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NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

OCT 25 2021

FOR THE NINTH CIRCUIT

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

JESSIE FLORES,

Petitioner-Appellant,

v.

W.J. SULLIVAN,

Respondent-Appellee.

No. 20-55817

D.C. No.
5:17-cv-00434-VBF(MRW)

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Valerie Baker Fairbank, District Judge, Presiding

Submitted October 21, 2021**
Pasadena, California

Before: R. NELSON and VANDYKE, Circuit Judges, and SCHREIER***, District Judge.

Jessie Flores appeals the district court's denial of his petition for habeas corpus. We have jurisdiction under 28 U.S.C. §§ 1291, 2253, 2254, and we affirm.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

*** The Honorable Karen E. Schreier, District Judge for the District of South Dakota, sitting by designation.

1. The district court's order finding no deficiency (and thus no ineffective assistance of counsel) was neither contrary to nor an unreasonable application of federal law. *See* 28 U.S.C. § 2254(d)(1); *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984).

Counsel conducted a reasonable investigation and then made a reasonable decision that made further investigation unnecessary. *See Rompilla v. Beard*, 545 U.S. 374, 377 (2005). Given the mental state evidence that she already had, including the evidence of malingering and the testimony of two experts that Flores was sane at the time of the murder, counsel reasonably decided not to investigate further and not to pursue the insanity defense.

Counsel investigated Flores's mental state at the competency stage of his trial. Flores was examined by four experts, two of whom found that he was sane at the time of the murder. Flores points to cases in which counsel "failed to conduct any investigation at all," *see Seidel v. Merkle*, 146 F.3d 750, 755 (9th Cir. 1998); failed to seek any psychological evaluation, based only on speculation that it "might undermine his trial strategy," *see Weeden v. Johnson*, 854 F.3d 1063, 1066, 1070 (9th Cir. 2017) (internal quotation marks omitted); "did virtually nothing to obtain the services of [the defendant's] key witness," *see Bloom v. Calderon*, 132 F.3d 1267, 1271 (9th Cir. 1997); and failed to pursue a mental state defense at all, even though there was a "wealth of mental health and drug abuse evidence" that

went undiscovered, *Jennings v. Woodford*, 290 F.3d 1006, 1019 (9th Cir. 2002).

These cases are not similar to Flores's case because Flores's counsel did investigate Flores's mental health, Flores was examined by four experts, and there was already considerable evidence of Flores's mental state.

2. The state trial court did not need to hold an evidentiary hearing because the record contained enough facts to adjudicate the petition. *See Hibbler v. Benedetti*, 693 F.3d 1140, 1147 (9th Cir. 2012) (“[W]e have never held that a state court must conduct an evidentiary hearing to resolve every disputed factual question . . .”).

Flores cites *Nunes v. Mueller*, 350 F.3d 1045 (9th Cir. 2003), but that case itself stated that “there may be instances where the state court can determine without a hearing that a criminal defendant’s allegations are entirely without credibility or that the allegations would not justify relief even if proved.” *Id.* at 1045–55. There is no “evidentiary hearing requirement as a pre-requisite to AEDPA deference.” *Lambert v. Blodgett*, 393 F.3d 943, 969 (9th Cir. 2004) (internal quotation marks omitted). Flores also cites *Earp v. Ornoski*, 431 F.3d 1158, 1176 (9th Cir. 2005), but in that case, counsel had completely failed to discover an entire kind of evidence; here, counsel had already discovered plenty of evidence about Flores’s mental state, both helpful and harmful to Flores’s insanity defense, and the record already contained enough facts to adjudicate the petition.

3. As to the other *Strickland* factor, prejudice, even assuming we reviewed prejudice de novo because the state court did not reach that factor, counsel's decision not to investigate further did not result in prejudice. One of the experts who found malingering also found that Flores had experienced mental health issues before, but that he was exaggerating his symptoms to feign mental illness. Contrary to Flores's arguments, more investigation would not have changed the finding of malingering, nor would it have changed the opinions of the two experts who said that he was sane at the time of the murder. Even if there had been more investigation, there is no reasonable chance that the outcome would have been different. *See Strickland*, 466 U.S. at 694.

AFFIRMED.

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9 **IN THE UNITED STATES DISTRICT COURT**
10 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**
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12
13 JESSIE JAMES FLORES,

14 Petitioner,

15 v.

16 W.J. SULLIVAN, Warden,

17 Respondent.
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Case No. ED CV 17-434 VBF (MRW)

ORDER GRANTING IN PART AND
DENYING IN PART CERTIFICATE
OF APPEALABILITY

20 Rule 11 of the Rules Governing Section 2254 Cases in the United
21 States District Courts requires a district court to issue or deny a certificate
22 of appealability when it enters a final order adverse to the applicant.

23 Under 28 U.S.C. § 2253(c)(2), a COA may issue “only if the applicant
24 has made a substantial showing of the denial of a constitutional right.”
25 The Supreme Court has held that this standard means showing that
26 “reasonable jurists could debate whether (or, for that matter, agree that)
27 the petition should have been resolved in a different manner or that the
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1 issues presented were adequate to deserve encouragement to proceed
2 further.” Slack v. McDaniel, 529 U.S. 473, 484 (2000) (internal quotation
3 marks omitted). The COA inquiry is only a “threshold question” to
4 determine whether a decision is “debatable.” It is made “without full
5 consideration of the factual or legal bases adduced in support of the
6 claims.” Buck v. Davis, ___ U.S ___, 137 S. Ct. 759, 773-74 (2017)
7 (quotation marks omitted).

8 Here, after duly considering Petitioner’s contentions in support of the
9 claims alleged in the petition, the Court grants a certificate of appealability
10 for his ineffective assistance of counsel claim (Ground One). The Court
11 concludes that Petitioner failed to make the requisite showing for the
12 issuance of a certificate for his remaining claims.

13
14 DATE: July 16, 2020

Valerie Baker Fairbank

HON. VALERIE BAKER FAIRBANK
SENIOR U.S. DISTRICT JUDGE

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9 **IN THE UNITED STATES DISTRICT COURT**
10 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**
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12
13 JESSIE JAMES FLORES,
14 Petitioner,
15 v.
16 W.J. SULLIVAN, Warden,
17 Respondent.
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Case No. ED CV 17-434 VBF (MRW)

JUDGMENT

19
20 Pursuant to the Order Accepting Findings and Recommendations of
21 the United States Magistrate Judge,

22 IT IS ADJUDGED that the petition is denied and this action is
23 dismissed with prejudice.

24
25 DATE: July 15, 2020

Valerie Baker Fairbank
HON. VALERIE BAKER FAIRBANK
SENIOR U.S. DISTRICT JUDGE

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9 **IN THE UNITED STATES DISTRICT COURT**
10 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**
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12
13 JESSIE JAMES FLORES,

14 Petitioner,

15 v.

16 W.J. SULLIVAN, Warden,

17 Respondent.
18
19

Case No. ED CV 17-434 VBF (MRW)

ORDER ACCEPTING FINDINGS
AND RECOMMENDATIONS OF
UNITED STATES MAGISTRATE
JUDGE

20 Pursuant to 28 U.S.C. § 636, the Court reviewed the petition, the
21 records on file, and the Report and Recommendation of the United States
22 Magistrate Judge. Further, the Court engaged in a de novo review of
23 those portions of the Report to which Petitioner objected. The Court
24 accepts the findings and recommendation of the Magistrate Judge.
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1 IT IS ORDERED that Judgment be entered denying the petition and
2 dismissing this action with prejudice.
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4
5 DATE: July 15, 2020

Valerie Baker Fairbank

6 HON. VALERIE BAKER FAIRBANK
7 SENIOR U.S. DISTRICT JUDGE
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**IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA**

JESSIE JAMES FLORES,

 Petitioner,

 v.

W.J. SULLIVAN, Warden,

 Respondent.

Case No. CV 17-434 VBF (MRW)
REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE
JUDGE

 This Report and Recommendation is submitted to the Honorable
Valerie Baker Fairbank, Senior United States District Judge, pursuant to
28 U.S.C. § 636 and General Order 05-07 of the United States District Court
for the Central District of California.

SUMMARY OF RECOMMENDATION

 This is a habeas action involving a state prisoner. Petitioner contends
that his trial lawyer provided ineffective assistance at his murder trial.
Petitioner also argues that the trial judge should have been disqualified.

1 However, the state court decisions denying relief to Petitioner were
2 neither contrary to, nor unreasonable applications of, clearly established
3 federal law. Accordingly, the Court recommends that the petition be denied.

4 **FACTS AND PROCEDURAL HISTORY**

5 **Trial and Direct Appeal**

6 Petitioner shot his girlfriend to death with a shotgun. He killed her in
7 front of family members. Writings by Petitioner (discovered shortly after the
8 shooting) detailed his intention to kill his girlfriend. (Docket # 45-8 at 3-6.)
9 Additionally, in his trial testimony, Petitioner admitted grappling over the
10 weapon with the victim. (*Id.* at 7.)

11 Petitioner pled not guilty by reason of insanity. At a bifurcated trial,
12 the jury convicted Petitioner of first degree murder, child endangerment, and
13 felon in possession of a firearm. (*Id.* at 4, 9.) Petitioner then withdrew his
14 insanity plea. The trial court sentenced Petitioner to a life term in prison.
15 (*Id.* at 9-10.)

16 The state appellate court affirmed the convictions in a reasoned,
17 unpublished decision. (*Id.*) The state supreme court denied review without
18 comment. (Docket # 45-10.)

19 **Habeas Proceedings**

20 Petitioner then filed this habeas action under 28 U.S.C. § 2254.
21 Magistrate Judge Wilner screened the petition and determined that it
22 contained several unexhausted claims that Petitioner had not presented on
23 direct appeal. (Docket # 5.) Judge Wilner appointed the Federal Public
24 Defender's Office to represent Petitioner.¹ (*Id.*) The Court granted a stay of
25 this action pursuant to Rhines v. Weber, 544 U.S. 269 (2005), so that
26

27 ¹ The Court thanks DFPD Mark Drozdowski for his professional and
28 diligent representation of Petitioner under this appointment.

1 Petitioner could pursue an unexhausted claim of ineffective assistance by his
2 trial attorney in further state court proceedings. (Docket # 16.)

3 The state superior court denied Petitioner's new claim in a reasoned
4 decision. (Docket # 45-13.) The court did not hold an evidentiary hearing.
5 (Id. at 4.) The state appellate and supreme courts subsequently denied
6 habeas relief without comment. (Docket # 45-15, 45-17.)

7 This Court lifted the stay of the federal action. (Docket # 31.) By
8 agreement of the parties, Petitioner filed an amended petition containing the
9 newly-exhausted claim. (Docket # 37.) (Petitioner voluntarily dismissed an
10 additional claim that remained unexhausted. (Docket # 41.)) The Court then
11 received additional briefing from the parties. (Docket # 44, 51.)

12 DISCUSSION

13 Standard of Review Under AEDPA

14 Under AEDPA, federal courts may grant habeas relief to a state
15 prisoner "with respect to any claim that was adjudicated on the merits in
16 State court proceedings" only if that adjudication:

17 (1) resulted in a decision that was contrary to, or
18 involved an unreasonable application of, clearly
19 established Federal law, as determined by the Supreme
20 Court of the United States; or (2) resulted in a decision
21 that was based on an unreasonable determination of the
22 facts in light of the evidence presented in the State court
23 proceeding.

24 28 U.S.C. § 2254(d).

25 In a habeas action, this Court generally reviews the reasonableness of
26 the state court's last reasoned decision on a prisoner's claims. Murray v.
27 Schriro, 746 F.3d 418, 441 (9th Cir. 2014); Harrington v. Richter, 562 U.S. 86,
28 99 (2011). Here, the state appellate court's opinion on direct appeal was the
last reasoned decision addressing Petitioner's two related claims involving the

1 disqualification of the trial judge and alleged ineffective assistance of counsel.
2 (Docket # 45-8.) The Court reviews that decision under AEDPA for
3 reasonableness. In doing so, the Court received and independently reviewed
4 the relevant portions of the state court record. Nasby v. McDaniel, 853 F.3d
5 1049, 1053 (9th Cir. 2017).

6 Petitioner presented another ineffective assistance claim in state habeas
7 proceedings. That claim related to the pursuit and abandonment of a mental
8 health defense to the criminal charges. The state superior court issued a
9 reasoned decision denying the claim on the merits. (Docket # 26-1.) Because
10 the state appellate and supreme courts denied relief without comment, this
11 Court “looks through” those silent decisions and reviews the superior court’s
12 reasoned decision under AEDPA. Ylst v. Nunnemaker, 501 U.S. 797, 803-04
13 (1991).

14 * * *

15 Overall, AEDPA presents “a formidable barrier to federal habeas relief
16 for prisoners whose claims have been adjudicated in state court.” Burt v.
17 Titlow, 571 U.S. 12, 19 (2013). On habeas review, AEDPA places on a
18 prisoner the burden to show that the state court’s decision “was so lacking in
19 justification that there was an error well understood and comprehended in
20 existing law beyond any possibility for fairminded disagreement” among
21 “fairminded jurists.” Richter, 562 U.S. at 101, 103; White v. Wheeler, ___ U.S.
22 ___, 136 S. Ct. 456, 461 (2015). Federal habeas corpus review under AEDPA
23 therefore serves as “a guard against extreme malfunctions in the state
24 criminal justice systems, not a substitute for ordinary error correction” in the
25 state court system. Richter, 562 U.S. at 102.

1 **Ineffective Assistance of Counsel (Ground 1)**

2 Petitioner contends that his trial attorney performed deficiently by
3 failing to investigate and present a mental state defense. (Docket # 37 at 11.)

4 **Facts and Relevant Procedural History**

5 Issues related to Petitioner's competency to stand trial and his mental
6 state at the time of the murder arose throughout this matter. As recounted in
7 the amended petition, the trial court declared a doubt about Petitioner's
8 competency to stand trial shortly after proceedings began. (Docket # 37-2
9 at 15.) Additionally, the defense pursued a plea of not guilty by reason of
10 insanity (and a parallel "accidental shooting" defense) to the murder charge
11 until the jury convicted Petitioner of the killing. (Docket # 45-8 at 9.)

12 Because of this, Petitioner was examined by mental health professionals
13 – at the direction of the court and the defense lawyer – numerous times.
14 According to the Attorney General's recitation of the history of Petitioner's
15 mental health evaluations, two practitioners (Drs. Jones and Leitman)
16 initially concluded that Petitioner was not competent to stand trial. (Docket
17 # 44-1 at 13-15.) However, both professionals later reexamined Petitioner.
18 They reviewed Petitioner's recorded jail calls, conducted additional clinical
19 tests, and interviewed Petitioner further. Both Dr. Jones and Dr. Leitman
20 determined that Petitioner was competent to stand trial. Further, Dr. Jones
21 concluded that test results and the jail recordings "strongly indicated
22 malingering" in Petitioner's interactions with psychologists. (Docket # 45-12
23 at 96.)

24 As for Petitioner's mental condition at the time of the offense,
25 two additional specialists examined him before trial. Both Dr. Molnar and
26 Dr. Suiter opined that Petitioner was not insane at the time of the killing.
27 (Docket # 44-1 at 18-21.)
28

1 Even so, Petitioner's bifurcated trial began on his plea of not guilty by
2 reason of insanity. After the jury found Petitioner guilty of murder (thereby
3 rejecting the accident defense), the prosecutor told the trial court that she was
4 prepared to present testimony to rebut the insanity claim from "three
5 witnesses, the two doctors and then the investigator in the case." (Docket
6 # 45-4 at 216.) Several days later, though, Petitioner withdrew his insanity
7 plea. Petitioner engaged in a colloquy with the trial judge and the defense
8 lawyer in which he waived the defense. Petitioner's lawyer joined in the
9 waiver after discussing "the state of the evidence and all the consequences
10 either way" with Petitioner. (Id. at 219-20.)

11 * * *

12 On habeas review, Petitioner contended that the trial lawyer was
13 ineffective "by failing to investigate, prepare, and present a mental state
14 defense." (Docket # 26-1 at 1.) The state habeas petition contained
15 declarations from family members regarding Petitioner's past mental health
16 conditions and substance abuse, as well as an evaluation from a forensic
17 psychiatrist. The superior court ordered the prosecution to respond to the
18 augmented petition.

19 The court ultimately denied relief in a reasoned decision. (Id.) The
20 court expressly cited Strickland v. Washington, 466 U.S. 668 (1984), and state
21 analogues in its analysis. The superior court noted "that there were
22 downsides to presenting a mental state defense that would have been
23 apparent to trial counsel." The state court described the expert reports of the
24 mental health professionals at the time of trial as "equivocal" regarding
25 Petitioner's claims. (Id. at 2-3.) However, because there were "multiple
26 expert reports on competency and sanity, there is no indication that trial
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1 counsel failed” to make a reasonable investigation or strategic decision in
 2 Petitioner’s case. (*Id.* at 3.)

3 Moreover, the court concluded that newly-submitted evidence of
 4 Petitioner’s mental health problems was “not as powerful” as he claimed,
 5 particularly given the “substantial” evidence available before trial that
 6 Petitioner: (a) was not experiencing psychosis at the time of the killing; and
 7 (b) was malingering during testing. (*Id.* at 2.) The court found a reasonable
 8 “tactical decision” to abandon a mental health defense in favor of the defense
 9 regarding the accidental nature of the shooting to which Petitioner testified at
 10 trial.² (*Id.*)

11 On that basis, the court held that Petitioner’s trial lawyer did not
 12 perform deficiently. The trial court did not hold an evidentiary hearing or
 13 compel a statement from Petitioner’s former lawyer (then a sitting superior
 14 court commissioner) in reaching this conclusion. The court determined that
 15 such testimony “would not resolve a material dispute framed by the
 16 pleadings,” such as establishing the facts of the case or the “available mental
 17 state evidence” at the time of trial. (*Id.* at 4.)

18 **Relevant Federal Law**

19 The Sixth Amendment of the Constitution guarantees a criminal
 20 defendant the right to effective assistance of a lawyer. *Strickland v.*
 21 *Washington*, 466 U.S. at 686. To establish ineffective assistance under
 22 *Strickland*, “a defendant must show both deficient performance by counsel and
 23 prejudice.” *Knowles v. Mirzayance*, 556 U.S. 111, 112 (2009). “Failure to
 24
 25

26 ² Although not expressly mentioned in the state habeas decision, the
 27 Attorney General notes that Petitioner told police that he had not used drugs for
 28 years before the shooting. (Docket # 45-2 at 28.) That recorded statement would
 have undermined a drug-related intoxication defense to his culpability.

1 satisfy either prong of the Strickland test obviates the need to consider the
2 other.” Rios v. Rocha, 299 F.3d 796, 805 (9th Cir. 2002).

3 Deficient performance is defined as representation that falls below an
4 objective standard of reasonableness. Strickland, 466 U.S. at 688. As to
5 prejudice, a challenger must demonstrate that “there is a reasonable
6 probability that, but for counsel’s unprofessional errors, the result of the
7 proceeding would have been different.” Padilla v. Kentucky, 599 U.S. 356, 366
8 (2010) (quotation omitted). Speculation that a defendant might have suffered
9 prejudice “is plainly insufficient to establish prejudice.” Gonzalez v. Knowles,
10 515 F.3d 1006, 1016 (9th Cir. 2008).

11 A trial lawyer is “strongly presumed to have rendered adequate
12 assistance,” and should not have a reviewing court “second-guess counsel’s
13 assistance.” Cullen v. Pinholster, 563 U.S. 170, 189 (2011). Federal courts
14 are not supposed to engage in “Monday morning quarterbacking” of a lawyer’s
15 strategic decisions. Ayala v. Chappell, 829 F.3d 1081, 1102 (9th Cir. 2016). A
16 lawyer’s “tactical decisions at trial [] are given great deference and must []
17 meet only objectively reasonable standards.” Dows v. Wood, 211 F.3d 480, 487
18 (9th Cir. 2000).

19 A defense lawyer has a duty to conduct a reasonable investigation before
20 trial. Atwood v. Ryan, 870 F.3d 1033, 1057 (9th Cir. 2017). However, when a
21 lawyer has reason to believe that “pursuing certain investigations would be
22 fruitless or even harmful,” the attorney’s “failure to pursue those
23 investigations may not later be challenged as unreasonable”; a trial decision
24 made after adequate investigation is “virtually unchallengeable.” Strickland,
25 466 U.S. at 691.

26 * * *

1 “Surmounting Strickland’s high bar is never an easy task.” Padilla,
2 559 U.S. at 371. Establishing that a state court’s application of Strickland
3 was unreasonable under AEDPA “is all the more difficult.” Richter, 562 U.S.
4 at 105. The standards created by Strickland and Section 2254(d) are both
5 “highly deferential”; when the two apply in tandem, “review is doubly so.” Id.
6 (quotation omitted).

7 Analysis

8 On doubly-deferential review, the Court concludes that Petitioner is not
9 entitled to relief. In reviewing Petitioner’s claim, the state court cited the
10 correct legal standard (Strickland), reviewed the pretrial and post-conviction
11 mental health evidence, and rendered an extended, reasoned decision. The
12 state habeas court clearly was aware of the governing constitutional test that
13 required Petitioner to demonstrate both deficient performance and resulting
14 prejudice based on the lawyer’s conduct. Knowles, 556 U.S. at 112.

15 The application of that test to Petitioner’s ineffective assistance claim
16 was not unreasonable, and warrants this federal court’s deference under
17 AEDPA. The state habeas court concluded that the defense lawyer had
18 adequate information (multiple reports from mental health experts, none of
19 which ultimately supported Petitioner’s position) to evaluate the viability of a
20 mental health or competency defense. Moreover, the issue of an insanity
21 defense was more than a theoretical possibility – it was Petitioner’s actual
22 plea until the final stage of the trial.

23 Given the trial lawyer’s active involvement in the case and the obvious
24 significance of the adverse psychological reports, the state habeas court did
25 not unreasonably conclude that the trial lawyer had a reasonable basis not to
26 advise pursuing a mental health / insanity defense. Strickland, 466 U.S. at
27 691; Dows, 211 F.3d at 487; Atwood, 870 F.3d at 1057. Moreover, opening the
28

1 door to such claims would, as the state court noted, open the door to negative
 2 evidence about Petitioner's malingering during his mental examinations.
 3 Declining to open that door was a legitimate, strategic decision that the state
 4 court was entitled not to second-guess. Pinholster, 563 U.S. at 189; Ayala, 829
 5 F.3d at 1102. And, because it concluded that there was no deficient
 6 performance, the state court did not commit constitutional error in declining
 7 to consider the alternate "prejudice" prong of the Strickland analysis. Rios,
 8 299 F.3d at 805.³

9 * * *

10 On federal review, Petitioner contends that the state court's evaluation
 11 of his habeas claim should not be subject to AEDPA deference. Rather, he
 12 argues that the state court acted unreasonably (both as a matter of federal
 13 law and in its factual evaluation of the record) by denying him an evidentiary
 14 hearing. (Docket # 37-2 at 19-21.) From this, Petitioner asserts that he is
 15 entitled to de novo consideration of his ineffective assistance claim, and an
 16 evidentiary hearing in this federal court.

17 Petitioner's arguments are without merit. Following Pinholster, a
 18 federal court's review is generally "limited to the record that was before the
 19 state court that adjudicated the claim on the merits." Pinholster, 563 U.S.
 20 at 181. Moreover, the state court did receive and review additional material
 21 from Petitioner in habeas proceedings. Its decision not to take further
 22 testimony from the trial lawyer about her subjective thought process (Docket

23 ³ Even so, the state court strongly suggested that Petitioner was not
 24 prejudiced by the decision not to pursue a mental state defense. The court noted
 25 that Petitioner's supplemental proof of his mental problems and past drug use was
 26 "not as powerful" as he asserted; it was based on his family's "vague impressions
 27 from long ago" and a forensic psychiatrist's opinion "without much explanation."
 28 (Docket # 26-1 at 3.) Although not directly focused on prejudice, the clear takeaway
 is that the state reviewing court was not impressed by Petitioner's habeas claim that
 the lawyer's error materially affected the outcome of the case. That, too, was not an
 unreasonable conclusion. Gonzalez, 515 F.3d at 1016.

1 # 26-1 at 4) did not impact its analysis of the objective reasonableness of the
2 lawyer's actions. Atwood, 870 F.3d at 1050. This Court has no basis to
3 conclude that the state court's procedures were so unreasonable that
4 Petitioner is entitled to either de novo review or further evidentiary
5 development in this forum.

6 * * *

7 Because Petitioner has not shown an "extreme malfunction" in the state
8 criminal justice system, habeas relief on this claim is not warranted. Richter,
9 562 U.S. at 102.

10 **Judicial Bias (Grounds Two and Three)**

11 Petitioner contends that the trial judge should have been disqualified
12 from hearing a motion regarding Petitioner's prior conviction because of the
13 judge's involvement in that earlier criminal case. (Docket # 37 at 24.) He also
14 alleges that his trial lawyer was ineffective for failing to disqualify the judge.

15 **Facts and Relevant Procedural History**

16 Petitioner had a previous burglary conviction. The trial judge was a
17 former deputy district attorney. In that capacity, he made three pretrial
18 appearances as a prosecutor in Petitioner's earlier case. The judge's
19 involvement in that case was limited. He appeared at Petitioner's
20 arraignment, and at two other hearings (including one where Petitioner was
21 not present) at which the parties requested a continuance of proceedings.
22 (Docket # 45-8 at 10.) The judge did not make any substantive arguments or
23 presentations when acting in Petitioner's previous burglary action. There was
24 also no proof that he made any charging or case-related decisions as a deputy
25 district attorney. (Id. at 37.)

1 At the sentencing phase of Petitioner's murder trial (the conviction
 2 currently under habeas review), the judge denied Petitioner's Romero⁴ motion
 3 to strike the prior burglary conviction. (Id. at 9.) At no point during the
 4 murder trial or at sentencing did anyone note the judge's limited involvement
 5 in Petitioner's earlier criminal case. (Id. at 38.)

6 * * *

7 But it came up on direct appeal. During appellate proceedings,
 8 Petitioner's attorney raised – for the first time – the issue of the judge's
 9 previous role as a prosecutor. (Id. at 11.) Petitioner “belatedly filed a
 10 ‘statement of disqualification’ of the trial court.” (Id.) Petitioner argued the
 11 trial judge's role as a lawyer in Petitioner's prior burglary case barred him
 12 from ruling on the Romero motion, both under state law and in violation of
 13 Petitioner's due process rights under the Constitution.

14 The state appellate court held that Petitioner's failure to seek the
 15 judge's disqualification during trial waived the statutory claim as a matter of
 16 state law. (Id. at 23.) The court also denied Petitioner's due process claim.
 17 The appellate court explained that the distinction “between statutory grounds
 18 for disqualification and grounds for disqualification under the constitutional
 19 due process clause is significant.” (Id. at 33.) The court noted that
 20 California's disqualification statute impose a more rigorous standard. (Id. at
 21 35-36.) The court stated that constitutional disqualification “focuses on actual
 22 bias” by a trial judge, or a “constitutionally intolerable” probability of such
 23 bias. (Id. at 31 (quotation omitted).) This standard “is an objective one.” (Id.)

24 The appellate court concluded the judge's limited involvement in
 25 Petitioner's earlier conviction raised “no significant or realistic risk of bias or
 26 prejudgment.” (Id. at 38.) The prosecutor-turned-judge was not “active” in
 27

28 ⁴ People v. Superior Court (Romero), 13 Cal. 4th 497 (1996).

1 Petitioner's burglary case a dozen years earlier; "There is nothing to show that
2 [the judge] had both tried the earlier strike offense, and then used that
3 knowledge in ruling on [Petitioner's] application to have the strike prior
4 dismissed" in the later murder case. (*Id.* at 35, 37.) The court concluded the
5 "probability of actual judicial bias under the circumstances" was "minuscule."
6 (*Id.* at 39.) The state court further determined that this was "not a rare case
7 presenting extreme facts, and implicates only statutory disqualification
8 concerns." (*Id.* at 33.) On that basis, the court rejected Petitioner's claim of
9 constitutional error.

10 * * *

11 Petitioner also argued that his trial lawyer provided ineffective
12 assistance by failing to seek the judge's disqualification at sentencing
13 (whether for statutory or constitutional reasons). Addressing that claim, the
14 state appellate court found no prejudice from any alleged deficient
15 performance. The appellate court noted Petitioner's concession that the judge
16 did not abuse his discretion in declining to strike the strike. (*Id.* at 28.)
17 Moreover, there was little reason (other than the age of the earlier conviction)
18 to plausibly support striking the conviction. The court concluded that "it
19 would be sheer speculation, and not a reasonable probability, that any other
20 judge would have found that defendant fell outside the spirit of the
21 three strikes scheme" and struck Petitioner's burglary prior if the judge had
22 been disqualified. (*Id.* at 30.) Because a different sentencing outcome was not
23 likely, the appellate court found no merit to Petitioner's ineffective assistance
24 claim.

25 **Relevant Federal Law**

26 The Due Process Clause guarantees a criminal defendant the right to a
27 fair and impartial judge at trial. *In re Murchison*, 349 U.S. 133, 136 (1955).
28

1 Judicial misconduct can lead to habeas relief when the judge's "behavior
2 rendered the trial so fundamentally unfair as to violate federal due process
3 under the United States Constitution." Duckett v. Godinez, 67 F.3d 734, 740
4 (9th Cir. 1996).

5 Due process violations based on judicial bias occur only in "rare" and
6 "exceptional" cases with "extreme facts." Caperton v. A.T. Massey Coal Co.,
7 556 U.S. 868, 890 (2009); Villasenor v. Long, No. CV 13-2399 PSG (JC), 2015
8 WL 3866211, at *7 (C.D. Cal. 2015) (same). "Most matters relating to judicial
9 disqualification" arise under state law; a state law basis for disqualification
10 alone "does not warrant a conclusion that [a defendant's] due process rights
11 were violated." Freeman v. Cate, 705 F. App'x 513, 515 (9th Cir. 2017)
12 (quoting Caperton).

13 To prevail on a judicial bias claim, a prisoner must overcome "a strong
14 presumption that a judge is not biased or prejudiced." Rhoades v. Henry, 598
15 F.3d 511, 519 (9th Cir. 2010) (citing Bracy v. Gramley, 520 U.S. 899, 909
16 (1997)); Withrow v. Larkin, 421 U.S. 35, 47 (1975) (there is a "presumption of
17 honesty and integrity in those serving as adjudicators.") The burden to
18 establish bias is high; "facts sufficient to create actual impropriety or an
19 appearance of impropriety" are required to show judicial bias. Greenway v.
20 Schriro, 653 F.3d 790, 806 (9th Cir. 2011). There is an "impermissible risk of
21 actual bias when a judge earlier had a significant, personal involvement as a
22 prosecutor in a critical decision" in a criminal action. Williams v.
23 Pennsylvania, ___ U.S. ___, 136 S. Ct. 1899, 1905 (2016) (error where former
24 district attorney who authorized death penalty failed to recuse from state
25 supreme court's later consideration of case).

1 Analysis

2 On deferential AEDPA review, the Court finds no constitutional error
3 with the state appellate court's reasoned decision. The court analyzed
4 Petitioner's judicial bias claim under the correct constitutional standard,
5 expressly citing Caperton and state law analogues. The court concluded that
6 the probability of bias was "miniscule" because of the judge's minimal
7 involvement in the prior felony case years earlier.

8 The state appellate court's determination was not an unreasonable
9 application of clearly established federal law. Petitioner fails to demonstrate
10 that the state court improperly evaluated whether Petitioner's sentencing was
11 "fundamentally unfair" because of the judge's tangential involvement in the
12 earlier case. Murchison, 349 U.S. at 136; Duckett, 67 F.3d at 740. The
13 appellate court correctly noted that the judge was not "active" in the
14 prosecution of the prior burglary. That's not an unreasonable construction of
15 the relevant test from Williams, 136 S. Ct. at 1905: Did the judge have "a
16 significant, personal involvement as a prosecutor in a critical decision" in the
17 earlier action?⁵

18 In reality, the prosecutor-turned-judge appears to have represented the
19 state in three "show up" pretrial hearings. The state appellate court did not
20 unreasonably conclude that this circumstance failed to present "extreme facts"
21 sufficient to establish any real or potential bias of the judge years later.

22
23 ⁵ The state appellate court issued its decision on direct appeal in
24 December 2015, or about six months before the Williams ruling from the Supreme
25 Court. However, a state court need not have cited or even been aware of the
26 controlling Supreme Court cases "so long as neither the reasoning nor the result of
27 the state court decision contradicts them." Early v. Packer, 537 U.S. 3, 8 (2002);
28 Andrews v. Davis, 944 F.3d 1092, 1117 (9th Cir. 2019). Here, the state court
decision was entirely in line with the analysis of the to-be-issued federal
constitutional opinion.

1 Caperton, 556 U.S. at 887; Rhoades, 598 F.3d at 519; Greenway, 653 F.3d at
 2 806. The state court's thoughtful analysis of this issue was not "so lacking in
 3 justification" as to violate the Constitution. Wheeler, 136 S. Ct. at 461.
 4 Habeas relief is not warranted.⁶

5 * * *

6 Petitioner's derivative claim of ineffective assistance (based on the trial
 7 lawyer's failure to seek the judge's disqualification at sentencing) fares no
 8 better. The state appellate court expressly cited Strickland's deficient
 9 performance / prejudice two-factor test. It also analyzed in detail the lack of
 10 prejudice that resulted from any unreasonable failure to disqualify the judge.
 11 As a matter of California sentencing law, the appellate court concluded that
 12 there was no "reasonable probability that any other judge" would have struck
 13 Petitioner's prior conviction.⁷ (Docket # 45-8 at 30.)

14 The state court's ruling noted the "sheer speculation" of potential
 15 prejudice; that analysis is a fair interpretation of the constitutional standard
 16 for ineffective assistance. Padilla, 599 U.S. at 366; Gonzalez, 515 F.3d at
 17 1016. Because the state court did not unreasonably apply federal law to
 18 Petitioner's claim, its decision survives deferential AEDPA review.

19 CONCLUSION

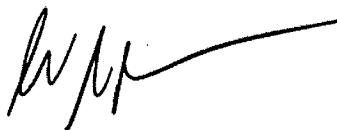
20 IT IS THEREFORE RECOMMENDED that the District Judge issue an
 21 order: (1) accepting the findings and recommendations in this Report;

22 ⁶ The Court notes, but declines to take up, the Attorney General's
 23 contention that Petitioner's disqualification claim is procedurally defaulted. A
 24 district court "may, in its discretion, reach the merits of a habeas claim" that is
 25 clearly meritless – particularly when the state court issued a reasoned, alternative
 26 explanation for denying the claim – "to further the interests of comity, federalism,
 and judicial efficiency." Boyd v. Thompson, 147 F.3d 1124, 1127 (9th Cir. 1998);
Ellis v. Armenakis, 222 F.3d 627, 631 (9th Cir. 2000) (same).

27 ⁷ A federal court sitting in habeas review generally is "bound to accept a
 28 state court's interpretation of state law." Butler v. Curry, 528 F.3d 624, 642 (9th Cir.
 2008); Reyes v. Madden, 780 F. App'x 436, 441 (9th Cir. 2019) (same).

- 1 (2) directing that judgment be entered denying the Petition; and
2 (3) dismissing the action with prejudice.
3

4
5 Dated: April 24, 2020



6 HON. MICHAEL R. WILNER
7 UNITED STATES MAGISTRATE JUDGE
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DECLARATION OF MARK R. DROZDOWSKI

I, Mark R. Drozdowski, declare:

1. I am an attorney with the Office of the Federal Public Defender for the Central District of California. I am licensed to practice law in the State of California. I represent Jessie James Flores in this habeas corpus action. I am the sole attorney assigned to represent Mr. Flores.

2. I have tried to speak with Mr. Flores's trial counsel, Commissioner Mickie Reed, about her representation of Mr. Flores at and before his murder trial, most recently after Respondent filed its Return. I received a phone message from Commissioner Reed on September 19, 2018. Her message stated that she would require a waiver of confidentiality by the client to speak with me. She and I spoke later that day and she told me that she would speak to me about her work on Mr. Flores's case only if he had executed a waiver of the attorney-client privilege. After the call, I sent her the attached email message containing Mr. Flores's authorization for her to speak with me about her work on the case (the authorization does not extend to the prosecution). I did not receive a response from Commissioner Reed to my email (I checked my emails and phone messages again before signing this declaration).

I declare under penalty of perjury of the laws of the United States of America and the State of California that the foregoing is true and correct.

Executed on October 11, 2018 at Los Angeles, California.


MARK R. DROZDOWSKI

Mark Drozdowski

From: Mark Drozdowski
Sent: Wednesday, September 19, 2018 5:10 PM
To: mreedesq@aol.com
Subject: Jessie James Flores case
Attachments: Prior Attorney.pdf

Here is the waiver Mr. Flores signed. Please let me know if you're willing to discuss his case with me. Thank you.

Mark Drozdowski
Deputy Federal Public Defender
213-894-7520

I, Jessie James Flores, authorize the lawyer who represented me at trial,
MICHAEL REED, to disclose any and all confidential
communications between me and her to my current lawyer, Mark Drozdowski, and
any and all people working with him on my habeas corpus case. I waive the
attorney-client and work product privileges for purposes of any meetings or other
communications between my trial lawyer and any staff who assisted her at or
before trial and my current lawyer and members of his legal team.

Executed on April 26, 2017 at Soledad, California.
Jessie James Flores
JEHACHAPI

Jessie James Flores
Jessie James Flores

SUPREME COURT
FILED

JUL 10 2019

Jorge Navarrete Clerk

S254999

Deputy

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re JESSIE JAMES FLORES on Habeas Corpus.

The petition for writ of habeas corpus is denied.

Kruger, J., was absent and did not participate.

CANTIL-SAKAUYE

Chief Justice

ATTORNEY GENERAL
SAN DIEGO

2019 JUL 15 AM 9:40

Case 5:17-cv-00434-SJO-MRW Document 45-17 Filed 11/18/19 Page 3 of 3 Page ID

Supreme Court of California

Clerk of the Court
350 McAllister Street
San Francisco, CA 94102-4797

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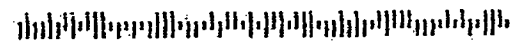
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Attorney General - San Diego Office
Office of the Attorney General
P.O. Box 85266
San Diego, CA 92186

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Pet. App. 69

COURT OF APPEAL -- STATE OF CALIFORNIA
FOURTH DISTRICT
DIVISION TWO

ORDER

In re JESSIE JAMES FLORES

E071811

on Habeas Corpus.

(Super.Ct.Nos. RIC1717440 &
BLF1100204)

The County of Riverside

THE COURT

The petition for writ of habeas corpus is DENIED.

RAPHAEL

Acting P. J.

Panel: Raphael
Menetrez
Ramirez

cc: See attached list

MAILING LIST FOR CASE: E071811
In re Jessie Flores on Habeas Corpus

Superior Court Clerk
Riverside County
P.O. Box 431 - Appeals
Riverside, CA 92502

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District Attorney
County of Riverside
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FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF RIVERSIDE

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF RIVERSIDE

NOV 16 2018

D. SIORDIAN

In the Matter of

Habeas Case Number: RIC1717440

Jessie James Flores

Criminal Case Number: BLF1100204

For Writ of Habeas Corpus

DENIAL ORDER RE: WRIT OF HABEAS
CORPUS

SJR

NOV 20 2018

The only habeas claim petitioner advances in his traverse is that his trial counsel rendered constitutionally ineffective assistance by failing to investigate, prepare, and present a mental state defense. (*People v. Romero* (1994) 8 Cal.4th 728, 739–40.)

There are two components to a claim by a defendant that his counsel's assistance was so defective as to require reversal of a conviction or death sentence. [Citations.] "First, the defendant must show that counsel's performance was deficient." [Citations.] This requires a showing that "counsel's representation fell below an objective standard of reasonableness." [Citations.] In evaluating a defendant's showing of incompetence, we accord great deference to the tactical decisions of trial counsel.

Second component requires that the defendant show prejudice resulting from counsel's alleged deficiencies. The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

(*In re Marquez* (1992) 1 Cal.4th 584, 602–03.)

Counsel's representation may be deficient where he or she "wholly fails to investigate a potentially meritorious defense of which he is or should be aware, and as a result the defense is withdrawn or counsel is incapable of making an informed tactical decision with respect to whether the defense should be offered." (*People v. Williams* (1988) 44 Cal.3d 883, 943.)

1 It is the petitioner's burden to "establish the nature and relevance of the evidence that
2 counsel failed to present or discover." (*Williams, supra*, 44 Cal.3d at p. 937.) Similarly, in or-
3 der to show ineffective assistance based on a failure to call expert witnesses, the record must
4 "establish defense experts would have provided exculpatory evidence if called" (*People v.*
5 *Bolin* (1998) 18 Cal.4th 297, 334.) "Such claims must be supported by declarations or other
6 proffered testimony establishing both the substance of the omitted evidence and its likelihood
7 for exonerating the accused.
8

9 Here, I think that respondent persuasively argues that there were downsides to present-
10 ing a mental state defense that would have been apparent to trial counsel. Drs. Molnar and
11 Suiter could have provided a substantial rebuttal to any opinion that petitioner was experiencing
12 psychosis at the time of the killing, and their testimony would potentially have alerted the jury
13 to the evidence of petitioner's malingering. (See *Centeno v. Superior Court* (2004) 117
14 Cal.App.4th 30, 42-43 [unlike competency evaluators, sanity evaluators may testify to a de-
15 fendant's statements at trial if the defendant puts his mental state at issue].)
16

17 For this reason trial counsel "may well have believed that reliance as well on a [mental
18 state] defense would have undercut the thrust of the main defense theory of the case." (*People*
19 *v. Weaver* (2001) 26 Cal.4th 876, 927.) "In view of these circumstances, trial counsel could
20 have had a reasonable tactical basis for deciding to forego the presentation of a mental state de-
21 fense in favor of a defense" of accident. (*People v. Hart* (1999) 20 Cal.4th 546, 627-28.)
22 "Counsel's strategy conceivably could have persuaded the jury to acquit defendant of [first de-
23 gree murder] and to convict him only of second degree murder" or involuntary manslaughter, or
24 even to acquit him altogether (*id.* at p. 628).
25

26 The reasonableness of counsel's tactical decision is also supported by the fact that even
27 petitioner's current evidence of mental impairment is not as powerful as he submits. As dis-
28

1 cussed above, the expert reports available at the time of trial are at best equivocal. The declara-
2 tions he has submitted from family members mostly reflect vague impressions from long ago,
3 and the more specific and more recent observations relate to petitioner's moods and depression
4 rather than more severe mental processing problems that would suggest that he acted without
5 malice, deliberation, or premeditation. Even the declaration of Dr. Saint Martin — who as both
6 a forensic psychiatrist and an attorney is in a perfect position to understand the interplay be-
7 tween petitioner's mental characteristics and the formation of mens rea — simply asserts with-
8 out much explanation that petitioner's

10 untreated depression with psychotic features at the time of the offense is
11 relevant to the question whether he actually formed the specific intent re-
12 quired for a conviction on the charges. Mr. Flores's judgment, ability to
13 control his impulses, and ability to reason, accurately perceive, and rati-
14 onally and appropriately respond to the world around him were im-
15 paired at the time of the shooting because of his mental illness and disorder.

(Traverse, ex. 16, ¶ 77.)

16 In light of the multiple expert reports on competency and sanity, there is no indication
17 that trial counsel failed in her "duty to make reasonable investigations or to make a reasonable
18 decision that makes particular investigations unnecessary." (*Strickland v. Washington* (1984)
19 466 U.S. 668, 691.) "To establish that investigative omissions were constitutionally ineffective
20 assistance, defendant must show at the outset that 'counsel knew or should have known' further
21 investigation might turn up materially favorable evidence.'" (*People v. Gonzalez* (1990) 51
22 Cal.3d 1179, 1244)

24 The final question is whether the court should deny habeas relief on the pleadings, or
25 whether an evidentiary hearing is necessary in order to receive the testimony of petitioner's trial
26 counsel.
27
28

1 If the written return admits allegations in the petition that, if true, justify the
2 relief sought, the court may grant relief without an evidentiary hearing. [Ci-
3 tations.] Conversely, consideration of the written return and matters of rec-
4 ord may persuade the court that the contentions advanced in the petition lack
5 merit, in which event the court may deny the petition without an evidentiary
6 hearing. [Citations.] Finally, if the return and traverse reveal that petitioner's
entitlement to relief hinges on the resolution of factual disputes, then the
court should order an evidentiary hearing.

7 (*Romero, supra*, 8 Cal.4th at pp. 739–40.) Here, it appears that petitioner's trial counsel does
8 not admit that she rendered ineffective assistance, meaning that her testimony could only serve
9 to explain in more detail her actual thought process behind not presenting a mental state de-
10 fense.

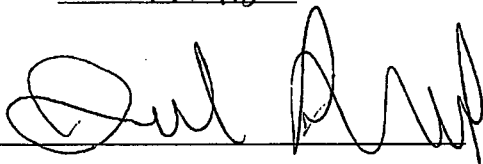
11
12 It would not resolve a *material* factual *dispute* framed by the pleadings. The pleadings
13 adequately establish the facts of the case and the available mental state evidence. In the absence
14 of an outright admission of neglect or incompetence from trial counsel — and the traverse does
15 not make a factual claim that trial counsel has or would make such an admission — there is no
16 reason to think that trial counsel's testimony would resolve any fact that's both material and ac-
17 tually in dispute, let alone in a way supportive of petitioner's claim.

18
19 Conclusion

20
21 For the above reasons the court denies habeas relief on the pleadings without conducting
22 an evidentiary hearing.

23
24 IT IS SO ORDERED

25 Dated: 11/16/18

26
27 
28 The Honorable Judge Bernard Schwartz

Court of Appeal, Fourth Appellate District, Division Two - No. E060209

S230023

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

JESSE JAMES FLORES, Defendant and Appellant.

The petition for review is denied.

**SUPREME COURT
FILED**

DEC -9 2015

Frank A. McGuire Clerk

Deputy

CANTIL-SAKAUYE

Chief Justice

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

JESSE JAMES FLORES,

Defendant and Appellant.

E060209

(Super.Ct.No. BLF1100204)

TENTATIVE OPINION

APPEAL from the Superior Court of Riverside County. Richard A. Erwood,
Judge. Affirmed.

Ellen M. Matsumoto, under appointment by the Court of Appeal, for Defendant
and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General,
Eric A. Swenson and Jennifer B. Truong, Deputy Attorneys General, for Plaintiff and
Respondent.

Defendant and appellant Jessie James Flores appeals after he was convicted of murder and other crimes in the shooting death of Jane Doe. Defendant urges that his trial counsel was incompetent in failing to file a disqualification of the trial judge; no one realized until after the trial and sentence that the trial judge had formerly been a prosecutor who appeared at arraignment on defendant's 1998 strike offense. Defendant also argues that it was a violation of his right to due process to permit the trial court to preside in this case, particularly as to the request to dismiss the strike prior in the interest of justice. (See *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.) We affirm.

FACTS AND PROCEDURAL HISTORY

Jane Doe, the victim, had been in a relationship with defendant for about seven years. Together, they had three children: six-year-old Jessie, four-year-old Jesslyn, and two-year-old Jillian.{RT 157-158} Defendant and his family occupied the back bedroom of Jane Doe's mother's house. Jane Doe's mother, father, her brother Oscar, and a sister, Susana, also lived in the house.{RT 158-161} The bedroom occupied by defendant and his family had two doors: one opened onto the hallway in the house; the other led to the backyard.{RT 162}

On the evening of August 11, 2011, another of Jane Doe's sisters, Florencia, came to the house to visit their mother. Florencia and her mother were talking in the mother's bedroom when Jane Doe came in. Jane Doe was upset and crying. Soon afterward, defendant also came to the mother's bedroom. Defendant angrily ordered Jane Doe to return to their bedroom.{RT 146, 156, 158-159, 163-165} Jane Doe and her mother told

defendant to leave the room. He went back to his family's bedroom; reluctantly, Jane Doe went with him.{RT 165-167}

Behind the closed door of defendant's and Jane Doe's bedroom, noise erupted. Jane Doe yelled at defendant to "stop" what he was doing.{RT 167} The other family members present, Florencia, Oscar, and their mother, rushed to the back bedroom and tried to open the door. It was locked or blocked; Florencia, Oscar and their mother were only able to partially force the door open.{RT 168-170} Through the crack in the doorway, Florencia could see that defendant had Jane Doe pinned on the floor against the wall with one hand, and held a shotgun on her in the other.{RT 170-171} Jane Doe was trying to push defendant away.{RT 172}

Florencia, Oscar, and their mother finally were able to push their way into the room. Defendant's three children also ran into the bedroom. Jane Doe's mother tried to wrest the shotgun from defendant, but he was able to shove her outside into the backyard.{RT 173-174, 179} Florencia and Oscar left the room to find a phone and call 911.{RT 175-176, 193} When Florencia returned, Jane Doe was on the floor, still struggling with defendant for control of the shotgun. When Jane Doe released her grasp on the barrel of the gun, defendant put the shotgun to her chest and fired.{RT 175-176} Defendant threw the shotgun onto the bed and fled out the back door.{RT 177}

Jane Doe died as a result of the shotgun wound.{RT 151} Defendant took refuge at his cousin's house where he was discovered and arrested several days after the shooting.{RT 152-155}

Defendant was charged with one count of first degree murder, one count of being a felon in possession of a firearm, and three counts (one for each of his children) of child endangerment.{CT 1-3}

A few days after the shooting, Oscar found a portfolio containing several pages of defendant's writings. Defendant had written a long and rambling statement, an extended apologia for an apparent intention to kill both Jane Doe and himself.¹ Among other

¹ The writing consisted of 15 handwritten pages, which were not dated or signed (and which contained many spelling, punctuation and grammatical errors which are set forth hereafter).{Supp CT 2-16} The writing was admitted at trial as exhibit 26A.{Supp CT 1} Defendant admitted that the writing was his.{RT 342}

Defendant wrote that he knew what he intended to do was wrong, but that he had gotten to a point that he "could not take it no more,"{Supp CT 2} and that he "had no choice" but it was "time for me to roll out," and that he was "sorry but sometimes the world is so cruel to people."{Supp CT 2} Defendant apologized that he "had to take a life with me," but that "it's the only thing that I really had in the world," although "she [presumably, Jane Doe] was n mine to begin with."{Supp CT 2} Defendant wrote that he now understood why people did things "like this when I watch the news and Americas most wanted," when they lose "the only thing in this world" that they care about.{Supp CT 2}

Defendant felt ignored and unheard, and all his dreams had been shattered.{Supp CT 3} He tried very hard to make things right, but was unable to do so. Defendant felt that others kept him and Jane Doe ("my only love") apart. He did not want to do what he contemplated "but I was at the edge."{Supp CT 3} Defendant wrote that "I have killed not wantin to but had to for I have a heart," and he "just did not no how to use it."{Supp CT 3-4} Defendant expressed love for his children and promised to see them "in another life."{Supp CT 4} Defendant said that "only God can and will judge me for what Ive done," and that he "had to follow thro with this mission for I can not tolerate with the situation of being ignored and hated by my people."{Supp CT 4}

Defendant hoped, "now that Im gone,"{Supp CT 4} that "everyone is happy,"{Supp CT 5} and that they would "understand[] what Ive done is for a good reason not just because."{Supp CT 5} Rather melodramatically, he asked that people not "shed any tears of sorrow" when "look[ing] in my casket."{Supp CT 5} Defendant said, "I write this with a smile cause Im headed home and theres a place for me some were up there."{Supp CT 5}

Defendant wrote an apology to his mother, and then explained that he "gave a warnin I wasn in my state of mind."{Supp CT 6} Defendant thanked Jane Doe for making him a better person, "but it came to late," for he "told her I will die and I will kill for her that's why Im here now." He said, "some people can move on," but "not me [because] I have to much with her and I love her to death."{Supp CT 6} Defendant enjoyed his life with Jane Doe, but he "told her even

[footnote continued on next page]

[footnote continued from previous page]

if she found someone I wasn't goin to let that happen nope shes mine and Im provin a point on that." {Supp CT 7} Defendant fretted that "she tells people she don't love me anymore," and "I no my girl wants someone else but I can't let that happen not as long a[s] Im alive." {Supp CT 7} He was not someone who could "just let things go just like that"; rather, he said, "not ever can I let her go." {Supp CT 7} He was very hurt when "she tells me she don't wanna be with me anymore." {Supp CT 7} He warned others to be careful what they say to people who love them, "so u don't end up in my shoez' hurtin people." {Supp CT 7-8}

Defendant asserted that "No one could not change my mind on what Im about to do," because "Im determined" and "I have lost my only family to something so dumbd." {Supp CT 8} He was determined not to leave the relationship: "I think she is just watin for me to get up and leave on my own but that's not happen." {Supp CT 8} Instead, "I stick around so I can show her that I'm serious but if she don't believd or not it will be to late tho prosis [*sic*: process?] will be done." {Supp CT 8} Defendant placed the responsibility on Jane Doe for his actions, saying, "it's all in her hands on what will happen fatue [*sic*: fate? Future?] is in her hands not mine anymore." {Supp CT 8}

Defendant related that he had "her name tattoed big on my back thats how sure I no she belong'z to me. And no one is going to chang that ever, twisted I am right now and twisted I will stay till it work'z out or until we are both gone Im not leavin without her." {Supp CT 9} Defendant had his "mind . . . all ready set for this," and "Im just ready for this and for who ever gets this note please let other people no why I did what I did its called crazy love for someone." {Supp CT 9} Defendant wrote that "my heart is pacin fast right now cause just known she will leave with me thats the only way Ill be at peace." {Supp CT 9} Defendant "really hope[d] for simthin good for us but if ur readin this letter its cause it did'n happen." {Supp CT 9} Defendant blamed others, saying, "I did not wish it to come down to this but [it] did thanks to all the people who put shit in her head that was not true just twistin shit up so she would leave me." {Supp CT 9} Defendant warned that others "Should have just kept your mouth shut and this would have never happened but because everyone wants to lie and tell storys, this is what came out of your nonsense." {Supp CT 10} Defendant blamed the circumstances of his growing up, and said that he wrote the letter so someone would tell his children that he loved them, but did not want them to be like him. {Supp CT 11} Defendant did not want people to be shocked by what he intended to do, but his life was "ruined by haters." {Supp CT 11} He was "tired of feelin this way," and lamented "all the people [who] always get into relationships that aint theres." {Supp CT 11}

Defendant was upset that Jane Doe ignored him: "I cant even touch her without her pushin me away." {Supp CT 12} He knew "she wants someone else[,] I can feel it." {Supp CT 12} He knew that she would have gone already if she had met someone else, "but I no that I would not let it. Not as long as Im alive[,] Ill let that happen not over my dead body. I told her already what I was going to do[,] I no she don't believe me but when the time comez' she will find out but it will be to late." {Supp CT 12} Defendant was at a "last point of not going back," and wrote that "Ive already told her my warning has been said if she dont take it then when the time is right it will happen. I look it now what ever happens, happens . . . at this point I leave it up to God's hands he no's what I wanna do." {Supp CT 12}

Defendant continued later, musing that when he called to talk to Jane Doe, she would merely say, "what you want[?]" He thought she "really dont wanna be with me . . . but like I

[footnote continued on next page]

things, he wrote that he did not want to be without her. If she pushed him away, it would be "too late." He resolved that he would not turn back; he would "blow her heart away so she feels no pain and suffering." {RT 315-317}

Evidence that came out at trial showed that, approximately two weeks before Jane Doe's death, defendant had confided to Jane Doe's sister, Susana, about the problems in his relationship with Jane Doe. Defendant stated that he intended to kill himself and Jane Doe; he had gone to church and talked to a priest and to God about it. {RT 292-295}

In another incident, about a month before the killing, defendant and Jane Doe had gone with some friends to the river so that defendant could teach Jane Doe how to shoot the shotgun. {RT 287-289} Defendant became jealous when he thought Jane Doe was

[footnote continued from previous page]

said before over my dead body she will be with another." {Supp CT 13} He was hurt that she said she did not love him, "but one day I won't be able to take it anymore for only the Father can forgive me for what I've done and what is to come but I guess that's just the way life goes." {Supp CT 13}

Defendant wrote that "my mission is gettin closer and closer" and "I no it will happen soon." {Supp CT 14} He felt he was giving full effort in the relationship, but Jane Doe was not. She listened too much to what others wanted to do. Defendant was "tired of all this shit," and felt he had "drawn the last straw." {Supp CT 14} Defendant "tried to tell her what was goin to happen," but "she didn't even see this comin but I did that's why I stand here alone to the grave." {Supp CT 14} He claimed that he "tried not to call it quits but she pushed me to the edge," and prayed "please forgive me Father for my sins." {Supp CT 14}

Defendant said, "what I've done is not wrong hell no," and "I leave it in God's hands." {Supp CT 15} He wrote, "I really don't care if you people hate me for what I'm about to do," and blamed others for putting ideas in Jane Doe's head. Defendant said, "my fuse is getting shorter," and that "tomorrow I will go to the church and ask God for my forgiveness for what has happened and for what is to come." {Supp CT 15} He stated, "we all got to go and I'm ready for it I dug I'm [sic: my ?] own grave" {Supp CT 15}

Defendant wrote that Jane Doe "don't no she is makin thing's worse by her pushing me away but for when it happens she will no but it will be to late cause theres no turning back[.] I'ma blow her heart away so she feels no pain and sufferin but I will tell her I did it for love." {Supp CT 16} Defendant felt that "this is what God wants me to do. This was my mission in life" {Supp CT 16}

trying to kiss her friend's brother, so he fired the gun at Jane Doe, grazing her leg with the shot.{RT 287-289}

Defendant testified on his own behalf at trial. He stated that he and Jane Doe had been arguing on the day of the killing. Jane Doe was packing defendant's belongings in a laundry basket and asking him to leave. She took the shotgun down from the shelf in the closet and put it in the laundry basket, presumably so that defendant would take the shotgun with him. Defendant testified that he was suicidal at the time.{RT 338}

Defendant picked up the gun and declared that he wanted to kill himself. Jane Doe grabbed the barrel of the shotgun and tried to take it away. Jane Doe's mother and the children came into the room while he and Jane Doe were fighting for possession of the shotgun; Jane Doe's mother also joined in the struggle over the gun.{RT 339-341}

During the struggle, the shotgun was in constant motion, pointing "everywhere." {RT 339, 341}. Defendant testified that the gun suddenly went off; defendant did not purposely shoot Jane Doe, and he believed that he did not have his finger on the trigger.{RT 341-342, 385} Even though the killing was unintentional, defendant ran away because he panicked.{RT 341-342, 372}

Defendant explained that the writings Oscar had found had been written a few weeks earlier, before a period when he and Jane Doe had separated. Defendant was depressed, and he felt "down and out" at that time. Then he and Jane Doe were separated for a couple of weeks. About two weeks before the killing, he and Jane Doe had reconciled, and were getting along well together.{RT 342-343} Although defendant had

written statements to the effect that he would kill Jane Doe and himself, he testified that he had no plans to actually do so. He “was just scribbling stuff down.”{RT 344} He did not really plan to kill himself, but he was “just saying that,” so that Jane Doe would feel sorry for him.{RT 345}

After the charges were initially filed, defense counsel requested appointment of a mental health professional to provide her with a report concerning a possible insanity defense.{CT 7} The court appointed Dr. William H. Jones.{CT 7} (Evid. Code, § 1017.) About six weeks later, the court declared a doubt as to defendant’s competence to stand trial, and asked Dr. Jones to provide a report to the court pursuant to Penal Code section 1368.{CT 10} The court later appointed Dr. Michael C. Leitman to provide a second opinion on defendant’s competency to stand trial,{CT 18} and, after many delays, reappointed Dr. Leitman to file an updated competency evaluation.{CT 43} At the competency hearing, the court found defendant competent to stand trial and resumed the criminal proceedings.{CT 52}

After the preliminary hearing, defendant was held to answer on all charges. At arraignment on the information, he pleaded not guilty but later amended the plea to not guilty, and not guilty by reason of insanity.{CT 92, 94} The court appointed Dr. Anna Molnar and Dr. Robert L. Suiter to provide reports to the court pursuant to Penal Code sections 1026 and 1027.{CT 94} At trial, the sanity phase was to be tried separately from the guilt phase, and defendant requested a court trial on his priors.{CT 163, 344}

The jury found defendant guilty as charged on all counts, and found true as to the first degree murder that defendant had personally used a firearm to commit the offense.{CT 271, 328-329, 341-343} After the guilt phase, defendant withdrew his plea of not guilty by reason of insanity.{CT 344} The truth of the prior conviction allegations was tried to the court. The People submitted a certified copy of the case printout in defendant's 1998 burglary conviction, which conviction was the basis of both the strike allegation and the prior serious felony conviction enhancement. The court admitted the case printout into evidence as exhibit 36.{CT 412, 417; Supp CT 22-30} The court found true that defendant had suffered a strike prior, the burglary conviction in 1998.{CT 412} (Pen. Code, § 667, subds. (c), (e)(1).) The also court found true an allegation that the same 1998 burglary offense constituted a prior serious or violent felony five-year enhancement. (Pen. Code, § 667, subd. (a).){CT 412}

Before sentencing, defense counsel requested the court to exercise its discretion under Penal Code section 1385 to dismiss defendant's strike conviction under *People v. Superior Court (Romero)*, *supra*, 13 Cal.4th 497. The trial court denied the request and declined to dismiss defendant's strike prior.{CT 422, 500}

The court sentenced defendant to an indeterminate term of 75 years to life (25 years to life for the murder, doubled as a second strike, plus 25 years to life for the firearm enhancement) on count 1 (murder), plus an indeterminate term of 19 years 8 months; as follows: The court selected the middle term of four years, doubled to eight years, for one of the child endangerment counts, deemed the principal offense; and

added two years eight months (one-third the middle term of four years, or one year four months, doubled to two years eight months) for each of the two other child endangerment counts; plus one year four months (one-third the middle term of two years—i.e., eight months—doubled to one year four months) for the firearm possession offense; and an additional five-year term for the prior serious felony conviction.{CT 502-503; RT 504-505}

Defense counsel filed a timely notice of appeal on defendant's behalf; the notice did not specify any particular ground of appeal.{CT 525-526}

ANALYSIS

I. Factual and Procedural Background of Judge Erwood's Participation in the 1998 Case and the Present Proceedings

The computer printout of defendant's prior burglary conviction, exhibit 36, was admitted into evidence below at the court trial on the truth of the prior conviction allegations. The trial judge here, Richard A. Erwood, was a deputy district attorney in 1998, and he had made three brief appearances as a prosecutor in defendant's 1998 case. After the preliminary hearing, defendant was held to answer on all the charges in the 1998 case.{Supp CT 25-27} Judge Erwood first appeared as a deputy district attorney at the arraignment on the information on February 11, 1998; the arraignment was continued for one week.{Supp CT 26} Judge Erwood appeared for a second time on February 18, 1998; defendant was arraigned, and he pleaded not guilty.{Supp CT 26} Judge Erwood made a third appearance on March 13, 1998, an occasion when defendant was not

transported to court, and which resulted in a continuance of the proceedings. {Supp CT 25-26} Defendant later pleaded guilty, at a proceeding attended by a different prosecutor, to a single count of burglary in the 1998 case. {Supp CT 24-25}

With respect to the present case, no one, at any time before the filing of this appeal, raised the issue that Judge Erwood had made these appearances in 1998. No statement of objection to disqualify Judge Erwood for cause was made at any time in the trial court; there is no trial court ruling on disqualification to review.

Defendant has belatedly filed a "statement of disqualification" of the trial court, and the court has entered an order striking the statement of disqualification as untimely. Defendant also filed a copy of the statement of disqualification with this court; we have deemed the statement a petition for writ of mandate (review of denial of disqualification by striking the statement) and/or writ of habeas corpus (review of defendant's claim that trial counsel was ineffective for failing to file a statement of disqualification below) and ordered the petition considered with this appeal. We determine the disposition of the writ petition by a separate order.

II. Statutory Provisions Concerning Disqualification of Trial Judges

Code of Civil Procedure section 170.1 provides in relevant part: "(a) A judge shall be disqualified if any one or more of the following are true: [¶] . . . [¶]

"(2) (A) The judge served as a lawyer in the proceeding, or in any other proceeding involving the same issues he or she served as a lawyer for a party in the

present proceeding or gave advice to a party in the present proceeding upon a matter involved in the action or proceeding.

“(B) A judge shall be deemed to have served as a lawyer in the proceeding if within the past two years:

“(i) A party to the proceeding, or an officer, director, or trustee of a party, was a client of the judge when the judge was in the private practice of law or a client of a lawyer with whom the judge was associated in the private practice of law.

“(ii) A lawyer in the proceeding was associated in the private practice of law with the judge.

“(C) A judge who served as a lawyer for, or officer of, a public agency that is a party to the proceeding shall be deemed to have served as a lawyer in the proceeding if he or she personally advised or in any way represented the public agency concerning the factual or legal issues in the proceeding.”

Here, the salient grounds for possible disqualification are those set forth in Code of Civil Procedure section 170.1, subdivisions (a)(2)(A) and (a)(2)(C).

As to Code of Civil Procedure section 170.1, subdivision (a)(2)(A), Judge Erwood never served as a lawyer “in the proceeding” at bench. The present proceeding did not “involv[e] the same issues” as the 1998 case, except in the sense that Judge Erwood was called upon here to exercise his discretion whether or not to dismiss the 1998 strike prior. Judge Erwood participated in the 1998 proceeding only for continuances or to stand by while the court arraigned defendant on the charge and entered defendant’s not-guilty

plea; the question is whether such participation amounted to giving “advice to a party in the present proceeding upon a matter involved in the action or proceeding.” (Code Civ. Proc., § 170.1, subd. (a)(2)(A).)

Code of Civil Procedure section 170.1, subdivision (a)(2)(B), is clearly inapplicable, both because Judge Erwood did not serve as a lawyer for a party to the current proceeding within two years of the present proceeding, and because he was not a lawyer in private practice.

As to Code of Civil Procedure section 170.1, subdivision (a)(2)(C), Judge Erwood did serve as an attorney for a public agency (Riverside County District Attorney) that is a party to the present proceeding; the issue is whether he “personally advised or in any way represented the public agency concerning the factual or legal issues in the proceeding.” Again, the only connection was that Judge Erwood had formerly represented the People in 1998, for purposes of continuances or defendant’s arraignment on the information in the burglary case. Then, he determined in the present proceeding whether or not to dismiss the 1998 prior strike conviction.

Code of Civil Procedure section 170.3 prescribes the procedures for disqualifying a trial court judge for cause.² Among other things, Code of Civil Procedure

² Code of Civil Procedure section 170.3 provides in relevant part:

“(a) [¶] (1) If a judge determines himself or herself to be disqualified, the judge shall notify the presiding judge of the court of his or her recusal and shall not further participate in the proceeding, except as provided in Section 170.4, unless his or her disqualification is waived by the parties as provided in subdivision (b). [¶] . . . [¶]

“(b) [¶] (1) A judge who determines himself or herself to be disqualified after disclosing the basis for his or her disqualification on the record may ask the parties and

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section 170.3, subdivision (b)(2)(B), provides that, when the ground of disqualification is that the judge had “served as an attorney in the matter in controversy,” the disqualification may not be waived by the parties. That is, the trial court may ask the parties to waive the disqualification, except if the alleged ground of disqualification is that the judge has a personal bias or prejudice concerning a party (Code Civ. Proc., § 170.3, subd. (b)(2)(A)), or if the ground is that the judge “served as an attorney in the matter in controversy, or the judge has been a material witness concerning that matter.”

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their attorneys whether they wish to waive the disqualification, except where the basis for disqualification is as provided in paragraph (2). A waiver of disqualification shall recite the basis for the disqualification, and is effective only when signed by all parties and their attorneys and filed in the record.

“(2) There shall be no waiver of disqualification if the basis therefor is either of the following: [¶] . . . [¶]

“(B) The judge served as an attorney in the matter in controversy, or the judge has been a material witness concerning that matter. [¶] . . . [¶]

“(4) If grounds for disqualification are first learned of or arise after the judge has made one or more rulings in a proceeding, but before the judge has completed judicial action in a proceeding, the judge shall, unless the disqualification be waived, disqualify himself or herself, but in the absence of good cause the rulings he or she has made up to that time shall not be set aside by the judge who replaces the disqualified judge.

“(c) [¶] (1) If a judge who should disqualify himself or herself refuses or fails to do so, any party may file with the clerk a written verified statement objecting to the hearing or trial before the judge and setting forth the facts constituting the grounds for disqualification of the judge. The statement shall be presented at the earliest practicable opportunity after discovery of the facts constituting the ground for disqualification. [¶] . . . [¶]. .

“(d) The determination of the question of the disqualification of a judge is not an appealable order and may be reviewed only by a writ of mandate from the appropriate court of appeal sought only by the parties to the proceeding. The petition for the writ shall be filed and served within 10 days after service of written notice of entry of the court’s order determining the question of disqualification. If the notice of entry is served by mail, that time shall be extended as provided in subdivision (a) of Section 1013.”

(Code Civ. Proc., § 170.3, subd. (b)(2)(B).) However, in *In re Steven O.* (1991) 229 Cal.App.3d 46, 53-55, under an earlier version of the disqualification statutes, where the ground of disqualification was that the judge had formerly served as a prosecutor in previous related proceedings, the failure to raise the disqualification challenge at any time before judgment effected a waiver of disqualification.

Code of Civil Procedure section 170.3, subdivision (d), provides that a determination as to disqualification is not an appealable order, and may only be reviewed by writ of mandate. Here, defendant never filed a statement of objection to Judge Erwood's presiding in the case, so there was never a determination made in the trial court as to the disqualification of Judge Erwood. We must first examine the consequences of this procedural posture.

III. Defendant Did Not File a Timely Statement of Objection in the Trial Court

In *Betz v. Pankow* (1993) 16 Cal.App.4th 931, a panel of three arbitrators decided a partnership dissolution dispute, and made an award in favor of the responding party. The award was confirmed by the trial court, and the appellant filed an appeal. While the appeal was pending, the appellant discovered that one of the arbitrators had recently retired from a law firm that had previously represented several business entities owned or controlled by the respondent. The challenged arbitrator was one of only two of the arbitrators who had signed the award; the third arbitrator had refused to sign the award for unrelated reasons. (*Id.* at p. 935.) The Court of Appeal held that "the acts of a judge subject to disqualification for cause are voidable rather than void and, by extension, [we]

conclude that the same rule should apply to arbitrators. Because the actions of the challenged arbitrator in the instant case were at most voidable, and not void, the trial court properly denied appellant's motion to vacate the judgment due to its pendency on appeal. [¶] However, a trial court's lack of jurisdiction to vacate a judgment while an appeal is pending creates a dilemma for the party who, with due diligence, discovers only after the notice of appeal is filed that the judge or arbitrator hearing the matter was disqualified. For the sake of judicial efficiency and economy, a party who first discovers facts during the pendency of an appeal indicating the disqualification of a judge or arbitrator should raise the disqualification issue at the earliest opportunity, rather than waiting until the appellate process is exhausted and the trial court is again vested with jurisdiction. (See, e.g., [Code Civ. Proc.,] § 170.3, subd. (c)(1); *Urias v. Harris Farms, Inc.* [(1991)] 234 Cal.App.3d [415,] 420.)" (*Betz v. Pankow, supra*, 16 Cal.App.4th 931, 940.)

The record here is not clear as to when defense counsel was presented with the records in defendant's 1998 burglary case. The records may have been provided earlier in discovery, or procured through counsel's own investigation, but at the very least, the documentation presented by the prosecutor at the trial of the prior conviction allegations included records that showed Judge Erwood's participation in that case. Arguably, a diligent examination of the documentation at that time would have disclosed Judge Erwood's appearances as a prosecutor on the three occasions described above. In that case, defense counsel should have filed a statement of objection to Judge Erwood in the

trial court at that time, especially before the assertedly crucial *Romero* proceeding. Any attempt to file one now would be untimely. (See Code Civ. Proc., § 170.3, subd. (b)(4); *In re Marriage of M.A. & M.A.* (2015) 234 Cal.App.4th 894, 904 [a bench officer may, “within 10 days of the filing or service of the statement, whichever is later, (1) order the statement stricken if the statement is untimely or, on its face, discloses no legal grounds for disqualification . . .”].)

However, even if we assume that defense counsel, acting diligently, did not reasonably discover the ground for challenging Judge Erwood until after the appeal was filed, *Betz v. Pankow*, *supra*, 16 Cal.App.4th 931, 940, indicates that the proper procedure is to file a statement of objection in the trial court, and not to raise the issue for the first time on appeal.

This analysis is supported by *People v. Barrera* (1999) 70 Cal.App.4th 541. There, the defendant was charged with check forgery with allegations that he had suffered two prior strike convictions. The trial was conducted by a commissioner who, at the outset, advised the parties that he had been a deputy public defender until his recent selection as a commissioner. As a deputy public defender, the commissioner had stood by the defendant at the defendant’s arraignment on the current forgery charge while the defendant entered a not guilty plea. (*Id.* at pp. 545-546.) The commissioner advised the parties that he would be happy to reassign the case if there was any objection; he then asked the parties if they agreed to have the commissioner hear the case, notwithstanding his earlier involvement as a deputy public defender. The defendant affirmatively

assented on the record, and both attorneys indicated “No problem” with the commissioner’s appointment as the bench officer in the case. (*Id.* at pp. 546-547.)

The commissioner tried the case, and the jury found the defendant guilty of check forgery and found true the strike allegations. (*People v. Barrera, supra*, 70 Cal.App.4th 541, 544.) The commissioner declined to dismiss the defendant’s strike priors under Penal Code section 1385 and sentenced him as a third striker. (*People v. Barrera, supra*, at pp. 552-553.) The defendant contended on appeal from the judgment that, because the ground of disqualification—serving as a lawyer for a party to the present case—was one that could not be waived under Code of Civil Procedure section 170.3, subdivision (b)(2), the judgment was void and should be set aside. The Court of Appeal held that the purported waiver or failure to object, when the ground of disqualification came within the non-waiver provision of the disqualification statutes, did not result in a void judgment (reviewable at any time), but “merely” a voidable one, “subject to the requirement of timely writ review of section 170.3, subdivision (d).” (*People v. Barrera, supra*, at pp. 548-549.)

The defendant argued that, because he had not objected below, “there was no ruling from which he could seek writ review as mandated in [Code of Civil Procedure section 170.3,] subdivision (d).” (*People v. Barrera, supra*, 70 Cal.App.4th 541, 552.) Nevertheless, the reviewing court held that the language and policy of the disqualification statutes, as amended in 1984, and again in 1990, required review solely by writ. “[A]s the Supreme Court observed, subdivision (d) ‘has the dual purpose of promoting “judicial

economy” and “fundamental fairness,” both of which are fostered by the timely seeking of a writ of mandate. [Citation.] The purpose behind subdivision (d) is to secure “ ‘speedy review of a disqualification ruling, since permitting that ruling to be attacked later on appeal of the judgment could invalidate every ruling made by the trial court judge after the disqualification motion was denied.’ ” ” (*People v. Barrera, supra*, 70 Cal.App.4th 541, 551, citing *People v. Brown* (1993) 6 Cal.4th 322, 333, fn. 8.) The Court of Appeal applied the same rationale to the purportedly non-waivable grounds for disqualification: “Were we to permit review on appeal in this matter, a defendant such as appellant would be able to waive the disqualification and permit the judge to preside over the entire case, secure in the knowledge that, if any portion of the result were unfavorable to him, he could appeal and obtain a reversal of the judgment and a ‘second bite at the apple,’ which would constitute an ‘intolerable windfall.’ ” [Citation.] The stated purpose of the amendment, to ‘assure that even the shadow of bias is kept out of our courts’ and to provide ‘useful conformity between the judiciary’s self-imposed ethical guidelines and the law,’ does not outweigh the public policy considerations underlying the requirement of prompt review of the question of a disqualification which has been disclosed by the judge and waived by the parties and their attorneys.” (*People v. Barrera, supra*, 70 Cal.App.4th 541, 551.)

We conclude, on the basis of these precedents, that even the so-called “non-waivable” grounds of disqualification in fact may be waived by conduct. In this context, the characterization of a particular ground of disqualification as “non-waivable” means

that the court may not affirmatively request from the parties a waiver of that ground of disqualification. It does not signify any impossibility of waiver in fact by other methods. In addition, even when the ground of disqualification has only been discovered after an appeal has been filed, the matter is governed by Code of Civil Procedure section 170.3, subdivision (d), and review is obtainable exclusively by writ after a statement of objection has been submitted to the trial court.

We recognize that, in the circumstances presented here, the prescribed remedy is unlikely to yield any cognizable relief to defendant, because any statement of objection presented at this point will be untimely. That is, any statement of objection must “be presented at the earliest practicable opportunity after discovery of the facts constituting the ground for disqualification.” (Code Civ. Proc., § 170.3, subd. (c)(1).) In this case, it is unknown exactly when the “earliest practicable opportunity” arose, but any window of opportunity to file a timely statement of objection has now closed.

As defendant describes it, “Judge Erwood’s conflict of interest never came up during [defendant’s] case. Judge Erwood never mentioned his participation in [defendant’s] prior conviction; the prosecutor in [defendant’s] case did not alert Judge Erwood or trial counsel about Judge Erwood’s participation in [defendant’s] prior. *Nor did trial counsel file a [statement of objection] to disqualify Judge Erwood, pursuant to section 170.1 of the Code of Civil Procedure.*”{AOB 10} (Italics added.) Singularly absent is any representation about when trial defense counsel actually (or should have) discovered that Judge Erwood had participated in defendant’s 1998 case. What we do

know is that the documentation presented at the trial on the priors, if examined with due diligence, would have disclosed Judge Erwood's connection to that case.

We also note that Code of Civil Procedure section 170.3, subdivision (b)(4), provides: "If grounds for disqualification are first learned of or arise after the judge has made one or more rulings in a proceeding, but before the judge has completed judicial action in a proceeding, the judge shall, unless the disqualification be waived, disqualify himself or herself, but in the absence of good cause the rulings he or she has made up to that time shall not be set aside by the judge who replaces the disqualified judge." Strictly speaking, this subdivision is inapplicable here, because Judge Erwood has "completed judicial action" in the proceeding. It is nevertheless instructive, as evidencing an intent to leave intact the prior rulings of a judge who is later disqualified, in the absence of a showing of good cause to change those rulings. This intent is consistent with the thesis that participation in a trial by a judge who is later determined to be disqualified results in only a potentially voidable judgment, not a void one. It also comports with the public policy, expressed in *People v. Barrera, supra*, 70 Cal.App.4th 541, 551, that a party must act promptly, and not await the outcome of a trial in which an objection should have been timely raised. Otherwise, a party may gain an " 'intolerable windfall' " of "invalidat[ing] every ruling made by the trial court judge" by failing to file a statement of objection in a timely manner. (*Ibid.*)

Here, Judge Erwood made all the necessary rulings in the proceeding, and the disqualification issue was never raised. If the disqualification statutes generally mandate that previously made rulings remain intact, and if they evince a policy of prompt consideration and review to forestall a “second ‘bite of the apple’” (*People v. Barrera, supra*, 70 Cal.App.4th 541, 551), then there would be little or no purpose in filing a belated challenge after the case has been completed.

Defendant acknowledges that the failure to move for disqualification before defendant’s trial was completed has forfeited the ability to raise the disqualification issue on direct appeal from the judgment. (See *People v. Carter* (2005) 36 Cal.4th 1215, 1243; *In re Steven O., supra*, 229 Cal.App.3d 46, 53-55.) In *Carter*, defense counsel moved before trial to disqualify the trial judge for cause (bias), because of the trial judge’s prior professional and social relationship with the prosecuting attorney. After a hearing, another judge made the determination that a reasonable person would not doubt the trial court’s impartiality and denied disqualification. The defendant did not seek writ review. The failure to pursue writ review precluded any challenge to the disqualification ruling on appeal from the judgment. (*People v. Carter, supra*, 36 Cal.4th 1215, 1243.) In *Steven O.*, a prosecutor represented the People on an initial wardship petition. A year later, the same prosecutor sat as judge pro tempore on an allegation that the minor had violated his probation in the same case; the prosecutor also presided as judge pro tempore on additional supplemental petitions alleging new crimes. The prosecutor, sitting as judge pro tempore, ultimately revoked probation and committed the minor to the youth

authority for both old and new offenses. The minor failed to file a statement raising the disqualification at any time before proceedings had concluded. The minor had been present at both the old and the new proceedings, and was presumably aware that the same person had participated as prosecutor on the original petition, and as judge pro tempore in the supplemental proceedings. In addition, the minor's counsel had access to the records in both cases. A diligent examination of those records would have revealed the role of the judge pro tempore acting as prosecutor on the initial petition, and acting as judge pro tempore with respect to the later petitions. The failure to raise the challenge at the earliest opportunity is one way of waiving the disqualification; raising the challenge for the first time on appeal was untimely. (*In re Steven O.*, *supra*, 229 Cal.App.3d 46, 53-55.)

Despite the forfeiture of the right to raise the disqualification issue on direct appeal from the judgment, defendant now urges that his trial counsel was remiss and rendered constitutionally ineffective assistance in failing to notice that Judge Erwood had appeared on the record in the prior case, and in failing on that basis to file a statement of objection to have Judge Erwood disqualified under Code of Civil Procedure section 170.1. Defendant contends that the failure to raise Judge Erwood's disqualification was particularly problematic with respect to the court's decision in the present proceeding not to dismiss defendant's strike prior, the very case in which Judge Erwood had formerly appeared as a prosecutor. We now turn to defendant's claim of ineffective assistance of counsel (IAC).

IV. Defendant Should Have Raised His IAC Claim by a Petition for Writ of Habeas

Corpus

The federal and state Constitutions guarantee criminal defendants the right to competent representation by counsel. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15; see *People v. Vines* (2011) 51 Cal.4th 830, 875.) Under the well established principles governing claims of IAC, “[t]o prevail on [such] a claim . . . , a defendant must show both that counsel’s performance was deficient . . . [because] the representation fell below an objective standard of reasonableness under prevailing professional norms” and that the deficient performance was prejudicial because “there is a reasonable probability that, but for counsel’s errors, the result of the proceeding would have been different.” (*People v. Benavides* (2005) 35 Cal.4th 69, 92-93, citing *Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 693 [104 S.Ct. 2052, 2064, 2067-2068, 80 L.Ed.2d 674].)

“In considering such a claim, ‘a reviewing court defers to counsel’s reasonable tactical decisions, and there is a presumption counsel acted within the wide range of reasonable professional assistance.’ [Citation.] ‘ “Tactical errors are generally not deemed reversible, and counsel’s decisionmaking must be evaluated in the context of the available facts.” ’ [Citation.] Because the presumption of counsel’s competence can typically be rebutted only with evidence outside the record, ineffective assistance claims are normally raised in habeas corpus proceedings where such evidence can be presented. [Fn. omitted.] [Citation.] A reversal on direct appeal is warranted only if ‘(1) the record affirmatively discloses counsel had no rational tactical purpose for the challenged act or

omission, (2) counsel was asked for a reason and failed to provide one, or (3) there simply could be no satisfactory explanation.’ [Citation.]” (*People v. Arce* (2014) 226 Cal.App.4th 924, 930.)

Here, the record does not affirmatively show that trial defense counsel had no rational tactical purpose for failing to challenge Judge Erwood, nor was counsel asked to provide an explanation yet failed to do so. The only available possibility is that there “simply could be no satisfactory explanation” for trial counsel’s failure to file a statement of objection, challenging Judge Erwood. (*People v. Arce, supra*, 226 Cal.App.4th 924, 930.) However, there is at least one eminently satisfactory explanation for a tactical decision not to challenge Judge Erwood: defense trial counsel may have wanted Judge Erwood to preside in this case.

None of the exceptions is applicable; defendant should have raised his IAC claim via a petition for writ of habeas corpus. The claim required defendant to present evidence outside the trial record, to show if and when defense counsel received the documentation concerning defendant’s 1998 prior, whether defense counsel exercised due diligence in examining those papers, and what, if any, tactical or other reason defense counsel may have had for failing to seek Judge Erwood’s disqualification.

As the California Supreme Court has held, “[t]he appellate record . . . rarely shows that the failure to object was the result of counsel’s incompetence; generally, such claims are more appropriately litigated on habeas corpus, which allows for an evidentiary hearing where the reasons for defense counsel’s actions or omissions can be explored.”

(*People v. Lopez* (2008) 42 Cal.4th 960, 966; accord, *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.) The same principle applies here. Defendant should have raised his IAC claim on habeas corpus, and cannot proceed with the claim on direct appeal.

V. Defendant Has Failed to Demonstrate Prejudice From the Alleged IAC

Even if we were to consider the merits of defendant's IAC claim, defendant is required to show both that counsel's performance was objectively deficient, and that the deficiency resulted in prejudice, i.e., a reasonable probability that, but for counsel's errors, the result would have been different. (*Strickland v. Washington*, *supra*, 466 U.S. 668, 688, 694 [104 S.Ct. 2052, 2064, 2068, 80 L.Ed.2d 674].)

As to competence, a defendant "must show that counsel's representation fell below an objective standard of reasonableness" measured against "prevailing professional norms." (*Strickland v. Washington*, *supra*, 466 U.S. 668, 688 [104 S.Ct. 2052, 2064, 80 L.Ed.2d 674].) Review of counsel's performance is highly deferential, and is subject to a strong presumption that counsel's conduct falls within the range of reasonable professional assistance. (*Id.* at p. 689.)

As to prejudice, "[p]rejudice is shown when there is a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citations.]" (*People v. Jennings* (1991) 53 Cal.3d 334, 357.)

However, if a defendant's showing is insufficient on either prong, the claim of IAC fails. (*Strickland v. Washington*, *supra*, 466 U.S. 668, 697 [104 S.Ct. 2052, 2069, 80

L.Ed.2d 674].) Thus, “[A] court need not determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed.” (*Ibid.*)

Here, the ground of disqualification—having served as an attorney in a prior proceeding—is not a ground that may be expressly waived by the parties. (Cf., however, *In re Steven O.*, *supra*, 229 Cal.App.3d 46, 53-55 [failure to raise a disqualification issue is one way of waiving the right to raise the issue on appeal].) Arguably, then, it would have been unreasonable not to have brought a motion to disqualify, had counsel been aware of Judge Erwood’s participation in the 1998 case. Against the disqualification, it might be disputed whether Judge Erwood’s participation as a lawyer in the 1998 case “involv[ed] the same issues” as the current case, or whether such participation amounted to giving “advice to a party in the present proceeding upon a matter involved in the action or proceeding.” (Code Civ. Proc., § 170.1, subd. (a)(2)(A).) Similarly, it could be disputed whether Judge Erwood, in the 1998 case, “personally advised or in any way represented the public agency concerning the factual or legal issues in the proceeding.” (Code Civ. Proc., § 170.1, subd. (a)(2)(C).) In addition, the question would remain whether defense counsel may have had some tactical reason for not moving to disqualify Judge Erwood, e.g., counsel may have wanted Judge Erwood to preside.

We need not be detained by these matters, however, as defendant cannot demonstrate prejudice. It is not reasonably probable that, even if defense counsel had

moved to disqualify Judge Erwood, and even if Judge Erwood's participation in the 1998 case would have warranted disqualification, the result of the *Romero* determination would have been different had it been made by any other judge. As noted, a "reasonable probability" is "a probability sufficient to undermine confidence in the outcome." [Citations.] (*People v. Jennings, supra*, 53 Cal.3d 334, 357.) Under that standard, a defendant must show that, absent the deficient performance, there would have been at least "a significant but something-less-than-50 percent likelihood of a more favorable verdict." (*People v. Howard* (1987) 190 Cal.App.3d 41, 48.) It should also be noted, however, that "[t]he likelihood of a different result must be substantial, not just conceivable. [Citation.]" (*Harrington v. Richter* (2011) 562 U.S. 86, 112 [178 L.Ed.2d 624, 647, 131 S.Ct. 770, 792].)

Defendant admits that he cannot argue that Judge Erwood abused his discretion in declining to dismiss defendant's 1998 strike conviction. {AOB 15} He is reduced to arguing, pursuant to *Howard*, that there is a significant, if less than 50 percent, chance that another judge might have ruled differently, and dismissed his strike prior. Defendant emphasizes that his burglary strike conviction was 13 years old, and that defendant had not had any criminal convictions in the interval between that offense and the present charges. {AOB 15} He maintains that Judge Erwood "focused much more on the nature and circumstances of [defendant's] present offenses than he did on [defendant's] priors," so that it is "probable under *Howard*'s less-than-50 percent chance that had another judge ruled . . . , his prior could have been stricken." {AOB 15}

As the California Supreme Court held in *Romero*, although the trial court retains discretion under Penal Code section 1385 to dismiss a strike allegation “in furtherance of justice,” that discretion is circumscribed and limited. (*People v. Superior Court (Romero)*, *supra*, 13 Cal.4th 497, 530.) The California Supreme Court further clarified in *People v. Williams* (1998) 17 Cal.4th 148, that “ ‘furtherance of justice’ ” in this context requires consideration of: “the constitutional rights of the defendant, and the interests of society represented by the People,” (*id.* at p. 159), and, more specifically, must consider “whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme’s spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.” (*Id.* at p. 161.)

The only factor that might conceivably militate in favor of dismissing defendant’s strike prior is the interval (approximately 13 years) between the strike offense and the present offenses. However, the mere passage of time between strike offenses is not as significant as the defendant’s conduct after the previous strike offense. (See *People v. Williams*, *supra*, 17 Cal.4th 148, 163.) During the interval between the prior strike and the present offenses, defendant may not have committed any new crimes, but his criminal behavior escalated dramatically with respect to the current offenses. In addition, the nature of the prior offense, burglary, was and remains a serious felony, fully within the spirit of the Three Strikes law.

Defendant's background, character, and prospects also did not place him outside the three strikes scheme of punishment. Defendant had been unemployed for an extended time, at least two years, and he did not remember when he had last worked.{CT 456, 457, 472-473} Defendant had very poor prospects. He had only a high school education. The court noted that defendant "was basically living off the person that he killed." {RT 496} Defendant had a history of mental health issues that the psychological professionals believed rendered him dangerous to the safety of others.{CT 480} Defendant was evaluated several times during the course of the proceedings below, and several of the evaluators found that defendant was manipulative and malingering.{RT 496} Defendant himself indicated that he had made his handwritten statement in part to emotionally manipulate the victim, e.g., by threatening suicide. The document itself graphically displayed an intention not only to commit suicide, but also to kill the victim. Defendant planned to kill the victim out of possessiveness and jealousy; if he could not have her, he would not let anyone else be with her.{RT 195-196, 496}

With respect to the present offenses, they were particularly egregious; defendant murdered his children's mother in their presence. Under all the circumstances, it would be sheer speculation, and not a reasonable probability, that any other judge would have found that defendant fell outside the spirit of the three strikes scheme.

Defendant cannot show prejudice, and his IAC claim fails on the merits.

VI. Defendant Was Not Deprived of Due Process

Defendant next recasts his claim—that Judge Erwood should have been disqualified—as a deprivation of due process.

“ ‘[N]otwithstanding the exclusive-remedy provision of Code of Civil Procedure section 170.3, “a [party] may assert on appeal a claim of denial of the due process right to an impartial judge.” [Citation.]’ [Citation.] ‘The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases.’ [Citation.]” (*Brown v. American Bicycle Group, LLC* (2014) 224 Cal.App.4th 665, 673.) However, not every claim that a judge should have been disqualified implicates due process.

As the California Supreme Court has explained, “a statutory disqualification scheme, like that found in our Code of Civil Procedure, is not *solely* concerned with the rights of the parties before the court but is also ‘intended to ensure public confidence in the judiciary.’ [Citation.] [Fn. omitted.] Thus, an explicit ground for judicial disqualification in California’s statutory scheme is a public perception of partiality, that is, the appearance of bias.” (*People v. Freeman* (2010) 47 Cal.4th 993, 1000-1001.) However, “[b]y contrast, the United States Supreme Court’s due process case law focuses on actual bias. This does not mean that actual bias must be proven to establish a due process violation. Rather, consistent with its concern that due process guarantees an impartial adjudicator, the court has focused on those circumstances where, even if actual bias is not demonstrated, the probability of bias on the part of a judge is so great as to become ‘constitutionally intolerable.’ [Citation.] The standard is an objective one.”

(*Id.* at p. 1001, citing *Caperton v. A. T. Massey Coal Co.* (2009) 556 U.S. 868, 882, [129 S. Ct. 2252, 2262, 173 L.Ed.2d 1208, 1221].)

The *Freeman* court explained the objective standard to be applied by the reviewing court, as set forth by the United States Supreme Court in *Caperton*. In *Caperton v. A. T. Massey Coal Co.*, *supra*, 556 U.S. 868 [129 S. Ct. 2252, 173 L.Ed.2d 1208], a West Virginia high court justice refused to recuse himself from a case involving a \$50 million damage award against a coal company whose chairman had contributed \$3 million to the justice's election campaign. The justice cast the deciding vote that overturned the award. "Noting that the West Virginia justice's rejection of the petitioners' disqualification motion was based on his conclusion that he harbored no actual bias, the [United States Supreme Court] said: 'We do not question his subjective findings of impartiality and propriety. Nor do we determine whether there was actual bias.' (*Caperton*, *supra*, 556 U.S. [868] at p. [882] [129 S.Ct. at p. 2263].) Rather, the court suggested, the inherent subjectivity involved in an individual judge's examination of his or her own bias 'simply underscore[s] the need for objective rules. . . . In lieu of exclusive reliance on that personal inquiry, or on appellate review of the judge's determination respecting actual bias, the Due Process Clause has been implemented by objective standards that do not require proof of actual bias. [Citations.] In defining these standards the Court has asked whether, "under a realistic appraisal of psychological tendencies and human weakness," the interest "poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be

adequately implemented.” [Citation.]’ (*Ibid.*)” (*People v. Freeman, supra*, 47 Cal.4th 993, 1004.)

The distinction between statutory grounds for disqualification and grounds for disqualification under the constitutional due process clause is significant. “The rule of judicial disqualification limned in *Caperton* may be complex but its application is limited. . . . [T]he protection afforded a litigant under the due process clause in the realm of judicial disqualification extends beyond the narrow common law concern of a direct, personal, and substantial pecuniary interest in a case to ‘a more general concept of interests that tempt adjudicators to disregard neutrality.’ [Citation.] Where such interests are present, a showing of actual bias is not required. . . . [T]he court has said that ‘“what degree or kind of interest is sufficient to disqualify a judge from sitting ‘cannot be defined with precision.’ ”’ [Citation.] Nonetheless, the court has also made it abundantly clear that the due process clause should not be routinely invoked as a ground for judicial disqualification. Rather, it is the exceptional case presenting extreme facts where a due process violation will be found. [Citation.] Less extreme cases—including those that involve the mere appearance, but not the probability, of bias—should be resolved under more expansive disqualification statutes and codes of judicial conduct. [Citation.]” (*People v. Freeman, supra*, 47 Cal.4th 993, 1005.)

We conclude that this case is not a rare case presenting extreme facts, and implicates only statutory disqualification concerns. As in *Freeman*, “[t]his case does not implicate any of the concerns—pecuniary interest, enmeshment in contempt proceedings,

or the amount and timing of campaign contributions—which were the factual bases for the United States Supreme Court’s decisions in which it found that due process required judicial disqualification. While it is true that dicta in these decisions may foreshadow other, as yet unknown, circumstances that might amount to a due process violation, that dicta is bounded by repeated admonitions that finding such a violation in this sphere is extraordinary; the clause operates only as a ‘fail-safe’ and only in the context of extreme facts.” (*People v. Freeman, supra*, 47 Cal.4th 993, 1006.)

Defendant analogizes his circumstances to two cases in which the reviewing court found that the judicial officer should have been disqualified.

First, he points to *In re Murchison* (1955) 349 U.S. 133 [75 S.Ct. 623, 99 L.Ed.942]. There, Michigan law permitted any trial court judge to “act as a so-called ‘one-man grand jury.’ ” (*Id.* at p. 133.) The petitioners, police officers, were called by a judge, sitting as a single “judge-grand jury,” and examined about an inquiry into alleged police corruption. The “judge-grand jury,” finding the answers of the examinees unsatisfactory, determined that one officer must have committed perjury, and issued an order to show cause why he should not be held in contempt. The “judge-grand jury” also issued an order to show cause to the other officer for contempt for refusing to answer questions without an attorney present. At an order to show cause hearing, the “judge-grand jury” tried both officers for contempt, found them guilty, and imposed sentence. The United States Supreme Court held that, “[i]t would be very strange if our system of law permitted a judge to act as a grand jury and then try the very persons accused as a

result of his investigations.” (*Id.* at p. 134-137.) The court described the problem: “As a practical matter it is difficult if not impossible for a judge to free himself from the influence of what took place in his ‘grand-jury’ secret session. His recollection of that is likely to weigh far more heavily with him than any testimony given in the open hearings. . . . [T]he judge whom due process requires to be impartial in weighing the evidence presented before him, called on his own personal knowledge and impression of what had occurred in the grand jury room and his judgment was based in part on this impression, the accuracy of which could not be tested by adequate cross-examination.” (*Id.* at p. 138.)

Defendant here does not present the same circumstances. As a former deputy district attorney, Judge Erwood had taken part in only three appearances in defendant’s 1998 case: two continuances and one arraignment, at which defendant pleaded not guilty. There is nothing to show that Judge Erwood had both tried the earlier strike offense, and then used that knowledge in ruling on defendant’s application to have the strike prior dismissed in the current proceedings. *Murchison* is inapplicable.

Second, defendant relies on *Sincavage v. Superior Court* (1996) 42 Cal.App.4th 224; this reliance is likewise unavailing.

The initial problem is that *Sincavage* did not raise a constitutional due process claim; rather, that case involved review of a statutory disqualification claim for which the standard is higher. (*People v. Freeman, supra*, 47 Cal.4th 933, 1005 [the states have adopted judicial conduct codes to eliminate even the appearance of partiality. These

codes impose “ ‘standards more rigorous than due process requires.’ ” The due process clause provides the “ ‘constitutional floor’ ” in matters involving judicial disqualification, whereas codes of judicial conduct provide greater protection[.]

In addition, *Sincavage* is distinguishable on the facts. There, the trial court judge, Judge Zuniga, presided over a 1995 trial, where the defendant was charged with drug and vehicular offenses. The information also charged the defendant with prior convictions in 1982 for robbery and attempted robbery. At the beginning of trial, the prosecutor alerted the court that, in reviewing transcripts of the 1982 trial, Judge Zuniga had acted as the calendar deputy district attorney in the courtroom where defendant’s guilty pleas were taken. Another deputy district attorney had actually taken the plea. Judge Zuniga assured the defendant on the record: “ ‘If in fact, Mr. Sincavage, I had taken your plea, if I had prosecuted one of your cases, I would automatically recuse myself. I would not hear the case. [¶] From looking at the transcript, I merely called your case and another prosecutor and Mr. Coleman . . . from the Public Defender’s Office were actually involved in the plea itself.’ ” (*Sincavage v. Superior Court*, *supra*, 42 Cal.App.4th 224, 227.) The defendant agreed to have the case tried by Judge Zuniga, and he was found guilty. At a separate court trial on the priors, the defendant filed a statement of objection, to disqualify Judge Zuniga for cause under Code of Civil Procedure section 170.1. Counsel had discovered, in preparing for hearing on the priors, that Judge Zuniga had actually tried the preliminary hearing in the defendant’s 1982 case. Judge Zuniga filed a response, declaring that she had no recollection of the 1982 case, and that she could be

fair and impartial in the hearing on the priors. Another judge denied the objection, refusing to disqualify Judge Zuniga. (*Sincavage v. Superior Court*, *supra*, at p. 228.)

The defendant filed for writ review of the denial of the request to disqualify Judge Zuniga. The Court of Appeal granted the writ of mandate, stating: "There are two facts in this case which, taken together, lead to the conclusion that, as a matter of law, a person knowing these facts would entertain doubt that Judge Zuniga would be impartial in ruling on matters involving the priors. The first fact is that Judge Zuniga was active in the prosecution of the priors. The second is that Judge Zuniga herself stated, if she heard that she had acted as prosecutor in a case charged as a prior, she would automatically recuse herself. Her statements may well have led petitioner to refrain from exercising any challenge at that time. A doubt as to impartiality and fairness arises when the judge changes her mind upon learning the very fact which she earlier said would disqualify her." (*Sincavage v. Superior Court*, *supra*, 42 Cal.App.4th 224, 230.)

Neither of the critical facts is present in the instant case. There is no showing that Judge Erwood was active in the prosecution of defendant's strike prior. Judge Erwood never made a statement, as did the judge in *Sincavage*, that he would recuse himself if it turned out that he had acted as a prosecutor in a case charged as a prior offense. *Sincavage v. Superior Court*, *supra*, 42 Cal.App.4th 224 is materially different from the instant case.

In conclusion, we find no due process violation in Judge Erwood's presiding over defendant's trial, and over the *Romero* determination not to dismiss defendant's strike

prior. The issue, as explained in *Freeman*, is “ ‘whether, “under a realistic appraisal of psychological tendencies and human weakness,” the interest [in the prior proceeding] “poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.” ’ ” (*People v. Freeman*, *supra*, 47 Cal.4th 993, 1004.)

Here, there is no significant or realistic risk of bias or prejudgment. Defendant has raised, as the sole ground of disqualification, the provisions of the disqualification statute, i.e., that Judge Erwood formerly served as a public attorney (deputy district attorney) for the People in defendant’s 1998 case. Judge Erwood’s involvement was limited to three appearances. The appearances had occurred over a dozen years before the trial in the instant case. Two of the three appearances were non-substantive, consisting of continuances. At the third appearance, then-Deputy District Attorney Erwood stood by as defendant was arraigned and entered a plea of not guilty on a burglary charge. A different attorney represented the People in the plea proceedings that disposed of that case.

The record here fails to show that either defendant or Judge Erwood remembered or was otherwise aware of his earlier appearances in defendant’s strike prior. There is also no indication that anyone—the court, either counsel, or defendant—recognized Judge Erwood’s connection to the 1998 strike prior until after all the current proceedings had been concluded.

The probability of actual judicial bias under the circumstances presented here is minuscule. Defendant's due process claim must be rejected.

DISPOSITION

Defendant forfeited the right to raise the issue of the trial judge's disqualification on direct appeal by failing to raise it at any time below and by failing to pursue writ review, the exclusive remedy for improper disqualification rulings. Defendant cannot proceed with the matter as a claim of IAC, because there is no factual record. Defendant should have proceeded by writ of habeas corpus on his IAC claim. Insofar as the IAC claim is reviewable on appeal, defendant fails to establish that he suffered any prejudice from counsel's failure to seek disqualification of the trial judge. Defendant's due process claim is unmeritorious; although such a claim may be pursued on direct appeal, it is only an extraordinary case that will present such a heightened risk of actual bias that due process requires disqualification of the judicial officer. This is not such a case.

The judgment is affirmed.

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