analogue to claim 11 should be denied because Petitioner has failed to make any specific allegations showing how counsel's conduct, whether influenced by the PCLA contractual arrangement or not, prejudiced Petitioner.

Petitioner alleges in conclusory terms that the conflict between attorney Tyre and himself resulting from Tyre's appointment under the PCLA contract "caused petitioner's counsel to render ineffective assistance as is alleged in Claim 7" and that "[c]ounsel's deficient performance prejudiced petitioner and undermines confidence in the verdict." (Am. Pet., at 85; *see also* Ptr's Opp., at 76-77 (describing the conflict created by the PCLA contract, concluding that, under the Strickland prejudice standard, "reversal is required, not only for the reasons argued in connection with Claim 7, but also because the conflict led to the additional ineffective assistance alleged in Claim 3, and to failure of appointment of second counsel altogether.").

Ordinarily, such allegations are too conclusory to support a grant of habeas relief. *James v. Borg*, *supra*, 24 F.3d at 26. However, in the present case, the Court concludes that denial of the conflict of interest element of claim 11 is inappropriate at this time on the present record because Petitioner may not have received a full and fair opportunity to develop the factual basis of the claim. *See generally*, Justin F. Marceau, *Don't Forget Due Process: The Path Not (Yet) Taken in § 2254 Habeas Corpus Adjudications*, 62 Hastings L.J. 1, 51 (2010) ("A state that has procedural rules that function so as to make a fair review of the federal claims unlikely by, for example, failing to provide meaningful procedures to develop material facts relating to postconviction claims,

would represent a systemic failure of process.").

To insure that petitioner receives that full and fair opportunity, the Court therefore DEFERS ruling on the conflict of interest element of claim 11 until after the parties have had an opportunity to meet and confer and to report back to the Court regarding the need for further factual development as set forth in a separate order filed concurrently with this Memorandum and Order. (*See* Order re: Further Proceedings, filed concurrently herewith). Upon receipt of the parties' joint status report, the Court will either (a) rule on the remaining elements of claim 11, (b) direct the parties to engage in further discovery and/or other factual development, and/or (c) direct the parties to return to state court where petitioner may present any newly developed facts or evidence as part of a state exhaustion proceeding. *See Gonzalez v. Wong*, *supra*, 667 F.3d at 980 (setting forth the appropriate procedure to follow when facts produced for the first time in federal court render a claim potentially meritorious).

For the foregoing reasons, with the exception of those elements of claim 11 which allege a conflict of interest between petitioner and his trial counsel, claim 11 does not survive review under 28 U.S.C. § 2254(d) and must be DENIED. A ruling on those elements of claim 11 which allege a conflict of interest between petitioner and his trial counsel is DEFERRED until further order of the Court. It is also possible that further facts and evidence would cause this Court to revisit its decision as to claims 1 and 2, or any other claim that involves the highly suspicious financial arrangements that prevailed in the trial court.

E. Cumulative Error Claim (Claim 12)

In Claim 12, Petitioner contends that his other claims of error cumulated to amount to a constitutional violation. (Am. Pet., at 85).

The United States Supreme Court has not recognized a claim of cumulative error in the context of habeas corpus. See *Lorraine v. Coyle*, 291 F.3d 416, 447 (6th Cir.) ("The Supreme Court has not held that distinct constitutional claims can be cumulated to grant habeas relief," so that a state court decision denying relief for cumulative error

"cannot be said to be contrary to . . . any . . . Supreme Court decision so as to warrant relief under the AEDPA"), *opinion corrected on other grounds on denial of rehearing*, 307 F.3d 459 (6th Cir. 2002).

Although the Ninth Circuit does recognize the cumulative error doctrine in the habeas context, *Daniels v. Woodford*, 428 F.3d 1181, 1214 (9th Cir. 2005) (granting relief based on cumulative error), cert. denied sub nom. Ayers v. Daniels, 550 U.S. 968 (2007); *Karis v. Calderon*, 283 F.3d 1117, 1132 (9th Cir. 2002) (rejecting cumulative error claim as meritless), *cert. denied sub nom. Woodford v. Karis*, 539 U.S. 958 (2003), in the instant case, because there was no cognizable error, Petitioner is not entitled to habeas corpus relief on his claim of cumulative error. *See Mancuso v. Olivarez*, 292 F.3d 939, 957 (9th Cir. 2002) (holding where there are no errors, there can be no cumulative error). Petitioner's cumulative error claim fails.

CONCLUSION

For all of the foregoing reasons, with the exception of those elements of claim 11 which allege a conflict of interest between petitioner and his trial counsel, the Court finds that Petitioner's claims do not survive review under 28 U.S.C. § 2254(d), and must therefore be **DENIED** with prejudice.

The Court has considered the arguments presented by Respondent in the Joint Report (DE # 200). Respondent argues that, in the absence of prejudice, no possible set of discoverable facts could make out a valid claim or be admissible under *Pinholster*.

Perhaps. But the Court views the PCLA Contract as sufficiently disturbing that it cannot dismiss that Claim at this stage without giving Petitioner another chance to present his arguments. Accordingly, the Court order Petitioner to show cause, if any he has, as to why summary judgment should not be granted as to Claim 11. The Response to the Order to Show Cause shall be filed by May 27, 2014. Respondent shall file an Opposition by June 23, 2014. Petitioner may file a Reply by July 21, 2014.

In his Response, Petitioner may address the following points: (1) The PCLA Contract created structural error; (2) in regard to the PCLA Contract, the Court is

mistaken in its analysis in this Order pursuant to *Cuyler*, *Cronic*, and *Fulminante;* and (3) additional discovery is necessary to defeat summary judgment. Fed. R. Civ. P. 56(d). Any additional discovery would also have to be admissible pursuant to AEDPA and *Pinholster* and justified by good cause under Rule 6.

IT IS SO ORDERED.

Dated: March 31, 2014.

MICHAEL W. FITZGERALD
United States District Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DEONDRE ARTHUR STATEN,

Petitioner,

vs.

RON DAVIS, Warden of the California State Prison at San Quentin,

Respondent.

Case No. CV 01-9178 MWF

DEATH PENALTY CASE

MEMORANDUM AND ORDER GRANTING SUMMARY JUDGMENT TO RESPONDENT ON CLAIM 11 AND DENYING FIRST AMENDED PETITION FORWRIT OF HABEAS CORPUS

Deondre Arthur Staten murdered his parents, Arthur and Faye Staten. In Los Angeles Superior Court, Staten was convicted and sentenced to death. Both the conviction and sentence were affirmed on appeal. This Court previously dismissed almost all of his habeas corpus claims.

The Court did question whether Claim 11should be denied without discovery or evidentiary hearing. Claim 11 alleged a conflict of interest arising from trial counsel's participation in the PCLA Contract. The Court has reviewed the written arguments of the parties and held a hearing on this remaining question. Despite the Court's suspicions of – indeed, disdain for – the PCLA Contract, Respondent correctly argues that no legal or factual basis exists for discovery or

an evidentiary hearing in regard to Claim 11. The Court reached that conclusion some time ago.

The United States Supreme Court, meanwhile, had granted certiorari in *Weaver v. Massachusetts*, 137 S.Ct. 809 (2017). The ruling in *Weaver* could potentially have affected this Court's ruling. Having examined the Supreme Court's recent decision in Weaver, 137 S.Ct. 1899 (2017), this Court's conclusion remains unchanged that Claim 11 on this record is infirm as a matter of law.

Accordingly, summary judgment is granted to Respondent on Claim 11, the First Amended Petition is denied in its entirety, and judgment shall be entered in favor of Respondent.

PROCEEDINGS

Petitioner Deondre Arthur Staten filed his initial federal petition for writ of habeas corpus on December 19, 2003. [Dkt. No. 50.] On March 18, 2004, Respondent moved to dismiss the original federal petition on the ground that it contained unexhausted claims. [Dkt. No. 64.] (Respondent Ron Davis is substituted for his predecessors as Warden of the California State Prison at San Quentin, pursuant to Federal Rule of Civil Procedure 25(d)).

On June 1, 2004, this Court found that three claims included in Petitioner's habeas petition were unexhausted. [Dkt. No. 69.] On June 23, 2004, Petitioner withdrew the unexhausted claims and sought a stay of proceedings pending resolution of his second state habeas petition, which this Court granted on June 30, 2004. [Dkt. Nos. 71 & 73.]

On July 25, 2005, Petitioner filed his First Amended Petition for Writ of Habeas Corpus in this Court. [Dkt. No. 78.] On September 19, 2005, Respondent moved to dismiss the First Amended Petition, or alternatively to strike Claim 11 and portions of Claim 1, on the ground that those claims were both unexhausted and untimely under 28 U.S.C. § 2244(d). [Dkt. No. 91.] On January 19, 2006, this Court granted the motion in part, finding Claim 11 unexhausted but declining

to reach the issue of timeliness. [Dkt. No. 100.] The Court granted Petitioner's motion to stay and abate proceedings while he exhausted that claim in state court. [Dkt. Nos. 101 & 112.]

On December 20, 2006, the California Supreme Court denied Petitioner's exhaustion petition, and this Court lifted its stay and vacated its order holding the case in abeyance on January 12, 2007. [Dkt. No. 114.] Respondent filed an answer to the First Amended Petition on May 4, 2007 [Dkt. No. 122] and Petitioner filed a motion for evidentiary hearing on July 10, 2007. [Dkt. No. 128.]

Respondent opposed Petitioner's motion for evidentiary hearing on December 4, 2007, and Petitioner replied on March 7, 2008. [Dkt. Nos. 136 & 146.] Petitioner's motion for evidentiary hearing remains pending before the Court.

In light of changes in the law governing habeas corpus petitions in federal court, including the United States Supreme Court's decision in *Cullen v. Pinholster*, 563 U.S. 170 (2011), on August 23, 2011, the Court directed Respondent to file and serve a motion to dismiss "those claims respondent believes are subject to dismissal without discovery or an evidentiary hearing" as a result of those changes. [Dkt. No. 147.] The Court stated it would rule on Petitioner's pending motion for evidentiary hearing after completion of proceedings related to Respondent's motion to dismiss. [Dkt. No. 147 at 3.]

Pursuant to the Court's order, Respondent filed a Motion to Dismiss on January 19, 2012. [Dkt. No. 154.] Petitioner filed his Opposition to Respondent's Motion to Dismiss on May 30, 2012. [Dkt. No. 175.] Respondent replied on August 13, 2012. [Dkt. No. 183.] The Court held hearings on May 23, 2013 and October 7, 2013, at which the parties argued the merits of the motion. [Dkt. Nos. 192 & 199.] At the Court's direction, the parties filed a joint report outlining their respective positions regarding the need for further factual development on October 28, 2013. [Dkt. No. 200.] On March 31, 2014, the Court issued an order granting

in part and denying in part Respondent's motion to dismiss. [Dkt. No. 201.] The Court dismissed all of Petitioner's claims with the exception of Claim 11, on which the Court issued an Order to Show Cause ("OSC") re Summary Judgment.

Petitioner filed his response to the OSC on May 27, 2014. [Dkt. No. 203.] Respondent filed a Reply to Petitioner's Response on July 7, 2014. [Dkt. No. 209.] Petitioner replied to Respondent's Opposition on August 4, 2014. [Dkt. Nos. 213 & 214.] The Court held a hearing on November 6, 2014, at which it heard arguments after the parties had reviewed a tentative ruling. [Dkt. No. 225.]

The Court now **GRANTS** summary judgment in favor of Respondent in regard to Claim 11. Petitioner's First Amended Petition for Writ of Habeas Corpus is **DENIED**. Petitioner's Pending Motion for Evidentiary Hearing is also **DENIED**. The action is **DISMISSED** with prejudice.

DISCUSSION

I. STANDARD OF REVIEW

Because Petitioner's original § 2254 habeas petition was filed after April 24, 1996, the Antiterrorism and Effective Death Penalty Act ("AEDPA"), codified in 28 U.S.C. § 2254, governs the disposition of Petitioner's claims in this court. *Woodford v. Garceau*, 538 U.S. 202, 207 (2003) (holding that applicability of the AEDPA depends on whether the petitioner filed an application for habeas relief seeking an adjudication on the merits before or after the AEDPA's effective date); *see also Lindh v. Murphy*, 521 U.S. 320, 323, 326-27 (1997).

Under the AEDPA, relitigation of any claim adjudicated on the merits in state court is barred unless a petitioner can show that the state's adjudication of his claim: "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d); *Harrington v. Richter*, 562 U.S. 86,

97-98 (2011); *Williams v. Taylor*, 529 U.S. 362, 412-13 (2000). If a petitioner satisfies either subsection (1) or (2) for a claim, then the federal court considers the claim de novo. *See Panetti v. Quarterman*, 551 U.S. 930, 953 (2007) (when section 2254(d) is satisfied, "[a] federal court must then resolve the claim without the deference AEDPA otherwise requires."); *Frantz v. Hazey*, 533 F.3d 724, 737 (9th Cir. 2008).

The United States Supreme Court held in *Cullen v. Pinholster*, that when determining whether a petitioner has satisfied § 2254(d), a court may only consider evidence in the state court record. 563 U.S. at 180-81, 185 n. 7. The Court held that "review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits." *Id.* at 180-81. Further, the Court found that section 2254(d)(2) "includes the language 'in light of the evidence presented in the State court proceeding,' . . . [providing] additional clarity . . . on this point." *Id.* at 185 n. 7.

The "contrary to" and "unreasonable application" clauses of section 2254(d)(1) have separate and distinct meanings. *Williams v. Taylor,* 529 U.S. at 404. The Supreme Court explained that a state court decision is "'contrary to our clearly established precedent if the state court applies a rule that contradicts the governing law set forth in our cases' or 'if the state court confronts a set of facts that are materially indistinguishable from a decision of th[e] Court and nevertheless arrives at a result different from our precedent.'" *Lockyer v. Andrade*, 538 U.S. 63, 73 (2003) (citing *Williams v. Taylor*, 529 U.S. at 405-406).

A state court decision is an "unreasonable application" of federal law "if the state court identifies the correct governing legal principle from [the Supreme Court's] decisions but unreasonably applies that principle to the facts of the [petitioner's] case." *Williams v. Taylor,* 529 U.S. at 413; *Andrade,* 538 U.S. at 75. "The 'unreasonable application' clause requires the state court decision to be more than incorrect or erroneous. The state court's application of clearly established

law must be objectively unreasonable." *Andrade,* 538 U.S. at 75 (internal citation omitted); *see also, Richter,* 562 U.S. at 101 ("an unreasonable application of federal law is different from an *incorrect* application of federal law," (citing *Williams*).) "While the 'objectively unreasonable' standard is not self-explanatory, at a minimum it denotes a great[ ] degree of deference to the state courts." *Clark v. Murphy,* 331 F.3d 1062, 1068 (9th Cir.), *cert. denied,* 540 U.S. 968 (2003), *overruled in part on other grounds by Andrade*, 538 U.S. 63. The United States Supreme Court made clear in *Richter* that "[a] state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Richter,* 562 U.S. at 101 (citing *Yarborough v. Alvarado,* 541 U.S. 652, 664 (2004)).

Further, under § 2254(d)(2), a decision adjudicated on the merits in a state court will not be overturned on factual grounds unless it is objectively unreasonable in light of the evidence presented in the state-court proceeding. 28 U.S.C. § 2254(d)(2). Factual determinations by state courts are presumed correct absent clear and convincing evidence to the contrary. 28 U.S.C. § 2254(e)(1); *Cudjo v. Ayers*, 698 F.3d 752, 762 (9th Cir. 2012) ("[T]he statement of facts from the last reasoned state court decision 'is afforded a presumption of correctness that may be rebutted only by clear and convincing evidence.'" (citation omitted)), *cert. denied,* __ U.S. __, 133 S.Ct. 2735 (2013). Therefore, this Court must defer to the state court's factual findings unless a defect in the process is so apparent that "'*any* appellate court ... would be unreasonable in holding that the state court's fact-finding process was adequate.'" *Hibbler v. Benedetti*, 693 F.3d 1140, 1146-47 (9th Cir. 2012) (internal citation omitted), *cert. denied,* __ U.S. __, 133 S.Ct. 1262 (2013); *Taylor v. Maddox,* 366 F.3d 992, 1000 (9th Cir.), *cert. denied,* 543 U.S. 1038 (2004).

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II. PETITIONER'S CLAIM

A. Facts Presented to the California Supreme Court

Claim 11 was presented to the California Supreme Court as "Claim 2" of Petitioner's Exhaustion Petition in 2007 – "The Appointment of Counsel Under the Defense Services Contract Between the Pomona Contract Lawyer's Association and the County of Los Angeles Violated Petitioner's Right to Counsel Under the Sixth Amendment, and Right to Equal Protection and Due Process of Law Under the Fifth and Fourteenth Amendment to the United States Constitution." [Dkt. No. 123, Lodged Doc. E1 at 73-80.] Claim 1 of that petition argued that "Petitioner's Right to Due Process of Law Under the Fifth and Fourteenth Amendments to the United States Constitution Were Violated by the Trial Court's Denial of His Request for the Appointment of Second Counsel Under the Established Law of the State of California." [Dkt. No. 123, Lodged Doc. E1 at 47-73.] Essentially, Petitioner argued as he does in his federal petition, that the PCLA Contract with the County impeded his attorney's ability to provide competent representation.

In support of these claims, Petitioner filed the following exhibits: the Declarations of his habeas counsel – Norman D. James and Jerry L. Newton [Dkt. No. 123, Lodged Doc. E2, Ex. 1 & 2]; a copy of the September 1990 Pomona Contract Lawyers' Association Contract [Dkt. No. 123, Lodged Doc. E2, Ex. 3]; a copy of the October 1991 First Extension of that contract; a letter from the Chief Administrative Office County of Los Angeles, dated February 4, 1994 [Dkt. No. 123, Lodged Doc. E2, Ex. 4]; and a copy of the October 1992 Second Extension of the Pomona Contract Lawyers' Association Contract for Conflict Administration Services [Dkt. No. 123, Lodged Doc. E2, Ex. 5]. These are the same exhibits Petitioner cites in his Response to this Court's Order to Show Cause Re: Summary Judgment on Claim 11. Petitioner did not file a declaration of trial counsel, John Tyre. In addition, Petitioner submitted to this Court his own

declaration, dated May 16, 2014, which was not previously presented to the California Supreme Court. Under §2254(d) and *Pinholster*, this Court may not consider this declaration as its review is limited to the record that was before the state court that adjudicated the claim on the merits. *Pinholster*, 563 U.S. at 181-82; 28 U.S.C. §2254(d)(2) ("An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim --. . . .(2) resulted in a decision that was based on an unreasonable determination of the facts *in light of the evidence presented in the State court proceeding*." (emphasis added).) Morever, even if considered, Petitioner's declaration would not change this Court's ruling.

The evidence indicates that John D. Tyre was appointed to represent Petitioner at trial in Pomona Superior Court on or around April 9, 1991. (CT 488; [Dkt. No. 123, Lodged Doc. E1 at 49].) At the time of his appointment, Mr. Tyre was a signatory to a defense services contract between the Pomona Contract Lawyers Association ("PCLA") and Los Angeles County (covering the period between November 1, 1990 and October 31, 1991), under which the PCLA agreed to provide representation to criminal defendants in the East District of Los Angeles Superior Court (Pomona) when the Public Defender's Office had a conflict. [Dkt. No. 123, Lodged Docs. E1 at 50, 73-74 & E2, Ex. 3 at 7-29.] The terms of the contract provided that the nine attorney signatories agreed to accept representation in up to 500 cases in the East District for the flat fee of $495,833, and $991.67 for each additional case over 500. [Dkt. No. 123, Lodged Docs. E1 at 74 & E2, Ex. 3 at 14-15.]

Under the contract, if the PCLA refused to accept an appointment, its members were liable to the County for any fees paid to a non-PCLA attorney. [Dkt. No. 123, Lodged Docs. E1 at 74-75 & E2, Ex. 3 at 18.] There is nothing in the contract that requires, as Petitioner suggests, that its signatories repay fees paid