

No. _____

IN THE
Supreme Court of the United States

WILLIAM A. NOGUERA,

Petitioner,

v.

RON DAVIS, WARDEN,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

**MOTION FOR EXTENSION OF TIME TO FILE
PETITION FOR WRIT OF CERTIORARI**

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To the Honorable Elena Kagan, Associate Justice of the United States and Circuit Justice for the Ninth Circuit:

Petitioner William A. Noguera respectfully requests a 60-day extension of time to file his Petition for a Writ of Certiorari in this matter to be extended to and including March 11, 2022. The Court of Appeals entered its opinion affirming the grant of penalty-phase relief and reversing the grant of guilt-phase relief on July 20, 2021. (*See* App. A.) On October 12, 2021, it entered an order denying Mr. Noguera's petition for panel rehearing and for rehearing en banc. (*See* App. B.) Without an extension of time, the certiorari petition would therefore be due on January 10, 2022. Mr. Noguera is filing this Application at least ten days before that date. (Supr. Ct. R. 13.5.) This Court would have jurisdiction over the judgment under 28 U.S.C. § 1254(1).

Background

In this death-penalty case, the Court of Appeals affirmed the district court's grant of penalty-phase relief and reversed its grant of guilt-phase relief. The issues raised include conflict of interest and ineffective assistance of counsel.

There is Good Cause for Counsel's Motion

The attached declaration of counsel provides the basis for granting this request for an extension of time. In brief, counsel has begun working on this

petition for writ of certiorari, but their duties in other matters have taken away from the time necessary to complete the petition.

Respectfully submitted,

CUAUHTEMOC ORTEGA
Federal Public Defender

DATED: December 15, 2021

By: 

CELESTE BACCHI*
Deputy Federal Public Defender
Attorneys for Petitioner
**Counsel of Record*

DECLARATION OF CELESTE BACCHI

I, Celeste Bacchi, declare:

1. I am an attorney licensed to practice law in the State of California. I am a Deputy Federal Public Defender with the Office of the Federal Public Defender for the Central District of California (“FPD”). I represent William A. Noguera in his habeas corpus action. I make this declaration in support of Mr. Noguera’s request for an extension of time to file his petition for a writ of certiorari in this Court.

2. The Ninth Circuit Court of Appeals issued its final opinion on October 12, 2021 and the certiorari petition is currently due January 10, 2022.

3. My co-counsel, Emily Groendyke, and I have begun drafting the petition for writ of certiorari. However, we require additional time to complete and file it for several reasons.

4. Since October 12, 2021, Ms. Groendyke and I investigated, prepared, and filed an initial federal petition for writ of habeas corpus in a Texas capital case, which was filed on November 12, 2021. Additionally, on December 20, 2021, Ms. Groendyke and I must file a reply brief in a distinct state-court case on behalf of Mr. Noguera.

5. I have also litigated a sentencing proceeding in federal district court, which occurred on October 25, 2021; prepared for trial in a bank fraud

case, currently set for April 2022; and am in the process of preparing briefs in three state court capital cases, with deadlines between January 8 and January 20, 2022. Additionally, I was unexpectedly out on sick leave for four days this month. Finally, I expect to be on leave for the winter holidays from December 23, 2021 to January 3, 2022.

6. Beginning on December 26, 2021, Ms. Groendyke will be out of the office for at least one month due to medical leave.

7. For the foregoing reasons, counsel for Mr. Noguera request additional time to file the petition for writ of certiorari.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on December 15, 2021, at Los Angeles, California.



CELESTE BACCHI

APPENDIX

A

FOR PUBLICATION**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

WILLIAM A. NOGUERA,
*Petitioner-Appellee/
Cross-Appellant,*
v.
RONALD DAVIS, Warden,
*Respondent-Appellant/
Cross-Appellee.*

Nos. 17-99010
18-99000
D.C. No.
2:94-cv-06417-
CAS
OPINION

Appeal from the United States District Court
for the Central District of California
Christina A. Snyder, District Judge, Presiding

Argued and Submitted January 12, 2021
Pasadena, California

Filed July 20, 2021

Before: Sidney R. Thomas, Chief Judge, and
Susan P. Graber and Bridget S. Bade, Circuit Judges.

Opinion by Judge Bade;
Partial Concurrence and Partial Dissent by
Chief Judge Thomas

SUMMARY*

Habeas Corpus / Death Penalty

The panel affirmed in part and reversed in part the district court's judgment granting habeas corpus relief under 28 U.S.C. § 2254 to William Noguera, who was convicted of first-degree murder and sentenced to death in California state court. On appeal by the State and cross-appeal by Noguera, the panel reversed the judgment of the district court granting the habeas petition as to Noguera's conviction, affirmed the judgment of the district court granting the petition as to Noguera's death sentence, affirmed the judgment of the district court denying the petition on Noguera's claims based on a financial-gain special circumstance, and remanded to the district court to enter an appropriate order.

The district court granted habeas corpus relief on ten claims, including Noguera's assertion of a right to conflict-free counsel, several other claims of ineffective assistance of counsel, and other claims that the district court considered "integrally related" to the conflict-free counsel claim. In Claim 1, Noguera asserted that a conflict arose from one of his two attorneys' representation of Noguera's mother in a divorce proceeding and from a fee arrangement in which she paid the attorney to represent Noguera and controlled the defense strategy. The panel held that, to the extent that this claim rested on successive presentation, the California Supreme Court's denial of this claim was not an

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

unreasonable application of clearly established federal law because there is no clearly established Supreme Court precedent applying the presumed-prejudice standard of *Cuyler v. Sullivan* to successive representation. As to the fee arrangement, the California Supreme Court reasonably concluded that petitioner did not demonstrate an actual conflict of interest that adversely affected his lawyer's performance. The panel concluded that the State waived its procedural-bar argument as to Claim 1.

The panel held that the California Supreme Court failed to reasonably apply clearly established federal law under *Strickland v. Washington* in rejecting Claim 10, Noguera's claim of ineffective assistance of counsel at the penalty phase in his attorneys' failure to investigate and present mitigating evidence pertaining to his background. The panel concluded that even if review of new exhibits presented with Noguera's third state petition was procedurally barred, the panel would reach the same determination.

The panel held that the California Supreme Court properly denied Noguera's Claim 4, asserting that his attorneys were ineffective during the guilt phase of trial for failing to investigate and present mental health defenses, and Claims 6 and 7, asserting that the attorneys were ineffective at the guilt and penalty phases for failing to investigate and present evidence of a motive for murder other than financial gain.

The panel reversed the district court's grant of habeas corpus relief on Claim 14, asserting that counsel were ineffective by failing to participate in a pretrial meeting with the prosecution and by failing to argue for a lesser sentence during that proposed meeting, and Claim 84, asserting that

Noguera's appellate counsel and first post-conviction counsel were ineffective for failing to raise this issue.

Having found a Sixth Amendment violated based on counsel's failure to investigate mental health defenses at the penalty phase and granted relief on that claim, the panel concluded that it need not consider Noguera's arguments that cumulative error affected the penalty phase.

To the extent that Noguera argued that the trial errors alone, without regard to ineffective assistance of counsel, accumulated in a way that violated the constitution, the panel concluded that the California Supreme Court's rejection of that claim was reasonable. The panel held that errors in the admission of limited hearsay evidence, an errant jury instruction, and improper statements by the prosecutor during the closing argument about Noguera's possible motive did not render the trial fundamentally unfair. The panel further concluded that any deficient performance by counsel at trial did not contribute to the prejudicial effect of the alleged trial errors. In sum the California Supreme Court reasonably rejected Noguera's Claims 16, 40, and 61, asserting cumulative error.

Turning to Noguera's cross-appeal, the panel affirmed the district court's denial of habeas corpus relief on Claim 41, his constitutional challenge to California's financial-gain special circumstance, asserting that the special circumstance was vague and overbroad both facially and as applied to his case and that the jury instructions regarding the special circumstance were inadequate.

The panel concluded that it need not address procedural bar because the State waived its argument that portions of Claim 1 were procedurally barred; the panel would reach the

same conclusion as to Claim 10 even without considering purportedly procedurally barred declarations; and the panel reversed for other reasons the district court's grant of habeas corpus relief as to Claims 4, 6, 7, 14, 16, 40, 61, and 84, and affirmed the district court's denial of relief as to Claim 41.

The panel concluded that the district court's grant of habeas relief without an evidentiary hearing on Claim 10 was not an abuse of its discretion. The panel held that Noguera was deprived of effective assistance of counsel at the penalty phase by counsel's unprofessional failure to investigate and present mitigating evidence pertaining to Noguera's familial history and his mental health, and he showed *Strickland* prejudice as a result of that deficient performance. Additionally, the panel concluded that the California Supreme Court's denial of Noguera's claim was an unreasonable application of *Strickland* and, thus, Noguera was entitled to relief under the Antiterrorism and Effective Death Penalty Act as to the capital sentence.

Concurring in part and dissenting in part, Chief Judge Thomas joined the majority opinion's holding that defense counsel rendered constitutionally ineffective assistance at the penalty phase of Noguera's trial by failing to investigate and present evidence regarding Noguera's mental health, family abuse, and substance use. He also joined the majority's resolution of Claims 14, 16, 40, 61, and the cross-appeal. Chief Judge Thomas wrote separately because he concluded that counsel had an actual conflict of interest that adversely affected his performance, and that counsel rendered constitutionally ineffective assistance at the guilt phase of Noguera's trial. Therefore, he would affirm the district court as to Claims 1, 4, 6, 7, and 10, and the district court's judgment vacating the conviction.

COUNSEL

Meredith S. White (argued), Deputy Attorney General; Holly D. Wilkens, Supervising Deputy Attorney General; Julie L. Garland and Ronald S. Matthias, Senior Assistant Attorneys General; Gerald A. Engler, Chief Assistant Attorney General; Office of the Attorney General, San Diego, California; for Respondent-Appellant/Cross-Appellee.

Emily J.M. Groendyke (argued) and Celeste Bacchi, Deputy Federal Public Defenders; Office of the Federal Public Defender, Los Angeles, California; for Petitioner-Appellee/Cross-Appellant.

OPINION

BADE, Circuit Judge:

In 1987, William Noguera was convicted of first-degree murder and sentenced to death in California state court. The State appeals the district court's grant of habeas corpus relief on numerous claims under 28 U.S.C. § 2254. Noguera cross-appeals the district court's denial of habeas corpus relief on his constitutional challenge to California's financial-gain special circumstance. We have jurisdiction under 28 U.S.C. §§ 1291 and 2253. We reverse in part and affirm in part.

I.**A.**

In the early morning of April 24, 1983, Jovita Navarro ("Jovita") was found dead in the bedroom of her home.¹ The police found Jovita when they responded to a 911 call from Jovita's neighbor, Mindy Jackson. It appeared that Jovita was killed during a burglary and rape—she was on the bed with her nightgown pulled up to her neck, the bed sheets were on the floor, and a jewelry box that normally sat on a dresser was found on the floor in the hall with its contents scattered along the hallway.

Jovita had been severely beaten; she suffered at least eighteen blows to the head and face. She had "extensive facial injuries" and depressed fractures on her skull, and her

¹ The facts are drawn from the California Supreme Court's decision on direct appeal. *People v. Noguera*, 842 P.2d 1160, 1164–70 (Cal. 1992). Except when noted, the parties do not dispute that statement of facts.

scalp had been torn loose from her head. *People v. Noguera*, 842 P.2d 1160, 1165 (Cal. 1992). She had “defensive wounds” on her arms and hands and “oval shaped wounds” on her left thigh.² *Id.* The examining pathologist testified that Jovita did not die from the extensive beating, but from asphyxiation “induced by pressing a rounded object against her throat with such force that her larynx was crushed, choking off her airway.” *Id.* But the pathologist also testified that, had she not been asphyxiated, Jovita would have died from “the severity of the beating.” *Id.*

At the time of her death, Jovita had a \$13,000 life insurance policy, \$14,000 in accumulated retirement benefits, and a house with a market value of around \$90,000 with a mortgage balance of \$7,000. She also carried “mortgage insurance in the event of her death.” *Id.* at 1166. Her sixteen-year-old daughter Dominique Navarro was her sole heir.

In the bedroom, the police investigators found a bloodstained tonfa—a martial arts weapon—that was “shattered in two pieces.” *Id.* at 1165. The police recovered a bloodstained wooden dowel from a neighboring yard, and a bloodied leather glove from a nearby yard. The blood was consistent with Jovita’s blood. Investigators determined that the crime scene had been staged to appear like a burglary and rape because there were no signs of forced entry, no missing valuables, and no signs of sexual trauma on Jovita’s body. The blood-spatter analysis suggested that the bed sheets were removed “and arranged on the floor *after* the murder”

² There was testimony that the wound on Jovita’s thigh was a bite mark that had significant similarities to Noguera’s teeth.

and that Jovita was murdered before her the room was rifled. *Id.* at 1166.

The on-scene criminalist estimated the time of death as sometime between 12:30 a.m. and 3:30 a.m., but later revised the approximate time of death to 4:45 a.m. An autopsy report estimated that Jovita died sometime between 12:30 a.m. and 2:30 a.m.

The police interviewed Jovita's neighbor, Mindy Jackson, who told them that she and her husband had a guest on the night of the murder, Tom Brooks. Jackson, her husband, and Brooks all heard loud noises coming from Jovita's house around 11:00 p.m., and Brooks testified that he heard "really radical noises" later that night. *Id.* at 1167. The three went outside around 1:45 a.m. They heard Jovita's dogs barking; no lights were on at the house.

From interviews with Jackson and Jovita's co-worker, Margaret Garcia, investigators learned that the relationships between Jovita, Dominique, and Dominique's boyfriend, Noguera, were rocky. The three had argued about Dominique's curfew violations and a sharp decline in her school attendance and performance that began after she started dating Noguera. Jovita and Dominique also had disagreements about Dominique's pregnancy with Noguera's child and her subsequent abortion. Jovita wanted to keep Dominique away from Noguera, and she considered moving or even hiring a "hit man" to kill him. *Id.* at 1166.

Garcia said that, about two weeks before Jovita's murder, Jovita told her she woke up in the middle of the night and found the front door open, all the outdoor lights off, and Dominique wandering the house with no explanation for opening the front door. Jackson said that, a few weeks before the murder, she observed Jovita scream into the

telephone, slam down the receiver, and express frustration. Jovita said that she “hated” Noguera and did not want to hear his name again. Jovita also said: “If he is going to use his karate on me, he has another thing coming.” *Id.* at 1167 (alteration omitted).

Dominique told police investigators that on the night of Jovita’s death, she went to a party with Noguera. They left the party around 11:30 p.m. and went out to eat with a friend. She got home around 1:30 or 2:00 a.m. She went to bed and awoke a few hours later to the sound of “muffled noises coming from her mother’s adjacent bedroom.” *Id.* at 1165. A few minutes later she heard her mother screaming, “get out, mi hija.” *Id.* Dominique stayed in her bedroom for a bit and then fled the house in hysterics and ran to the home of a neighbor, who called 911.

The evidence presented at trial linking Noguera to the murder included the testimony of Ricky Abram and Steven Arce. Abram testified that, about two months before Jovita’s murder, he drove with Noguera to pick up Dominique, and the three of them went to Bob’s Big Boy restaurant where they talked about killing Jovita. Dominique and Noguera shared their plan to stage a burglary and rape and asked Abram to “fake the burglary and take any items of value.” *Id.* at 1167. Dominique would let Noguera and Abram into the house. Noguera would shoot Jovita and, after the murder, Dominique would have intercourse with Noguera and then run next door to report a rape and burglary. Noguera promised to give Abram “\$5,000 from the \$25,000 . . . from the mother’s insurance” and to let him live with Noguera and Dominique in Jovita’s “house [that] would be passed on to [Dominique] after the mom’s death.” *See id.* at 1167–68. About a week and a half before the meeting at Bob’s Big Boy, Noguera had asked Abram about getting a

gun. Abram considered the murder scheme a “joke,” and he did not see Noguera or Dominique again until the trial. *See id.* at 1168.

Steven Arce testified that he had seen the tonfa found at the murder scene, and other tonfas, in Noguera’s car about a month before Jovita’s death. He had also seen Noguera “wearing tan leather motorcycle gloves on occasion.” *Id.* A few weeks before the murder, he heard Noguera complain that Jovita was impeding his relationship with Dominique and heard Noguera say “he wanted to kill that bitch,” referring to Jovita. *Id.* (internal quotation marks omitted).

After Jovita’s death, her house was rented out, and Dominique lived with her uncle. Dominique frequently spoke to Noguera on the phone from her uncle’s house. Her uncle testified that one time, after Dominique finished a call with Noguera, he overheard her complain that she did not want to contact the family attorney, who was Dominique’s cousin. That attorney confirmed that, after the murder, Dominique frequently contacted him about insurance and the estate, including how long it would take to process and the amount owed to creditors. During one call she was “very emphatic . . . that she did not want the house to be sold.” *Id.* That June, Noguera’s mother, Sarita Salinas (“Salinas”), attended a meeting with the family attorney and another attorney, during which the possibility of Dominique’s emancipation was discussed.³ Dominique was seventeen at that time.

³ In a footnote, Noguera takes issue with the California Supreme Court’s statement in its recitation of facts that he also attended that meeting. *See Noguera*, 842 P.2d at 1168. “The summary mention of an issue in a footnote, without reasoning in support of the [party’s]

B.

In December 1983, authorities arrested Dominique and Noguera and charged them with Jovita's murder.⁴ Noguera was charged with first-degree murder. He presented an alibi defense and testified at his trial. He described his relations with Jovita as "fair." He denied knowledge of Jovita's life insurance.

Noguera testified that he had lunch with Abram and Dominique at Bob's Big Boy. Noguera said he talked to Abram about selling him a car engine, and Dominique complained about Jovita's punishing her for breaking curfew. Noguera said he had studied martial arts, but he was not trained to use a tonfa and had never owned one.

Noguera denied involvement in the murder. He testified that, on the night of the murder, he and Dominique went to a party and then out to eat with a friend, he dropped Dominique off at her house around 2:00 a.m., and he then went home. He chatted with his mother and grandmother and went to bed. Around 3:30 a.m., he heard a knock on his window. His friend Margaret Noone was at the window. He let her in, they hung out in his room for about an hour, and then Noone left.

argument, is insufficient to raise the issue on appeal." *United States v. Strong*, 489 F.3d 1055, 1060 n.4 (9th Cir. 2007) (citation omitted). Additionally, Noguera does not point to any portion of the California Supreme Court's decision indicating that it relied on that fact.

⁴ Dominique was charged with one count of conspiracy to commit murder and one count of first-degree murder. "She was tried as a juvenile, convicted, and sentenced to the custody of the Youth Authority; her conviction was affirmed on appeal." *Noguera*, 842 P.2d at 1168.

Noguera's mother, Salinas, and his grandmother corroborated Noguera's testimony. Noguera's grandmother confirmed that he arrived home around 2:00 a.m. the night of the murder. Salinas also testified that he returned home around 2:00 a.m. and that she spoke with him briefly. Salinas later heard Noguera talking in his room and, through the door, asked who was there.

Noone testified that around 3:00 a.m. on April 24, 1983, she climbed through the window of Noguera's bedroom and stayed for about an hour and a half. She left after someone knocked on the bedroom door.

The defense presented two of Noguera's friends to attack Abram's and Arce's credibility. Wilbur Boring testified that Abram implicated Noguera in Jovita's murder and later told him that "[Noguera] got what he deserved; he put me in jail so I put him in jail." *Noguera*, 842 P.2d at 1169. Patrick Reese stated that Arce "told him that he cooperated with the police in exchange for immediate release on a felony charge." *Id.* Arce also told Reese that he saw Noguera with nunchaku sticks—not a tonfa—and that Arce told Reese he "should not have told the police some of the things he told them." *Id.* The defense also presented expert testimony that the mark on Jovita's thigh was not a bite mark. *Id.* at 1165 n.1.

On rebuttal, the prosecution recalled Noone. She said she lied about "almost everything" in her testimony for Noguera because she had been threatened that "something would happen" to her or her family if she did not testify for him. *Id.* at 1169. She testified that Noguera liked to "mess around" with nunchaku sticks and she had seen some in his car. *Id.* Noone testified that the State had granted her immunity from prosecution.

The trial court took judicial notice that the prosecution called Dominique as a witness, but she refused to testify and was held in contempt of court. A deputy marshal testified that, shortly after Dominique was held in contempt, he overheard Noguera tell another inmate that Dominique “did a good job and tell her I love her.” *Id.*

The court instructed the jury on first-degree murder, second-degree murder, and voluntary and involuntary manslaughter. The court also instructed the jury on California’s financial-gain special circumstance. No narrowing instruction was requested or given on the financial-gain special circumstance. The jury found Noguera guilty of one count of first-degree murder. The jury found that the financial-gain special circumstance applied, which made Noguera eligible for the death penalty. The jury also found that Noguera used a dangerous and deadly weapon in the murder.

C.

At the penalty phase, the prosecution presented evidence of Noguera’s failed attempt to steal a car after threatening the driver with a handgun, which was prior criminal activity involving the threat of force for purposes of California Penal Code section 190.3(b) (identifying factors the jury may consider in determining whether to impose the death penalty).

Noguera presented a “good guy” defense. The defense called fifteen witnesses, including a former employer, Noguera’s high school girlfriend, several family friends, his mother, his sister, and his grandmother, to tell the jury about the positive aspects of Noguera’s life, including his work ethic, close familial relationships, and participation in school activities.

During deliberations, the jury asked two questions. First, they asked whether the word “you” in the instruction that “in the event that *you* cannot so find, you shall impose life without possibility of parole,” referred to “to the individual juror [or] to the jury collectively.” And second, they asked: “If the jury finds aggravating circumstances exceed the mitigating circumstances, is it still possible for the jury to find the appropriate sentence is life without the possibility of parole?” In response to the first question, the trial court stated, “As I’ve instructed you, each of you have to decide the punishment by yourselves. Obviously[,] you deliberate together; however, before you can render a verdict as to which punishment can be imposed, all 12 of you must agree to that punishment.” In response to the second question, the trial court reread the penalty-determination instruction. The jury returned a death verdict.

In 1992, the California Supreme Court affirmed Noguera’s conviction and death sentence on direct appeal. *Noguera*, 842 P.2d 1160. The California Supreme Court denied Noguera’s petition for rehearing in 1993. The United States Supreme Court denied Noguera’s petition for a writ of certiorari in 1994. *Noguera v. California*, 512 U.S. 1253 (1994).

II.

A.

In 1992, Noguera filed his first petition for a writ of habeas corpus in the California Supreme Court and the court summarily denied the petition. He filed a second petition in the California Supreme Court in 1998 and, in 2001, the court summarily denied all claims on the merits and it also denied all but one claim on procedural grounds. In 2003 and 2005, Noguera filed his third and fourth petitions in the California

Supreme Court. In 2007, the court summarily denied all claims on the merits and denied relief on nearly all claims on procedural grounds.

During state post-conviction proceedings, Noguera submitted numerous declarations: from his mother; his father, Guillermo Noguera; his sister, Sarita Perez; his defense attorneys, Lorenzo Pereyda and Benjamin Campos; his wife, Francesca Mozqueda; other family members; friends; a neighbor; Dominique; psychiatrists; psychologists; and social workers. He offered this evidence to support his claims that (1) Pereyda operated under a conflict of interest because of his prior representation of Noguera's mother in his parents' divorce, and (2) that Pereyda failed to investigate or present potentially mitigating evidence of the physical and psychological abuse that Noguera experienced in his childhood home; his mental health issues; his abuse of steroids and other substances throughout his adolescence, including his use of such substances around the time of the murder; and motives for the murder other than financial gain, including Jovita's abuse of Dominique.

To support his claim that Pereyda had a conflict of interest, Noguera relied almost entirely on Salinas' declaration. She stated that she retained Pereyda conditioned on his agreement to prove Noguera's innocence and not to disclose any "family problems," and that "Pereyda knew the only defense was proving [Noguera's] innocence." Salinas stated that Noguera "had a serious drug problem" and "serious mental problems," but she did not allow Pereyda to investigate those matters and refused to pay for a mental examination. Noguera's wife, Mozqueda, declared that Salinas told her "that she would not allow anyone to say anything bad about [Noguera] or the family."

Pereyda stated in his declaration that he had known Noguera since Noguera was around twelve years old. Salinas retained Pereyda in 1979 “to represent her in the divorce action she brought against” Noguera’s father. While representing Salinas, Pereyda learned about Noguera’s tumultuous upbringing. Pereyda described the divorce as “extremely bitter and acrimonious” and stated that the proceedings lasted years, concluding in January 1983, just months before Jovita’s murder. Pereyda further stated that, after Noguera was arrested for Jovita’s murder, Salinas retained him to represent Noguera. He stated that he did not explain any conflict to Noguera based on his prior representation of Salinas, nor did he obtain a waiver of any such conflict. In contrast to Salinas’s statements, Pereyda did not state that Salinas was directing the defense, or that he was representing Salinas, or that he viewed her as his client.

Pereyda, however, acknowledged that he lacked experience in capital litigation and, at the defense’s request, the trial court appointed Benjamin Campos as second counsel. Pereyda stated that the “vast majority of trial preparation” was spent on the guilt phase and that he did not explore potentially mitigating evidence. Campos stated in his declaration that he lacked experience in capital litigation, that he agreed with Pereyda’s statements about the trial, and that he billed a total of 4.5 hours for the guilt phase and the “beginning of the penalty phase” and an additional “3 hours of out-of-court time during the penalty phase” of the trial.

Pereyda stated that he knew about Salinas’s “emotional problems” and that she and Guillermo’s violent relationship might have negatively affected Noguera. But the defense instead focused on proving that Noguera did not commit the crime. The “strategy during the penalty phase was to present

[Noguera] in a positive light to the jury.” The defense did not investigate Noguera’s “emotionally impoverished history” or background for “potentially mitigating evidence.” Counsel “did not have [Noguera] or any member of his family interviewed by a mental health professional; nor did [counsel] explore family and social background to determine whether the family dynamics could have had a bearing on his culpability.” They “did not investigate Dominique or her family to determine whether she had any other motives for killing her mother,” even though “[t]here was no strategic reason for not doing so.”

Through declarations from his family, Noguera presented evidence that his father committed violent acts. Noguera saw his father hit Salinas. When Noguera was a child, his father tortured and killed animals in front of him. Noguera’s father hit him on the head, and his mother beat him with a belt or stick. Noguera was hit once or twice a week until he was ten years old. Noguera’s mother also engaged in other violent behavior. She once stabbed Noguera’s father in the hand with a fork at the dinner table. She threatened to abandon the family or kill herself if Noguera and his sister misbehaved.

Noguera also presented evidence suggesting that Salinas sexually abused him. As a child and adolescent Noguera had nightmares in which he was held down by a woman and he felt “[c]old lips . . . on his throat and ears, and someone was sucking on his cheeks and chin,” among other things. Salinas touched Noguera inappropriately when he was a child, and when he was an adult she bragged that he performed “like a stallion in bed.”

Dr. Fred Rosenthal, a psychiatrist who interviewed Noguera in 1992, opined in his declaration that witnessing routine violence between parents is “[p]articularly

disturbing to a young boy.” Salinas’s threats of abandonment or suicide were “severely destructive” and constituted “psychological torture.” As a result of Noguera’s family life where “lying and deceit were commonplace” and “violence was the prevailing dispute resolution method,” he lacked appropriate coping skills and had “severe emotional problems.”

According to Dr. Rosenthal, psychologist Dr. Anne Evans, and neuropsychologist Nell Riley, Noguera suffered from Attention Deficit Hyperactivity Disorder (“ADHD”) and organic brain damage. Such deficits “can significantly interfere with an individual’s ability to regulate his own behavior and control impulses.” Those impairments may have resulted from circumstances surrounding his premature birth, a head injury when he was in first grade, or the regular physical abuse his father inflicted on him.

Because of those issues, Noguera “is likely to use poor judgment and to lack control over his impulses at those times when he believes he is being threatened by others or is being strongly provoked.” Noguera’s thinking is disturbed by his “paranoid beliefs and strongly ingrained suspiciousness,” which causes him to “frequently misinterpret[] the behavior of others and events, [and] read[] into them meanings which are not accurate.”

Noguera also submitted evidence that, at his father’s urging, he started using steroids at the age of fourteen to become a “man,” and he continued using them through the time of Jovita’s murder, at which time he was eighteen. Noguera also used PCP, cocaine, marijuana, and alcohol. Noguera’s sister declared that he “had behaved crazily since childhood” and had severe mood swings. Noguera’s sister and his friend Chris Reyes stated that Noguera acted “crazy” and “out-of-control” when he took steroids and other drugs.

Dr. Evans also discussed the “direct link between the psychological effects of steroids and the behaviors associated with [committing murder],” noting that “steroid-induced violence” can manifest as “extreme degrees of atypical behavior and potentially disastrous consequences . . . even in individuals with no pre-existing mental disorders or history of violence.” She further explained that research has shown “cases of men with no history of violence, who . . . have impulsively committed violent acts—including killing—when they were taking steroids.” Steroids are harmful and are known to cause “extremely unstable moods, paranoid delusions,” “heightened irritability and aggression,” and “violent reactions to even minor stresses.” When used by an adolescent with ADHD the “adverse effects,” including the “mental and emotional disruption,” are more severe.

Noguera submitted evidence related to the motive for Jovita’s murder. Dominique declared that her mother often asked her to shower with her and to sleep in her bed and that her mother touched and kissed her “in a sexual way.” Jovita also arranged for Dominique to pose for semi-nude photographs when she was seven years old and, by the age of twelve, Dominique was posing fully-nude and the photos were marketed and sold as pornography. When Dominique became pregnant with Noguera’s child, Jovita insisted that Dominique have an abortion so she could continue modeling. Dominique said she “constantly cried and complained” to Noguera for help and frequently told him “how terrible life was with [her] mother.” Dominique “wanted [her] mother out of [her] life” and wanted Noguera to “solve [her] problems.” She “pressured [him] to come up with a solution” and told Noguera that, “if he really loved [her], he would take care of it.” In addition to Dominique’s statements that she pressured him, Noguera also submitted

evidence that his personality and experiences made him particularly susceptible to manipulation.

B.

In July 1996, Noguera petitioned for a writ of habeas corpus in federal court on numerous grounds, including that the state court unreasonably rejected his Sixth Amendment claim that Pereyda operated under an actual conflict of interest and was ineffective for failing to investigate and present evidence pertaining to certain defenses. After several stays and amended filings, including the filing of the fourth amended petition for a writ of habeas corpus—the operative petition in this appeal—the district court granted habeas corpus relief on ten claims, including Noguera’s assertion of a violation of his right to conflict-free counsel, several other claims of ineffective assistance of counsel, and other claims that the court considered “integrally related” to the conflict-free-counsel claim.

The district court denied relief on Noguera’s constitutional challenge to California’s financial-gain special circumstance. The district court also denied relief on Noguera’s claims of ineffective assistance of post-conviction counsel and ineffective assistance of appellate counsel—except for his claim that appellate counsel was ineffective for failing to challenge trial counsel’s failure to participate in a pre-charging conference. The State timely appealed, and Noguera cross-appealed.

III.

We review de novo a district court’s grant or denial of habeas relief. *Lambert v. Blodgett*, 393 F.3d 943, 964 (9th Cir. 2004). Our review is governed by the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), Pub. L.

No. 104-132, 110 Stat. 1214. *See* 28 U.S.C. § 2254(d). Under the AEDPA, we must defer to a state court’s decision on any claim that was adjudicated on the merits unless the decision was: (1) “contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States”; or (2) “based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” 28 U.S.C. § 2254(d). This a “highly deferential standard for evaluating state-court rulings.” *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam) (quoting *Lindh v. Murphy*, 521 U.S. 320, 333 n.7 (1997)).

We generally apply the AEDPA’s standard of review to the “last reasoned state-court decision.” *Martinez v. Cate*, 903 F.3d 982, 991 (9th Cir. 2018) (internal quotation marks and citation omitted). But § 2254(d) of the AEDPA applies even when the state court summarily denied relief. *Cullen v. Pinholster*, 563 U.S. 170, 187 (2011); *Harrington v. Richter*, 562 U.S. 86, 98 (2011). “In these circumstances, [a petitioner] can satisfy the ‘unreasonable application’ prong of § 2254(d)(1) only by showing that ‘there was no reasonable basis’ for the California Supreme Court’s decision.” *Pinholster*, 563 U.S. at 187–88 (quoting *Richter*, 562 U.S. at 98). Thus, when a state court rules on a petition summarily, “a habeas court must determine what arguments or theories . . . could have supported[] the state court’s decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the Supreme] Court.” *Richter*, 562 U.S. at 102. Even if we would grant federal habeas relief if we were reviewing *de novo*, § 2254(d) precludes such relief if there are “arguments that would otherwise justify the state court’s result.” *Id.*

For some of Petitioner's claims relevant to this appeal, the California Supreme Court denied relief in a reasoned opinion on direct appeal. *See Noguera*, 842 P.2d at 1170, 1160, 1179–82, 1190 (denying relief on the challenge to the financial-gain special circumstance, hearsay claims, and two claims of cumulative error (claims 40 and 61 in his federal habeas corpus petition)). For those claims, the California Supreme Court's decision is the last reasoned decision, which we review through the AEDPA lens. *Maxwell v. Roe*, 606 F.3d 561, 568 (9th Cir. 2010).

For all of Noguera's other claims, the California Supreme Court summarily denied relief on post-conviction review on the merits. The California Supreme Court also denied nearly all of his claims on procedural grounds. The post-conviction decision "is unaccompanied by an explanation," but Noguera bears the burden of showing that the "there was no reasonable basis for the state court to deny relief." *Richter*, 562 U.S. at 98. Because the state court did not provide any underlying reasoning for its adjudication on the merits, we conduct an independent review of the record to determine whether the state court's final resolution of those claims constituted an unreasonable application of clearly established federal law. *See Greene v. Lambert*, 288 F.3d 1081, 1088–89 (9th Cir. 2002).

IV.

In Claim 1, Noguera asserts a violation of his Sixth Amendment right to be represented by conflict-free counsel. The district court granted relief on this claim. We reverse.

Two attorneys represented Noguera during his criminal proceedings: retained lead counsel Pereyda and court-appointed second counsel Campos. Although two attorneys represented Noguera, he argues that only one of them,

Pereyda, had an undisclosed conflict of interest that adversely affected his performance. Noguera asserts that this conflict arose from Pereyda's representation of Noguera's mother, Salinas, in her divorce from Noguera's father and from the fee arrangement—Salinas hired and paid Pereyda to represent Noguera, and she controlled the defense strategy.

A.

On appeal, the State asserts a partial procedural bar to our review of this claim. But, as the State acknowledges, it waived the procedural-bar argument by failing to raise the issue before the district court. *See Franklin v. Johnson*, 290 F.3d 1223, 1233 (9th Cir. 2002). We therefore turn to the merits of Claim 1.

B.

Under the Sixth Amendment, when “a constitutional right to counsel exists, . . . there is a correlative right to representation that is free from conflicts of interest.” *Wood v. Georgia*, 450 U.S. 261, 271 (1981). To establish a Sixth Amendment violation based on a conflict of interest when, as in this case, a defendant did not object at trial, the defendant “must demonstrate that an actual conflict of interest adversely affected his lawyer’s performance.” *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980). An “actual conflict” means “a conflict of interest that adversely affects counsel’s performance,” not simply a “theoretical division of loyalties.” *Mickens v. Taylor*, 535 U.S. 162, 171, 172 n.5 (2002). When a defendant makes this showing, the court presumes prejudice because the “assistance of counsel has been denied entirely or during a critical stage of the proceeding.” *Id.* at 166; *Sullivan*, 446 U.S. at 349–50. This is an exception to the typical *Strickland* standard, which

requires a showing of prejudice. *See Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984) (defining prejudice as “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different”).

The Supreme Court has applied the *Sullivan* standard for ineffective assistance to *some*, but not all, types of conflicts. *See Mickens*, 535 U.S. at 176. Specifically, the *Sullivan* standard applies to conflicting *concurrent* representations. *Sullivan*, 446 U.S. at 348. But there is no clearly established law that *successive* representation constitutes an “actual conflict” that we would assess under the *Sullivan* standard. *See Mickens*, 535 U.S. at 176 (“Whether *Sullivan* should be extended to [successive representation] cases remains, as far as the jurisprudence of this Court is concerned, an open question.”). Considering *Mickens*, we have held that a state court’s rejection of a petitioner’s “non-concurrent representation conflict claim was neither contrary to, nor an unreasonable application of, established federal law.” *Rowland v. Chappell*, 876 F.3d 1174, 1192 (9th Cir. 2017); *see also Earp v. Ornoski*, 431 F.3d 1158, 1184 (9th Cir. 2005) (holding that the petitioner was not entitled to relief on his conflict of interest claim and reasoning that “[t]he *Mickens* Court specifically and explicitly concluded that *Sullivan* was limited to joint representation, and that any extension of *Sullivan* outside of the joint representation context remained . . . an open question” (internal quotation marks and citation omitted)).

C.

Noguera argues that Pereyda had an “actual conflict” on two grounds. First, he argues that Pereyda had an actual conflict because he represented Noguera’s mother in her divorce before he represented Noguera in criminal

proceedings. To the extent that this claim rests on successive representation, the California Supreme Court’s denial of this claim was not an unreasonable application of clearly established federal law because, as Noguera recognizes, there is no clearly established Supreme Court precedent applying *Sullivan*’s presumed-prejudice standard to successive representation. *See Rowland*, 876 F.3d at 1191–92; 28 U.S.C. § 2254(d)(1).

Second, Noguera asserts that the fee arrangement—Noguera’s mother retained and paid Pereyda—adversely affected Pereyda’s performance. Noguera argues that, under *Wood v. Georgia*, third-party payor situations are analogous to concurrent representation and, thus, the *Sullivan* exception applies. In *Wood*, the petitioners challenged the revocation of their probation on equal protection grounds. 450 U.S. at 262. The Supreme Court *sua sponte* identified a due process issue, recognizing that, although the petitioners were represented by retained counsel, due process would have required the appointment of counsel. *Id.* at 264–65, 271–72. And, when a right to counsel exists, “there is a correlative right to representation that is free from conflicts of interest.” *Id.* at 271.

Because defense counsel had divided loyalties arising from a third-party fee arrangement, the Supreme Court held that there was a possible due process violation due to “the risk of conflict of interest.” *Id.* at 267, 271, 273. The Court remanded the case with instructions that it be returned to the trial court to determine whether “an actual conflict of interest existed.” *Id.* at 273. If such a conflict existed and was not waived, the trial court was instructed to “hold a new revocation hearing that is untainted by a legal representative serving conflicting interests.” *Id.* at 273–74.

Wood recognized that a third-party fee arrangement could give rise to an actual conflict of interest. *Id.* at 272. The State argues that *Wood* did not decide under what standard a conflict of interest arising from a third-party fee arrangement should be assessed—the *Strickland* prejudice analysis or the *Sullivan* exception.⁵ We need not resolve this issue, however, because even if the *Sullivan* exception applies to the third-party fee arrangement here, there is no evidence that an actual conflict adversely affected Pereyda’s representation of Noguera. *See United States v. Walter-Eze*, 869 F.3d 891, 906 (9th Cir. 2017) (assuming that even if the *Sullivan* presumption of prejudice could extend beyond multiple representation, it did not apply in that case when the actual conflict was limited to a single decision); *United States v. Wells*, 394 F.3d 725, 733–35 (9th Cir. 2005) (concluding that a third-party fee arrangement created a “theoretical division of loyalties” but declining to grant relief because the defendant did not demonstrate that the fee arrangement actually adversely affected counsel’s representation).

The issue is whether there existed a “conflict that affected counsel’s performance—as opposed to a mere theoretical division of loyalties.” *Mickens*, 535 U.S. at 171. To make this showing, “[the petitioner] must demonstrate that some plausible alternative defense strategy or tactic might have been pursued but was not and that the alternative defense was inherently in conflict with or not undertaken due

⁵ Noguera argues that the State waived arguments regarding *Wood* that it presented for the first time in its reply. But Noguera discussed *Wood* in his brief, and we exercise our “discretion to review an issue not raised by [the] appellant . . . when it is raised in the appellee’s brief.” *In re Riverside-Liden Inv. Co.*, 945 F.2d 320, 324 (9th Cir. 1991) (citing *Eberle v. City of Anaheim*, 901 F.2d 814, 818 (9th Cir. 1990)).

to the attorney’s other loyalties or interests.” *Foote v. Del Papa*, 492 F.3d 1026, 1029–30 (9th Cir. 2007) (alteration in original) (quoting *Hovey v. Ayers*, 458 F.3d 892, 908 (9th Cir. 2006)); *see also McClure v. Thompson*, 323 F.3d 1233, 1248 (9th Cir. 2003) (noting that to establish an adverse effect, a defendant “must demonstrate that his attorney made a choice between possible alternative courses of action that impermissibly favored an interest in competition with those of the client”).

Noguera argues that the fee arrangement adversely affected Pereyda’s representation of him because the trial strategy focused solely on an alibi defense, and Pereyda did not pursue “plausible alternative defense strateg[ies].” Specifically, Pereyda did not present alternative motives for the murder and did not present evidence of Noguera’s mental health that may have influenced his decision-making.

Noguera primarily argues that Pereyda did not pursue plausible alternative defense strategies because Salinas precluded him from doing so, as evidenced by her declaration. In particular, Salinas stated that, when she hired Pereyda to represent Noguera, she told Pereyda “not to bring out any of our family problems or anything about [Noguera that] would embarrass [her].” According to Salinas, “Mr. Pereyda agreed. It was a condition of accepting the case that [Noguera] was to be proven innocent.” She declared that Pereyda “understood that all he knew about [Noguera] and the family . . . was not to be used in [her] son’s defense.”

In his declaration, Pereyda stated that he made mistakes in his representation of Noguera, including his failure to investigate Noguera’s background. But, in sharp contrast to Salinas’s declaration, Pereyda simply stated that Salinas “retained [him] to represent [Noguera]”; he was notably

silent on whether that arrangement influenced the defense strategy. Pereyda stated that he did not “explain[] to [Noguera] that there was a legal conflict . . . because [he] had previously represented [Noguera’s] mother in a divorce action and [he] never obtained” a waiver from Noguera. But he did not connect the defense strategy, tactics, or any of his possible errors in representing Noguera to the fee arrangement—the alleged source of his loyalty to Salinas—in any manner.

Campos’s 1992 and 1996 declarations describe his role during the different phases of the criminal proceedings. In both declarations, Campos stated that, due to his “relative inexperience,” he “deferred to [Pereyda] on most questions of trial tactics and strategy,” but he “discuss[ed] all crucial issues with Mr. Pereyda and was part of the decision-making process.” Campos’s 1996 declaration also admits to mistakes in Noguera’s defense, but neither of his declarations mentions the fee arrangement or says anything about Salinas’s influencing or controlling defense strategies or decisions. Instead, both Pereyda and Campos simply blamed their mistakes on their own inexperience.

As Noguera observes, the defense strategy was to prove his innocence and to focus on the positive aspects of his life. Noguera attributes that defense solely to Pereyda’s “conflicting loyalties.” But the defense’s trial strategy was sound. Viewed “from counsel’s perspective at the time,” *Strickland*, 466 U.S. at 689, Noguera had a solid alibi—someone was with him around the time of the murder, corroborated by others who had seen him shortly before or after the time of the murder. And Campos—who was not

conflicted—was “part of the decision-making process” and “discuss[ed] all crucial issues with [Pereyda].”⁶

Salinas’s declaration confirms *her* understanding that Pereyda would not disclose “family problems or anything about [Noguera that] would embarrass [her],” and would endeavor to prove Noguera innocent. But her statements about *Pereyda’s* understanding of that agreement are nothing more than speculation; she can testify only to matters of which she had personal knowledge. *See* Cal. Evid. Code § 702. And while Pereyda stated that an undisclosed legal conflict existed, he did not state that he was *actually* conflicted. *See, e.g., Burger v. Kemp*, 483 U.S. 776, 784 (1987) (“[W]e generally presume that the lawyer is fully conscious of the overarching duty of complete loyalty to his or her client.”). Additionally, Pereyda and Campos represented Noguera and participated in the decision-making. There is no allegation that Campos was conflicted. And neither Pereyda nor Campos stated that Salinas was influencing or controlling the defense strategy.

Noguera argues that the California Supreme Court’s failure “to inquire further” was an unreasonable

⁶ Noguera further argues that, due to his conflicting loyalties, Pereyda’s penalty-phase strategy focused on showing Noguera in a positive light and ignored mitigating evidence related to Noguera’s mental health, drug use, and troubled upbringing. Noguera makes this same argument to support a claim of ineffective assistance of counsel under *Strickland*. As discussed in Section V, because we conclude that Noguera is entitled to relief on his claim that he was denied the effective assistance of counsel during the penalty phase when viewed under *Strickland’s* “deficient performance” and “prejudice” standard, we need not resolve whether—if the *Sullivan* exception applied—Noguera has shown that it was unreasonable for the California Supreme Court to conclude that the fee arrangement did not adversely affect the penalty-phase representation.

determination of the facts under § 2254(d)(2). We have held that, “[i]n some limited circumstances, . . . the state court’s failure to hold an evidentiary hearing may render its fact-finding process unreasonable under § 2254(d)(2).” *Hibbler v. Benedetti*, 693 F.3d 1140, 1147 (9th Cir. 2012). But the record was not so suggestive of a conflict of interest that adversely affected the defense that the state court’s failure to order an evidentiary hearing was unreasonable. Both Pereyda and Campos were silent on the effect of the fee arrangement despite admitting other sorts of errors in their declarations. The evidence supporting Noguera’s claim—Salinas’s declaration—even if accepted as true, rests on speculation and hearsay. The California Supreme Court reasonably concluded that Salinas’s declaration was insufficient to overcome the strong presumption that a lawyer adheres to his duty of strict loyalty to a client and therefore reasonably rejected Noguera’s claim that Pereyda had an actual conflict of interest that adversely affected his performance. Thus, the California Supreme Court’s implicit holding that, even crediting Salinas’s declaration, Pereyda was not in fact adversely affected by the fee agreement, was not unreasonable. *See* 28 U.S.C. § 2254(d).

V.

Noguera asserts several claims of ineffective assistance of counsel that are governed by the clearly established federal law announced in *Strickland v. Washington*. *Pinholster*, 563 U.S. at 189. A defendant has a Sixth Amendment right to the effective assistance of counsel at the guilt and penalty phases of a capital trial. *Strickland*, 466 U.S. at 684–87. To establish a claim of ineffective assistance under *Strickland*, a petitioner must show deficient performance and prejudice. *Id.* at 687.

To establish deficient performance, a petitioner “must show that counsel’s representation fell below an objective standard of reasonableness.” *Id.* at 688. “A court considering a claim of ineffective assistance must apply a ‘strong presumption’ that counsel’s representation was within the ‘wide range’ of reasonable professional assistance.” *Richter*, 562 U.S. at 104 (quoting *Strickland*, 466 U.S. at 689). An attorney’s strategic choices are entitled to deference when they are “made after counsel has conducted ‘reasonable investigations or [made] a reasonable decision that makes particular investigations unnecessary.’” *Summerlin v. Schriro*, 427 F.3d 623, 630 (9th Cir. 2005) (en banc) (alteration in original) (quoting *Strickland*, 466 U.S. at 691).

To establish prejudice, a petitioner “must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694. “A reasonable probability is a probability sufficient to undermine confidence in the outcome,” *id.*, and “must be substantial, not just conceivable,” *Richter*, 562 U.S. at 112.

Strickland sets a “high bar” for relief. *Id.* at 105 (citation omitted). And, when reviewed under the AEDPA, the relevant question is whether the state court’s decision involved an unreasonable application of *Strickland*’s principles. *Id.* Mindful of these principles, we turn to Noguera’s claims.

A.

In Claim 10, Noguera asserts a violation of his Sixth Amendment right to the effective assistance of counsel at the penalty phase on the ground that Pereyda and Campos failed to investigate and present mitigating evidence pertaining to

his background. In rejecting this claim, the California Supreme Court failed to reasonably apply clearly established federal law. Therefore, we affirm the district court's grant of habeas corpus relief on this claim.⁷

1.

Under *Strickland*'s first prong, deficient performance falls "below an objective standard of reasonableness" and falls outside "the range of competence demanded of attorneys in criminal cases." *Strickland*, 466 U.S. at 687–88 (quoting *McMann v. Richardson*, 397 U.S. 759, 771 (1970)). The Supreme Court has not "articulate[d] specific guidelines for appropriate attorney conduct," *Wiggins v. Smith*, 539 U.S. 510, 521 (2003), but has instructed that the reasonableness of counsel's actions is assessed under the prevailing professional norms at the time of the challenged actions, *id.*, and in view of "counsel's perspective at the time," *Strickland*, 466 U.S. at 689. The American Bar Association ("ABA") standards, among others, reflect the "[p]revailing norms of practice" and provide guidance for determining whether an attorney's investigation was reasonable. *Strickland*, 466 U.S. at 688–89.

Noguera challenges counsel's limitation of the scope of investigation to evidence showing "the positive aspects of [Noguera's] life" and counsel's failure to investigate other mitigating evidence. The State attempts to justify counsel's limited investigation as a strategic decision to pursue a "positive light" defense that obviated the need for investigation into Noguera's background.

⁷ The State asserts a partial procedural bar to Claim 10. We address that issue in Section V.A.3 below.

“To perform effectively in the penalty phase of a capital case, counsel must conduct sufficient investigation and engage in sufficient preparation to be able to ‘present[] and explain[] the significance of all the available [mitigating] evidence.’” *Mayfield v. Woodford*, 270 F.3d 915, 927 (9th Cir. 2001) (en banc) (alterations in original) (quoting *Williams v. Taylor*, 529 U.S. 362, 393, 399 (2000)). Counsel’s “strategic choices made after thorough investigation” are “virtually unchallengeable,” but “counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” *Strickland*, 466 U.S. at 690–91. Whether strategic judgments are owed deference depends on the “adequacy of the investigations supporting those judgments.” *Wiggins*, 539 U.S. at 521.

During “the guilt phase, a defendant’s mental state is directly relevant for limited purposes—principally, . . . legal insanity or actual failure to form the requisite intent at the time of the offense.” *Bemore v. Chappell*, 788 F.3d 1151, 1171 (9th Cir. 2015). By contrast, at sentencing, the jury has wide “latitude to consider amorphous human factors,” *id.* (citation omitted); thus, “[i]t is imperative that all relevant mitigating information be unearthed for consideration at the capital sentencing phase.” *Id.* (quoting *Wharton v. Chappell*, 765 F.3d 953, 970 (9th Cir. 2014)). “To that end, trial counsel must inquire into a defendant’s social background, family abuse, mental impairment, physical health history, and substance abuse history; obtain and examine mental and physical health records, school records, and criminal records; consult with appropriate medical experts; and pursue relevant leads.” *Id.* (internal quotation marks and citation omitted). “Where counsel is aware of potentially mitigating evidence, he or she must investigate that

evidence, absent a reasonable strategic reason not to do so.” *Id.* (citation omitted).

Under the ABA standards in effect at the time of Noguera’s trial and sentencing in 1987, defense counsel had a duty “to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction.” 1 ABA Standards for Criminal Justice 4-4.1, p. 4-53 (2d ed. 1980). The accompanying commentary provides that defense counsel “has a substantial and important role to perform in raising mitigating factors” and that “[i]nformation concerning the defendant’s background, education, employment record, mental and emotional stability, family relationships, and the like, will be relevant, as will mitigating circumstances surrounding the commission of the offense itself.” *Id.* at 4-55. The commentary emphasizes that “[i]nvestigation is essential to fulfillment of these functions.” *Id.*

To the extent the California Supreme Court concluded that Pereyda’s and Campos’s penalty-phase representation met those standards, its conclusion was unreasonable. The jury found Noguera guilty of a brutal murder and, in so doing, rejected his testimony and that of his mother. Significantly, counsel’s perspective *at the time of the penalty phase* included their knowledge that the key alibi witness, Noone, had recanted her testimony. Noguera faced a death sentence, but Pereyda and Campos simply “looked for witnesses who could say good things about him.” They even relied on Noguera’s mother for this critical task, even though the jury had already rejected her trial testimony, which was a key component of the alibi defense. The prevailing ABA standards “‘at the time called for [Noguera’s] counsel to cover several broad categories of mitigating evidence,’ not

just one.” *Bemore*, 788 F.3d at 1172 (quoting *Bobby v. Van Hook*, 558 U.S. 4, 11 (2009) (per curiam)). Viewed from their penalty-phase perspective, counsel’s decision to investigate *only* the positive aspects of Noguera’s life fell well below the prevailing professional norms.

Counsel’s limited scope of investigation was also unreasonable considering what Pereyda knew from his personal experience with the Noguera family. Pereyda met Noguera when Noguera was around twelve or thirteen years old. Pereyda represented Salinas in her “acrimonious” divorce from Noguera’s father, which resolved a few months before Jovita’s murder. Pereyda states that Salinas told him that Noguera’s father was violent, had a bad temper, had threatened her with harm or death many times, and, on one occasion, “cut her lip, pushed her down on the floor and choked her,” prompting her to call the police. Pereyda states that Salinas told him “many times” that she feared her husband’s “actions were having a very bad effect on her children.” Pereyda learned that Noguera’s father possessed audiotapes “contain[ing] details [about] sexual acts involving animals.” Pereyda knew about Noguera’s “troubled family history,” including Salinas’s “emotional problems, her failings as a wife and mother, and . . . the bitterness and humiliation she suffered in her home life.”

But despite this knowledge, Pereyda and Campos “did not investigate the case to determine whether through [Noguera’s] emotionally impoverished history or background [they] could explain to the jury the environmental or genetic factors that could have [led] to the crime” or that might bear on his culpability. They “did not explore his family situation or background to obtain potentially mitigating evidence.” And they did not investigate Noguera’s “mental state,” nor retain “a

psychologist, psychiatrist, or neurological expert” to assess his mental health.

The State acknowledges that Pereyda “knew much about” Noguera’s dysfunctional family but argues that this knowledge excused Pereyda and Campos from further investigating Noguera’s background. We disagree. The information that Pereyda knew would have prompted any “reasonably competent attorney” representing a defendant facing death to further investigate these issues to facilitate “an informed choice among possible defenses.” *See Wiggins*, 539 U.S. at 525 (“[A]ny reasonably competent attorney would have realized that pursuing these leads [related to the petitioner’s mother’s alcoholism, petitioner’s stays in foster homes, his absences from school, and his emotional difficulties] was necessary to making an informed choice among possible defenses”).

The State attempts to justify counsel’s limited investigation as a “strategic choice” to pursue a “positive light” defense strategy that obviated the need to investigate Noguera’s family life or upbringing because such evidence would have been inconsistent with the chosen defense theory.⁸ The State also argues that counsel may have been concerned that the defense would lose credibility with the jury if, instead of continuing with the innocence defense presented at the guilt phase, it changed course and acknowledged Noguera’s guilt but presented mitigating evidence. And the State argues that counsel made a strategic judgment that evidence of “Noguera’s mental health issues

⁸ A district judge who considered Noguera’s request for an evidentiary hearing on this claim initially accepted this argument, but that decision was later vacated.

might suggest a propensity for violence.” These arguments are unconvincing.

“[A]n attorney’s performance is not immunized from Sixth Amendment challenges simply by attaching to it the label of ‘trial strategy.’” *Silva v. Woodford*, 279 F.3d 825, 846 (9th Cir. 2002). “The relevant question is not whether counsel’s choices were strategic, but whether they were reasonable.” *Roe v. Flores-Ortega*, 528 U.S. 470, 481 (2000). Pereyda’s and Campos’s decision not to investigate Noguera’s background was unreasonable. By their admission, they settled on a penalty-phase strategy despite having conducted no investigation into Noguera’s “family situation or background.” And they did this despite Pereyda’s knowledge of Noguera’s turbulent upbringing, which would have prompted a reasonably competent attorney to inquire further to assess the value of such evidence. *See Wiggins*, 539 U.S. at 525.

Additionally, presenting evidence that Noguera was a “good guy” in most situations is not inconsistent with presenting other evidence that due to drug use, abuse, and mental health issues, he would be compelled to act differently in other situations. *See Bemore*, 788 F.3d at 1174 (“[Counsel’s] early decision to pursue a risk-fraught ‘good guy’ mitigation strategy did not satisfy her duty first to unearth potentially mitigating mental health evidence.” (citation omitted)). At the penalty phase, the jury had already found Noguera guilty of a brutal murder for financial gain, and evidence of his background and mental health could have helped the jury “accurately gauge his moral culpability.” *Porter v. McCollum*, 558 U.S. 30, 41 (2009) (per curiam).

The State speculates that Pereyda and Campos curtailed their investigation because they believed mental health

evidence would suggest that Noguera was prone to violence. Counsel did not provide that explanation. We decline to entertain this post hoc rationalization because it is inconsistent with Pereyda's and Campos's admitted failure to investigate mental health evidence, including their failure to have Noguera evaluated by a mental health professional.

In the absence of such investigation, counsel could not reasonably have evaluated the benefit—or possible detriment—of mental health evidence to the sentencing defense. *Richter*, 562 U.S. at 109 (“[C]ourts may not indulge ‘post hoc rationalization’ for counsel’s decisionmaking that contradicts the available evidence of counsel’s actions.” (quoting *Wiggins*, 539 U.S. at 526–27)).

We conclude that the California Supreme Court applied *Strickland* to the facts of this case in an objectively unreasonable manner. While counsel is not required to “investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing,” nor “to present mitigating evidence at sentencing in every case,” counsel must make a reasonable decision whether to investigate. *Wiggins*, 539 U.S. at 533. Pereyda's and Campos's decision to investigate only the positive aspects of Noguera's life did not reflect “reasonable professional judgment[.]” *Strickland*, 466 U.S. at 691. The decision was inconsistent with the prevailing professional norms at the time and was not reasonable considering what Pereyda already knew about Noguera's turbulent upbringing. To the extent the California Supreme Court deferred to Pereyda's and Campos's choice of a penalty-phase defense strategy and found their performance objectively reasonable, the California Supreme Court unreasonably applied *Strickland*. See 28 U.S.C. § 2254(d).

2.

The second *Strickland* prong requires a petitioner to show “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694. A defendant “need not show that counsel’s deficient conduct more likely than not altered the outcome in the case.” *Id.* at 693. Rather, “[a] reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* at 694. The prejudice prong “looks to the weight of the available evidence and its effect on the case.” *Andrews v. Davis*, 944 F.3d 1092, 1116 (9th Cir. 2019) (en banc) (citing *Strickland*, 466 U.S. at 693–95). To determine the probability of a different outcome, we consider “the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding”—and “reweigh[] it against the evidence in aggravation.” *Williams*, 529 U.S. at 397–98.

In this case, the jury recommended the death penalty without knowing anything about Noguera’s troubled background. Defense counsel’s failure to investigate and present abundant, compelling mitigating evidence impeded the jury’s ability to fairly assess Noguera’s culpability at sentencing and undermines confidence in the outcome. The California Supreme Court’s contrary conclusion was unreasonable.

Mitigating evidence of a defendant’s background puts criminal behavior in context and allows a jury to impose a sentence that reflects a “reasoned *moral* response to the defendant’s background, character, and crime.” *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) (citation omitted), *abrogated on other grounds by Atkins v. Virginia*, 536 U.S. 304, 320–21 (2002). A jury’s consideration of abuse

suffered during youth, a formative time, is especially critical, considering our society’s “long held” belief that “defendants who commit criminal acts that are attributable to a disadvantaged background . . . may be less culpable than defendants who have no such excuse.” *Boyde v. California*, 494 U.S. 370, 382 (1990) (emphasis omitted) (citation omitted).

In aggravation, the State presented evidence of Noguera’s prior criminal activity involving the threat of force during a failed auto theft. *Noguera*, 842 P.2d at 1169. In mitigation, the jury heard evidence about Noguera’s activities and relationships that Pereyda described as “the total background of Mr. Noguera.” Pereyda and Campos presented fifteen witnesses including Noguera’s parents and other family members, a former employer, a school principal and sports coach, school employees, a high school girlfriend, and several family friends. *Id.* These witnesses testified that Noguera was a good worker, participated in a youth organization called the California Blue Jacket Cadette Corps, participated in elementary school and junior high school social activities and sports, and played musical instruments, and that his parents were involved in his activities and in his elementary schooling. *Id.* at 1170. Many of these witnesses had not seen Noguera for several years.

Noguera’s mother and sister testified that he hunted, fished, and went on motorcycle rides with his father until after his parents’ divorce, at which time he became “quieter, more serious, less playful.” *Id.* at 1169–70. Several witnesses testified that Noguera had a close family. *Id.* at 1169. But the witnesses did not tell the jury about the “kind of troubled history [the Supreme Court has] declared

relevant to assessing a defendant's moral culpability." *Wiggins*, 539 U.S. at 535 (collecting cases).

If Pereyda and Campos had performed effectively, the jury would have learned about the brutal physical abuse Noguera's father inflicted on him as a child, the abuse by his mother, the violent acts Noguera saw his parents commit against each other, and the violence he saw his father commit against animals. The jury would have heard the views of mental health experts that growing up under these conditions left Noguera with "severe emotional problems" and bereft of coping skills. The jury would have also learned about Noguera's mental health conditions, including ADHD, possible organic brain damage that caused a disturbed thought process, a propensity to use poor judgment, a predisposition to paranoid beliefs, and a lack of control over his impulses.

Further, the jury would have learned about Noguera's drug use that began when his father urged him to use steroids at the age of fourteen to become "a man" and that progressed to the use of PCP, cocaine, and other substances. The jury would have also heard experts' opinions that steroids compound paranoia and impulsivity and that these adverse effects would have been more severe for Noguera because of his mental health issues. But the jury did not hear any of this evidence.

This background evidence—that Noguera suffered severe emotional and physical abuse and had mental health issues—is the type of "troubled history" that is relevant to aid the jury's assessment of a defendant's culpability. *Wiggins*, 539 U.S. at 535. And if counsel had discovered this evidence, they could have urged the jury to consider additional mitigating factors under California law, including California Penal Code § 190.3(d), (g), and (h), rather than

allowing the prosecution to argue, without rebuttal, that those factors did not apply.

To the extent the California Supreme Court made a determination on *Strickland*'s prejudice prong, it was objectively unreasonable. For example, in *Williams*, the Supreme Court determined that there was a reasonable likelihood that a different outcome would have occurred at sentencing if counsel had presented evidence of the defendant's "nightmarish childhood" or his intellectual disability. 529 U.S. at 395–96, 398. In *Bemore*, the prosecution presented evidence of multiple aggravating incidents: the petitioner had raped someone, severely beaten someone, and acted violently in jail. 788 F.3d at 1158–60. The defense presented more than forty witnesses to testify about the defendant's "personal history and good character" and while some mentioned his "drug problems and tumultuous upbringing," many of those witnesses knew the defendant "only slightly," and the presentation omitted mental health evidence. *Id.* at 1159, 1172. Compared to *Bemore*, in which this court found prejudice, *id.* at 1175, the aggravating evidence against Noguera was weak, and the defense relied on only one category of mitigating evidence and failed to present several types of crucial mitigating evidence—childhood abuse, drug use, and mental health issues.

In sum, in addition to being constitutionally deficient, Pereyda's and Campos's performance at the penalty phase prejudiced Noguera. Counsel's failure to investigate Noguera's background led to the failure to uncover an abundance of relevant and compelling mitigating evidence. This failure undermines confidence in the outcome of the penalty phase. *Strickland*, 466 U.S. at 694. Even after hearing only the meager mitigating evidence that counsel

presented, the jury asked questions that suggested the deliberations were close—a factor that we have recognized in several cases. *See e.g., Wharton*, 765 F.3d at 978 (noting that the jury’s questions, and deliberations lasting three days, suggested that the jury struggled to reach a verdict (citing *Thomas v. Chappell*, 678 F.3d 1086, 1103 (9th Cir. 2012))). It was unreasonable for the California Supreme Court to reject Noguera’s claim of ineffective assistance of counsel related to the penalty phase. Therefore, we affirm the district court’s grant of habeas corpus relief on this claim.

3.

Finally, before concluding our analysis of Claim 10, we address the State’s assertion of a partial procedural bar to federal habeas review of this claim. Noguera asserted Claim 10 in his first state habeas petition in 1992. The exhibits filed with the original state petition in 1992 supported that claim.

Noguera reasserted Claim 10 in his third state petition in 2003, with two new exhibits, the declarations of Ann Evans, Ph.D., and Nell Riley, Ph.D. The State argues that this court’s “consideration of [Claim 10] should be limited to the record as it existed when the state court first ruled on [that claim]” and, therefore, we should not consider the declarations by Evans and Riley. But the resolution of Claim 10 does not turn on these two declarations. Thus, even if review of the latter evidence is procedurally barred, we would reach the same determination.

B.

In Claim 4, Noguera asserts that Pereyda and Campos were ineffective during the guilt phase of trial for failing to investigate and present mental health defenses. In Claims 6

and 7, Noguera asserts that they were ineffective at the guilt and penalty phases for failing to investigate and present evidence of a motive for Jovita's murder other than financial gain. He argues that the California Supreme Court's contrary conclusion was unreasonable. We disagree.

1.

Relevant to *Strickland*'s deficient-performance prong, Pereyda and Campos admit that they did not investigate mental health defenses during the guilt phase of trial, and we assume that they were deficient for failing to do so. But before addressing *Strickland*'s prejudice prong, we consider counsel's performance related to the motives for Jovita's murder.

Pereyda and Campos admit that they did not investigate motives for Jovita's murder other than financial gain. Pereyda and Campos knew that the State was going to argue the financial-gain special circumstance. Because the financial-gain motive for Jovita's murder made Noguera eligible for the death penalty under California law, counsel's failure to investigate other motives was deficient. *See Rompilla v. Beard*, 545 U.S. 374, 383 (2005).

In *Rompilla*, the Supreme Court held that counsel's performance was "obvious[ly]" deficient because they failed to obtain and review the petitioner's prior conviction files when "[c]ounsel knew that the Commonwealth intended to seek the death penalty by proving Rompilla had a significant history of felony convictions indicating the use or threat of violence, an aggravator under state law." 545 U.S. at 383. The Supreme Court reached this conclusion despite counsel's significant investigation into the petitioner's background and despite the petitioner's obstruction of counsel's investigation. *Id.* at 381. The Court reasoned that

“[w]ithout making efforts to learn the details and rebut the relevance of the [aggravating factor,] the earlier crime, a convincing argument for [counsel’s trial strategy of] residual doubt was certainly beyond any hope.” *Id.* at 386.

Our decision in *White v. Ryan* further illustrates counsel’s duty to investigate and challenge aggravating circumstances that render a defendant eligible for the death penalty. 895 F.3d 641 (9th Cir. 2018). Like Noguera, the petitioner in *White* was eligible for the death penalty because of one aggravating factor: that he had committed a murder for financial gain (namely, insurance proceeds). *Id.* at 645. Petitioner’s counsel at sentencing failed to challenge the financial-gain aggravator because he mistakenly believed that the issue had been resolved in the first direct appeal. *Id.* at 666. We held that this reasoning was “objectively unreasonable in light of *Strickland* and *Wiggins*,” and that the state “court’s contrary conclusion was an unreasonable application of those cases,” *id.* at 670, because counsel had “no strategic reason . . . not to have challenged the pecuniary gain factor,” and because counsel “made no attempt to uncover—let alone examine—evidence rebutting a pecuniary motive,” *id.* at 666.

Here, Pereyda and Campos were on notice that the State planned to allege the financial-gain special circumstance, which made Noguera eligible for the death penalty. Despite this knowledge, counsel admittedly did not investigate alternative motives to rebut the special circumstance. The State justifies this omission as a strategic decision. But the record does not support that rationale because Pereyda confirmed that this decision was *not* strategic. *See Richter*, 562 U.S. at 109 (“[C]ourts may not indulge ‘post hoc rationalization’ for counsel’s decisionmaking that

contradicts the available evidence of counsel's actions." (citing *Wiggins*, 539 U.S. at 526–27)).

In his declaration, Pereyda stated that "[t]here was no strategic reason" why the defense "did not investigate Dominique or her family to determine whether she had any other motives for killing her mother," besides "[t]he prosecution's theory . . . that Bill [Noguera] and Dominique conspired to kill Jovita in order to end her interference with their relationship and to obtain the proceeds of her estate." Pereyda admits he did not think that "the motives alleged by the prosecution [were] sufficient to result in parricide," yet he still declined to pursue additional investigation. Campos agreed with the statements in Pereyda's declaration. "[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation," *Strickland*, 466 U.S. at 690–91, but here, Pereyda admittedly made no professional judgment about whether to investigate alternative motives. Thus, the California Supreme Court's conclusion that counsel's failure to investigate alternative motives was not deficient was unreasonable.

2.

Having assumed the deficiency of defense counsel's performance alleged in Claim 4 and having concluded that defense counsel performed deficiently as alleged in Claims 6 and 7, we next consider whether Noguera has shown that the California Supreme Court would have been unreasonable

to conclude that counsel's deficient performance did not prejudice him.⁹

"In a case in which counsel's error was a failure adequately to investigate, demonstrating *Strickland* prejudice requires showing both a reasonable probability that counsel would have made a different decision had he investigated, and a reasonable probability that the different decision would have altered the outcome." *Bemore*, 788 F.3d at 1169 (citing *Wiggins*, 539 U.S. at 535–36). Applying that standard, we conclude that fair-minded jurists could find that, even if Pereyda and Campos had adequately investigated mental health defenses and alternative motives, they likely would have presented the alibi defense and they would not have presented Dominique's testimony about her mother's abuse in the guilt or penalty phase. *See Wiggins*, 539 U.S. at 535.

Noguera points to evidence submitted with his state habeas petition to support his claims that he had "frontal-lobe damage," an impaired ability to control his impulses, paranoia, a tendency to misunderstand situations and to perceive people as threatening, a propensity to impulsive actions, and that his drug use exacerbated those issues. He argues that if this evidence had been presented at trial, expert witnesses could have explained to the jury that his drug use and brain damage made it "difficult for him to control his behavior or to think or plan in a rational manner" when he was "under emotionally stressful circumstances." He further

⁹ Noguera argues that the State waived arguments pertaining to *Strickland*'s prejudice prong because it did not make them in its opening brief. We exercise our discretion to consider these arguments because Noguera addressed the prejudice prong in his brief and carries the burden on that issue. *See In re Riverside-Liden Inv. Co.*, 945 F.2d at 324.

argues that counsel could have presented evidence that Noguera and Jovita had a bad relationship, acknowledged that Noguera owned a tonfa that he kept in his car, and then relied on the mental health evidence to argue that Noguera grabbed the tonfa when tensions with Jovita “flared up uncontrollably one night.”

Noguera’s state habeas petition included a declaration from Dominique in which she described how her mother sexually abused and exploited her. Dominique also stated that her mother forced her to get an abortion when she was pregnant with Noguera’s child. Dominique stated that she wanted her mother out of her life, that she “pressured” Noguera to help “solve [her] problems,” and that she told him that “if he really loved [her], he would take care of it.” Noguera argues that had the defense presented evidence at trial that Dominique pressured him to act out of love to protect her from her abusive mother, there is a reasonable probability that at least one juror would not have found that Noguera committed the murder for financial gain.

However, as we have previously noted, the trial strategy—an alibi defense—was sound. From defense counsel’s perspective at the time of the guilt phase, Noguera had a solid alibi defense: someone was with him around the time of the murder, corroborated by others who had seen him shortly before or after the time of the murder. The mental health evidence and alternative-motive evidence that post-conviction counsel uncovered supports an alternative theory of defense—that Noguera *committed the murder*, but it was understandable or less culpable due to his mental state or because he did it for reasons other than financial gain.

During the guilt phase, a defendant’s mental state is relevant for limited purposes: to establish “legal insanity” or the defendant’s “actual failure to form the requisite intent

at the time of the offense.” *Bemore*, 788 F.3d at 1171. Noguera has never argued, or offered evidence to suggest, that he was legally insane. And because Jovita’s murder took place after June 1982, a diminished capacity defense was unavailable to him under California law. *Daniels v. Woodford*, 428 F.3d 1181, 1207 n.29 (9th Cir. 2005) (citing *People v. Weaver*, 29 P.3d 103, 130 n.8 (Cal. 2001)); *see also People v. Saille*, 820 P.2d 588, 592–93 (Cal. 1991). Thus, even if Pereyda and Campos had uncovered the mental health evidence, it would have been inadmissible to “negate the capacity to form any mental state.” *See Saille*, 820 P.2d at 593. Therefore, the expert opinions that Noguera offered with his state habeas petition, that “there was a defense of [d]iminished [c]apacity,” are irrelevant.

Noguera could have presented the mental health evidence to show whether he “*actually formed* a required specific intent.” *Id.* “[T]o present a viable mental state defense, counsel would have had to show that ‘because of his mental illness or voluntary intoxication, [Noguera] did not *in fact* form the intent unlawfully to kill’” Jovita. *Sully v. Ayers*, 725 F.3d 1057, 1070 (9th Cir. 2013) (quoting *Saille*, 820 P.2d at 596). But “mental defenses to charges of premeditated murder are rarely successful during the guilt phase.” *Silva*, 279 F.3d at 851. And Noguera “was tried at a time of hostility to mental health defenses.” *Mickey v. Ayers*, 606 F.3d 1223, 1239 (9th Cir. 2010) (discussing the climate surrounding mental health defenses and the death penalty in the early to mid-eighties). Thus, Noguera has not shown a probability that a reasonable attorney would have decided to present a mental health defense.

Even if Noguera had presented a mental health defense, there was still considerable evidence suggesting that Jovita’s murder was the result of premeditation and deliberation.

Abram's testimony showed that Noguera planned to murder Jovita several weeks before he carried out that plan. Noguera's desire to kill Jovita was corroborated by his statement that "he wanted to kill that bitch," which he made to Arce around that same time. And Abram described the details of the plan to murder Jovita—to stage the murder to look like a burglary in the middle of the night and, after the murder, for Dominique to "act hysterical" and go to a neighbor's house to call the police. Abram testified that he thought the scheme "was probably a joke," but many of the circumstances of Jovita's murder were consistent with the scheme he described. Thus, the California Supreme Court reasonably could have concluded that Noguera had not established a probability that the presentation of a mental health defense would have undermined the jury's verdict. *See Wiggins*, 539 U.S. at 535.

Turning to the alternative-motive evidence, the prosecution's theory was that Noguera and Dominique planned to kill Jovita to obtain the financial proceeds of her estate. This was the special circumstance that made Noguera eligible for the death penalty. In support of that theory, the State offered Abram's testimony that, during a meeting with Dominique and Noguera at Bob's Big Boy restaurant, Noguera promised him \$5,000 from Jovita's insurance and promised that he could live in Jovita's house after Dominique inherited it. Moreover, the alternative motive evidence—Jovita's abuse and exploitation of Dominique—could have come only through Dominique's testimony. Noguera asserts that declarations from a friend, Dominique's doctor, her attorney, and a photographer corroborate Dominique's statements. But those individuals could testify only to matters of which they had personal knowledge, *see* Cal. Evid. Code § 702, and without Dominique's testimony that proffered evidence was weak.

Dominique was charged as a co-defendant, and she refused to take an oath or to testify when called by the prosecution at a pretrial hearing. And, as the prosecution advised the court during that hearing, if Dominique had testified, she would have been impeached with her statements to investigators affirming the meeting at Bob's Big Boy restaurant where she and Noguera discussed financial arrangements with Abram. Thus, her testimony would have confirmed Abram's testimony and strengthened, not weakened, the prosecution's evidence of the financial-gain motive. Presenting this evidence would have strengthened the State's case against Noguera and, thus, he has not established a probability that a reasonable attorney would have presented it. *See Mickey*, 606 F.3d at 1236–37 (explaining that in a failure-to-investigate claim, the prejudice inquiry “is whether the noninvestigated evidence was powerful enough to establish a probability that a reasonable attorney would decide to present it and a probability that such presentation might undermine the jury verdict”).

Considering all these factors—“that mental defenses to charges of premeditated murder are rarely successful,” *Silva*, 279 F.3d at 851, that there was evidence of premeditation, that calling Dominique to testify about the abuse she experienced would have led to the admission of her testimony that strengthened the evidence supporting the financial-gain special circumstance, and that the alibi defense was strong from counsel’s perspective at the time of the guilt phase of trial—it was reasonable for the California Supreme Court to conclude that Pereyda and Campos would not have undermined the apparently strong “it wasn’t me” defense to pursue an alternative theory that required Noguera to admit to killing Jovita.

Indeed, Pereyda and Campos had testimony from a critical alibi witness, Margaret Noone, to establish that Noguera was at home at the time of the murder. Although the alibi defense fell apart at trial, Pereyda and Campos could not have anticipated that their key witness would perjure herself and then recant her testimony. Noone testified for the defense, as planned, that she was with Noguera at his house at the time of the murder. But she then recanted to the prosecutor and, on rebuttal, testified that she had lied under pressure from Noguera and others. And, while this turn of events changed Pereyda's and Campos's perspective at the time of the penalty phase, offering Dominique's testimony about her mother's abuse still would have presented the same fundamental problem: she would have been impeached with her prior statements confirming Abram's testimony about the meeting at Bob's Big Boy restaurant where she and Noguera discussed financial arrangements with Abram. Thus, the California Supreme Court's rejection of these claims of ineffective assistance of counsel was not an objectively unreasonable application of *Strickland*.

C.

In Claim 14, Noguera argues that Pereyda and Campos were ineffective by failing to participate in a pretrial meeting with the prosecution and by failing to argue for a lesser sentence during that proposed meeting. In Claim 84, Noguera further argues that appellate counsel and his first-post-conviction counsel were ineffective for failing to raise this issue.

Noguera has not cited any controlling authority holding that counsel's lack of participation in a pretrial meeting such as the one at issue here amounts to deficient performance under *Strickland*'s first prong. And the evidence in the

record supports a contrary conclusion. The letter to defense counsel inviting them to attend a meeting with a “committee of Grade V level deputies” of the district attorney’s office “to ensure uniformity in evaluation of Special Circumstance cases” recognized that counsel may have “tactical” reasons for not participating and stated that declining to participate would not “be viewed as an indication of lack of diligence on counsel’s part or as a tacit admission that mitigating circumstances are lacking in a particular case.” Pereyda’s and Campos’s declarations do not address the invitation or the pretrial meeting. When counsel’s conduct is unexplained in the record, we may consider “the range of possible reasons” for counsel’s actions. *Leavitt v. Arave*, 646 F.3d 605, 609 (9th Cir. 2011) (internal quotation marks omitted) (quoting *Pinholster*, 563 U.S. at 196 (directing the court of appeals “to affirmatively entertain the range of possible ‘reasons’” for counsel’s conduct when counsel did not remember, and the record was ambiguous as to the extent of penalty-phase investigation)).

Noguera has not shown that counsel’s failure to attend the pretrial meeting fell below an objective standard of reasonableness. The California Supreme Court could have determined that Pereyda and Noguera made a tactical decision not to participate in the meeting to avoid disclosing confidential information pertaining to the defense’s strategy. Thus, the California Supreme Court could have reasonably concluded that defense counsel’s lack of participation in the pretrial meeting was not deficient performance and, thus, denied this claim without needing to consider *Strickland*’s prejudice prong. See *Strickland*, 466 U.S. at 700 (stating that a court may dispose of a claim of ineffective assistance of counsel if a petitioner fails to satisfy either part of the two-part test).

If the California Supreme Court reached the prejudice prong, it reasonably could have concluded that Noguera did not make the required showing because he has not made any showing that, but for counsel's failure to attend the pretrial meeting, there is a reasonable probability of a different outcome. *See id.* at 694. Thus, we reverse the district court's grant of habeas corpus relief on Claims 14 and 84.

D.

In Claims 16, 40, and 61, Noguera argues that he was prejudiced by the cumulative instances of trial errors combined with counsel's alleged ineffective assistance and that the errors, taken together, require granting relief as to both the guilt phase and the penalty phase. The California Supreme Court denied claims 40 and 61 on the merits on direct review. *Noguera*, 842 P.2d at 1181–82, 1190. Noguera raised claims 16, 40, and 61 to the California Supreme Court on post-conviction review, and the court denied them on the merits and as untimely.

As described above, we found a Sixth Amendment violation based on counsel's failure to investigate mental health defenses at the penalty phase, and we granted relief on that claim. *See* Section V.A. We therefore need not consider Noguera's arguments that cumulative error affected the penalty phase. Having already granted relief on the penalty phase, we need not grant such relief again. We turn, then, to the claim of cumulative error at the guilt phase.

The Supreme Court has clearly established that the cumulative effect of trial errors can violate due process when it "renders a trial fundamentally unfair, even where each error considered individually would not require reversal." *Parle v. Runnels*, 505 F.3d 922, 928 (9th Cir. 2007) (citing *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974);

Chambers v. Mississippi, 410 U.S. 284, 290 n.3 (1973)). To the extent that Noguera argues that the trial errors alone, without regard to ineffective assistance of counsel, accumulate in a way that violates the constitution, we conclude that the California Supreme Court’s rejection of that claim was reasonable. The errors—the admission of limited hearsay evidence, an errant jury instruction, and improper statements by the prosecutor during the closing argument about Noguera’s possible motive—did not render the trial fundamentally unfair.

In *Bemore*, we considered counsel’s multiple unprofessional errors cumulatively when considering *Strickland*’s prejudice prong for purposes of determining whether the petitioner was denied his Sixth Amendment right to the effective assistance of counsel. *See* 788 F.3d at 1176 (“The two ineffective representation decisions—not putting on a mental health mitigation defense at the penalty phase, and putting on a guilt phase defense both unlikely to succeed and likely adversely to affect the jury’s view of Bemore for the penalty phase—must be viewed cumulatively in determining whether the *Strickland* prejudice standard was met with regard to the jury’s decision to sentence Bemore to death.” (citations omitted)); *see also* *Strickland*, 466 U.S. at 687 (explaining that the prejudice prong “requires showing that counsel’s *errors* were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” (emphasis added)). To the extent that Noguera asserts a Sixth Amendment violation of the right to the effective assistance of counsel and alleges prejudice for purposes of satisfying the *Strickland* standard based on cumulative instances of deficient performance, the California Supreme Court reasonably could have concluded that cumulative instances of alleged deficient performance during the guilt phase did not prejudice Noguera.

As discussed above, in Sections IV (Claim 1) and V.C. (Claim 14), the California Supreme Court reasonably concluded that counsel was not deficient; thus, there was no deficient performance to accumulate with other alleged deficiencies. In Section V.B.1., we found counsel deficient for failing to investigate motives for the murder other than financial gain, and we presumed counsel was deficient for failing to investigate mental health defenses at the guilt phase. The state court, however, reasonably could have determined that the combined effect of these instances of deficient performance was not prejudicial at the guilt phase. As we discussed in Section V.B.2., it was reasonable for the California Supreme Court to conclude that Pereyda and Campos would not have undermined the apparently strong “it wasn’t me” defense to pursue alternative theories that required Noguera to admit to killing Jovita. In other words, the deficient performance did not affect the presentation of evidence at trial; counsel would have presented the same case even had they conducted a competent investigation.

Finally, we reject Noguera’s claim to the extent that he relies on the aggregation of the trial errors in combination with the alleged ineffective assistance of counsel. As just described, competent counsel would have presented the same evidence at trial. For that reason, any deficient performance by counsel at trial does not contribute to the prejudicial effect of the alleged trial errors. In these circumstances, there is no prejudicial effect to accumulate. In sum, the California Supreme Court reasonably rejected Noguera’s claims of cumulative error.

E.

We now turn to Noguera’s cross-appeal. In California, a defendant is eligible for the death penalty only if, at the guilt phase, the jury finds a defendant guilty of first-degree

murder and finds true at least one “special circumstance” defined in California Penal Code section 190.2.¹⁰ *California v. Ramos*, 463 U.S. 992, 995, 1008 (1983). In Claim 41 of his federal habeas petition, Noguera argued that the financial-gain special circumstance is unconstitutional. It makes a defendant eligible for the death penalty if “[t]he murder was intentional and carried out for financial gain.” Cal. Penal Code § 190.2(a)(1). Noguera argues that this special circumstance is vague and overbroad both facially and as applied to his case and that the jury instructions regarding the special circumstance were inadequate. The California Supreme Court rejected this argument on the merits on direct review, *Noguera*, 842 P.2d at 1180–81, and on procedural grounds on post-conviction review. The district court denied relief on this claim. We affirm.

A death-penalty statute must provide a “meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not.” *Furman v. Georgia*, 408 U.S. 238, 313 (1972) (White, J., concurring). As the Supreme Court has explained, its “capital punishment cases under the Eighth Amendment address two different aspects of the capital decisionmaking process: the eligibility decision and the selection decision.” *Tuilaepa v. California*, 512 U.S. 967, 971 (1994). The eligibility aspect is at issue here.

To be eligible for the death penalty, a defendant must be convicted of murder and the trier of fact must find one “aggravating circumstance” at the guilt or penalty phase. *Id.* at 971–72 (citations omitted). The aggravating

¹⁰ At the penalty phase, the jury considers both statutory aggravating and mitigating factors. See *Mayfield*, 270 F.3d at 924 (discussing California’s death penalty scheme).

circumstance, which may be part of the definition of the crime or contained in a separate sentencing factor, must meet two requirements: (1) it cannot apply to every defendant convicted of a murder, but instead must apply only to a subclass of such defendants; and (2) it “may not be unconstitutionally vague.” *Id.* at 972. An aggravating circumstance is unconstitutional if it lacks “some ‘common-sense core of meaning . . . that criminal juries should be capable of understanding.’” *Id.* at 973 (ellipsis in original) (quoting *Jurek v. Texas*, 428 U.S. 262, 279 (1976) (White, J., concurring in judgment)).

1.

Noguera asserts a facial challenge to the financial-gain special circumstance on the ground that it does not specify “the degree of motivation or intent required” and thus fails to adequately narrow the class of persons eligible for the death penalty under the special circumstance, and it fails to “define the criteria necessary to find it true.” On direct review, the California Supreme Court explained that it had previously held that “the relevant inquiry is whether the defendant committed the murder in the expectation that he would thereby obtain the desired financial gain.” *Noguera*, 842 P.2d at 1180 (quoting *People v. Edelbacher*, 766 P.2d 1, 26 (Cal. 1989)). “[S]o construed, . . . the special circumstance provision is not unconstitutionally vague or overbroad.” *Id.* (internal quotation marks and citation omitted).

The financial-gain special circumstance applies if the jury finds that “[t]he murder was intentional *and* carried out for financial gain.” Cal. Penal Code § 190.2(a)(1) (emphasis added). Thus, it applies only to a subclass of defendants convicted of murder—it does not apply to every defendant convicted of a murder. *Tuilaepa*, 512 U.S. at 972; *see Karis*

v. Calderon, 283 F.3d 1117, 1141 n.11 (9th Cir. 2002) (rejecting a constitutional challenge to California’s sentencing scheme and holding that California’s special circumstances statute “has identified a subclass of defendants deserving of death and by doing so, it has ‘narrowed in a meaningful way the category of defendants upon whom capital punishment may be imposed’” (quoting *Arave v. Creech*, 507 U.S. 463, 476 (1993)).

Noguera next argues that the financial-gain special circumstance is unconstitutionally vague because it does not specify the “degree of motivation or intent required” and thus does not “inform the jury about what they must find for the special circumstance to be true,” causing the statute to encompass situations in which the financial-gain motivation was insignificant or was “not the driving force behind the killing.” The California Supreme Court has held that the plain text of the statute is not vague for failing to convey that financial gain be the “direct” or “motivating cause of the murder” because there is no indication the drafters intended such a limitation. *People v. Howard*, 749 P.2d 279, 297 (Cal. 1988).

As *Tuilaepa* explained, vagueness review is deferential because ““the proper degree of definition’ of [the] eligibility . . . factor[] often ‘is not susceptible [to] mathematical precision.’” *Tuilaepa*, 512 U.S. at 973 (quoting *Walton v. Arizona*, 497 U.S. 639, 655 (1990), *overruled on other grounds by Ring v. Arizona*, 536 U.S. 584, 588–89 (2002)); (additional citation omitted). Thus, an eligibility factor need only have a “common-sense core of meaning . . . that criminal juries should be capable of understanding.” *Id.* (citations omitted). The financial-gain special circumstance meets this standard. In contrast to the few aggravating factors that the Supreme Court has found unconstitutionally

vague, the financial-gain special circumstance provides an easily understood, common-sense core—it applies to those who “committed the murder in the expectation that [they] would thereby obtain the desired financial gain.” *Howard*, 749 P.2d at 298; *cf. Maynard v. Cartwright*, 486 U.S. 356, 363–64 (1988) (finding statutory aggravating circumstances that required the jury to determine whether murder was “especially heinous, atrocious, or cruel” unconstitutionally vague); *Godfrey v. Georgia*, 446 U.S. 420, 428, 433 (1980) (finding “outrageously or wantonly vile, horrible and inhuman” unconstitutionally vague).

2.

Noguera next argues that the financial-gain special circumstance is unconstitutionally vague as applied to him. According to Noguera, the jury instructions did not require the jury to find that he was motivated by financial gain *at the time of the murder* and, without that limitation, the “financial-gain special circumstance as applied to Noguera was bereft of a ‘common-sense core of meaning’ that the jury was ‘capable of understanding.’” The California Supreme Court rejected this claim on direct review. *Noguera*, 842 P.2d at 1180.

The phrase “that it was carried out for financial gain” adequately conveyed to the jury that Noguera must have been motivated by financial gain at the time of the murder. In the context of the instructions, the word “it” clearly referred to Jovita’s murder. And the phrase carried out “for financial gain” “is not a technical one.” *Howard*, 749 P.2d at 298. Additionally, the facts support that financial gain was Noguera’s motive at the time of the murder. The meeting during which financial arrangements were discussed occurred before the murder, and efforts were made afterwards to obtain the funds that were discussed.

3.

Noguera further argues that giving California Jury Instruction–Criminal (“CALJIC”) 2.51, which states that “motive is not an element of the crime charged and need not be shown,” confused the jury because the instruction suggested to the jury that it did not need to determine motive to determine the financial-gain special circumstance. The California Supreme Court rejected this claim, concluding that “any reasonable juror would have understood the instruction as referring to this substantive offense only and not to any special circumstance allegation.” *Noguera*, 842 P.2d at 1181 (citation omitted). Noguera notes that a conviction based on a jury instruction that does not require the prosecution to meet its burden of proof beyond a reasonable doubt as to any fact necessary to constitute the crime violates a defendant’s due process rights, *Sandstrom v. Montana*, 442 U.S. 510, 521–24 (1979), and right to a trial by jury, *Bollenbach v. United States*, 326 U.S. 607, 614 (1946).

The state court reasonably concluded that a juror would have understood the instruction as referring only to the substantive offense. The trial court gave the “motive instruction” early in the jury instructions. Long after giving that instruction, and after instructing the jury on the substantive offense, the trial court instructed that “[i]f you find the defendant in this case guilty of murder of the first degree, you must then determine if murder was committed under the [murder for financial gain] special circumstance.”

Noguera has not shown that the California Supreme Court’s rejection of this claim is contrary to or an unreasonable application of clearly established federal law, or an unreasonable determination of the facts. Therefore, we affirm the district court’s denial of relief on this claim.

VI.

In 2007, the California Supreme Court summarily denied Noguera's claims on the merits and also denied his claims at issue on appeal on procedural grounds, including California's timeliness rule, citing *In re Clark*, 855 P.2d 729, 737–62 (Cal. 1993), and *In re Robbins*, 959 P.2d 311, 317–18 (Cal. 1998).¹¹ In the district court, the State moved to dismiss nearly all of Noguera's claims on the ground that California's timeliness rule is an independent and adequate rule of state law that bars federal habeas review. The district court granted relief on multiple claims without addressing this issue. The State argues that doing so was error. *See Davila v. Davis*, 137 S. Ct. 2058, 2064 (2017); *Coleman v. Thompson*, 501 U.S. 722, 729–31 (1991). Noguera argues that California's timeliness rule is not adequate to support the judgment and therefore cannot preclude federal review.

A state court's application of a procedural rule is not undermined when the state court simultaneously rejects the merits of a claim. *Harris v. Reed*, 489 U.S. 255, 264 n.10 (1989). But a state court's application of a procedural rule can preclude federal habeas review only if the application of that rule is independent of federal law and adequate to support the judgment. *Coleman*, 501 U.S. at 729–30. To be adequate, the rule must be “firmly established and regularly followed” at the time of the purported default. *Beard v. Kindler*, 558 U.S. 53, 60 (2009) (quoting *Lee v. Kemna*, 534 U.S. 362, 376 (2002)). The state has the initial burden of pleading the existence of a state procedural rule. *Bennett*

¹¹ In 1993, the California Supreme Court denied Noguera's claims asserted in his 1992 petition on the merits. In 2001, that court denied all of the claims asserted in Noguera's 1998 petition on the merits and also denied all but one claim on procedural grounds.

v. Mueller, 322 F.3d 573, 585–86 (9th Cir. 2003). If a state procedural ground exists, the burden then shifts to the petitioner to assert “specific factual allegations that demonstrate the inadequacy of the state procedure, including citation to authority demonstrating inconsistent application of the rule.” *Id.* at 586. If the petitioner meets that burden, the burden shifts back to the state to show that the procedural rule “has been regularly and consistently applied in habeas actions.” *Id.*

The State argues that the district court erred by granting habeas corpus relief without determining the merits of the procedural bars and further argues that all or portions of Noguera’s claims are procedurally barred from federal habeas review pursuant to the state court’s application of California’s timeliness rule. *See Clark*, 855 P.2d at 737–62 and *Robbins*, 959 P.2d at 317–18. If that procedural rule—California’s timeliness rule—is independent and adequate, it bars federal habeas corpus review unless Noguera overcomes that bar. *Coleman*, 501 U.S. at 729.

In Section IV.A. of this opinion, we determined that the State waived its argument that portions of Claim 1 were procedurally barred and, thus, we need not further consider the partial procedural bar asserted against that claim. As discussed in Section V.A., we affirm the district court’s grant of habeas corpus relief as to the penalty phase based on Claim 10, and we previously considered the partial procedural bar that the State asserted against that claim. We determined that we would reach the same conclusion even without considering the purportedly procedurally barred declarations, and thus, we need not resolve the partial procedural bar issue as to that claim. *See Ayala v. Chappell*, 829 F.3d 1081, 1096 (9th Cir. 2016).

We also need not resolve the State's assertion of a procedural bar to Noguera's remaining claims because, for the reasons previously discussed in Section V., we reverse the district court's grant of habeas corpus relief as to Claims 4, 6, 7, 14, 16, 40, 61, and 84. And we affirm the district court's denial of habeas corpus relief as to Claim 41. Thus, we need not resolve the procedural bar issue for those claims. *See Franklin v. Johnson*, 290 F.3d 1223, 1232 (9th Cir. 2002).

VII.

Finally, we consider whether an evidentiary hearing is necessary on Noguera's claim of ineffective assistance of counsel at the penalty phase based on counsel's failure to investigate and present mitigating evidence pertaining to Noguera's background including his mental health and family issues, which he asserted in Claim 10. The district court granted relief on this claim, and we have affirmed.

Generally, we would remand to the district court for an evidentiary hearing. But a district court need not conduct an evidentiary hearing in every case before granting relief, even on fact-intensive claims. The Advisory Committee Note for Rule 8 of the Rules Governing § 2254 Cases in the United States District Court makes clear that a court "may grant the [habeas] relief sought without a hearing." (emphasis added). *See id.* ("In all other cases where the material facts are in dispute, the holding of such a hearing is in the discretion of the district judge."). And this court has granted habeas relief in cases when no evidentiary hearing was held. *See, e.g., Bemore*, 788 F.3d at 1155, 1160, 1177.

We conclude that the district court's grant of habeas relief without an evidentiary hearing was not an abuse of its discretion and that remand for a hearing is not necessary.

The State repeatedly argued in the district court that no evidentiary hearing was warranted. Additionally, the State’s “desire to cross-examine an affiant does not suffice to raise a genuine dispute” as to a material fact. *James v. Ryan*, 679 F.3d 780, 820 (9th Cir. 2012).¹² And Noguera sufficiently developed the record on his ineffective assistance of counsel claim based on counsel’s failure to investigate mitigating evidence and that evidence—including the declarations of Pereyda, Campos, and several medical professionals—provides a sufficient basis to grant relief. Additionally, the usefulness of an evidentiary hearing is unclear because a key declarant, Pereyda, is now deceased.

VIII.

Noguera was deprived of effective assistance of counsel at the penalty phase by counsel’s unprofessional failure to investigate and present mitigating evidence pertaining to Noguera’s familial history and his mental health. He has shown *Strickland* prejudice as a result of that deficient performance. Additionally, we conclude that the California Supreme Court’s denial of Noguera’s claim was an unreasonable application of *Strickland* and, thus, Noguera is entitled to relief under the AEDPA as to the sentence of death.

We **REVERSE** the judgment of the district court granting the petition as to Noguera’s conviction; we

¹² The Supreme Court vacated the grant of relief in *James* and remanded in view of *Johnson v. Williams*, 568 U.S. 289 (2013). See *Ryan v. James*, 568 U.S. 1224 (2013) (mem.). On remand, the Ninth Circuit reaffirmed its grant of relief on the ineffective assistance of counsel claim without remanding for an evidentiary hearing. See *James v. Ryan*, 733 F.3d 911, 912, 916 (9th Cir. 2013), *cert. denied*, *Ryan v. James*, 572 U.S. 1150 (2014) (mem.).

AFFIRM the judgment of the district court granting the petition as to Noguera's death sentence; we **AFFIRM** the judgment of the district court denying the petition on Noguera's claims based on the financial-gain special circumstance.¹³ We **REMAND** to the district court with instructions to enter an appropriate order. *See, e.g., Bemore*, 788 F.3d at 1177 (describing the appropriate remedy in that case). The parties shall bear their own costs.

**AFFIRMED IN PART, REVERSED IN PART, AND
REMANDED.**

THOMAS, Chief Judge, concurring in part and dissenting in part:

I join the majority opinion's holding that defense counsel rendered constitutionally ineffective assistance at the penalty phase of Petitioner William Noguera's trial by failing to investigate and present evidence regarding Noguera's mental health, family abuse, and substance use. I also join the majority's resolution of Claims 14, 16, 40, 61, and the cross-appeal.

I write separately because I conclude that counsel had an actual conflict of interest that adversely affected his performance, and that counsel rendered constitutionally ineffective assistance at the guilt phase of Noguera's trial. Therefore, I would affirm the district court as to Claims 1, 4,

¹³ We affirm the grant of habeas corpus relief only on Claim 10. We reverse the judgment granting habeas corpus relief on Claims 1, 4, 6, 7, 14, 16, 40, 61, and 84 in their entirety. We affirm the district court's denial of habeas relief on Claim 41.

6, 7, and 10, and the district court’s judgment vacating the conviction.

Thus, I respectfully concur in part and dissent in part.

I

A

“Where a constitutional right to counsel exists, [the Supreme Court’s] Sixth Amendment cases hold that there is a correlative right to representation that is free from conflicts of interest.” *Wood v. Georgia*, 450 U.S. 261, 271 (1981) (citing *Cuyler v. Sullivan*, 446 U.S. 335 (1980); *Holloway v. Arkansas*, 435 U.S. 475, 481 (1978)). Under the *Cuyler* framework, to demonstrate that his Sixth Amendment right to counsel has been violated, a defendant must establish that an “actual conflict of interest adversely affected his lawyer’s performance.” *Cuyler*, 446 U.S. at 350. “To show an actual conflict resulting in an adverse effect, [the petitioner] must demonstrate that some plausible alternative defense strategy or tactic might have been pursued but was not and that the alternative defense was inherently in conflict with or not undertaken due to the attorney’s other loyalties or interests.” *Foote v. Del Papa*, 492 F.3d 1026, 1029–30 (9th Cir. 2007) (quoting *Hovey v. Ayers*, 458 F.3d 892, 908 (9th Cir. 2006)).

In *Wood*, the Supreme Court held that third-party fee agreements create actual conflicts of interest when “counsel was influenced in his basic strategic decisions by the interests of the [party] who hired him.” 450 U.S. at 272. The Court noted that such agreements create a risk that “the lawyer will prevent his client from obtaining leniency,” or “from taking other actions contrary to” the interests of the party paying the lawyer’s fee. *Id.* at 269.

B

In Claim 1 of his habeas petition, Noguera alleges that trial counsel, Lorenzo Pereyda, labored under an actual conflict of interest that adversely affected his defense. Because Noguera filed his initial federal habeas petition after the effective date of the Antiterrorism and Effective Death Penalty Act (“AEDPA”) (April 24, 1996), the scope of our review is limited by 28 U.S.C. § 2254. Whether a lawyer labored under an actual conflict of interest is a mixed question of law and fact that we generally review under 28 U.S.C. § 2254(d)(1). *See Cuyler*, 446 U.S. at 342; *Tong Xiong v. Felker*, 681 F.3d 1067, 1074 (9th Cir. 2012). Therefore, Noguera is not entitled to relief unless he can demonstrate that the California Supreme Court’s denial of his conflict of interest claim on the merits¹ resulted in a decision that was contrary to, or involved an unreasonable application of, federal law clearly established by Supreme Court precedent. 28 U.S.C. § 2254(d)(1). Additionally, because of the stage at which the California Supreme Court denied Noguera’s claim on the merits, in conducting § 2254(d)(1) review, we accept the facts averred in the sworn declarations provided by a habeas petitioner as true. *See Cullen v. Pinholster*, 563 U.S. 170, 188 n.12 (2011).

Noguera clears the § 2254(d)(1) relitigation bar because his petition provided sufficient evidence for a reasonable fact

¹ The “California Supreme Court’s summary denial of a habeas petition on the merits reflects the court’s determination that the claims made in th[e] petition do not state a *prima facie* case entitling the petitioner to relief.” *Cullen v. Pinholster*, 563 U.S. 170, 188 n.12 (2011) (quotations and citations omitted). A *prima facie* case requires only “sufficient evidence for a reasonable fact finder to conclude” that the elements of the claim are satisfied. *Nunes v. Mueller*, 350 F.3d 1045, 1054 (9th Cir. 2003).

finder to conclude that he is eligible for relief under *Cuyler* and *Wood*, and therefore, the California Supreme Court's decision was an unreasonable application of these precedents.

First, Noguera's petition provided sufficient evidence to conclude that Pereyda labored under an actual conflict of interest created by a third-party fee agreement with Noguera's mother, Sarita Salinas. The declarations attached as exhibits to Noguera's habeas petition demonstrate that Salinas's interest in protecting her reputation, and the reputation of her family, influenced Pereyda's basic strategic decisions in representing Noguera during his capital proceedings. The California Supreme Court's implicit holding to the contrary is therefore an unreasonable application of *Cuyler* and *Wood*.

Salinas's declaration sets forth facts supporting the existence of a conflict of interest. She explains that Pereyda had previously represented her in her acrimonious divorce proceedings with Noguera's father, Guillermo Noguera. These proceedings lasted for years, and they concluded just before Jovita's death. Salinas explained that, during the course of that representation, Pereyda "witnessed through the years how crazy our family was," and that he "knew all about our troubles." For this reason, when Salinas "hired Mr. Pereyda to represent Billy, [she] still considered him [her] attorney and obligated first to [her]." She "told Mr. Pereyda that in defending Billy, he was not to bring out any of [their] family problems or anything about Billy which would embarrass [her]. . . . [and] Mr. Pereyda agreed."

Noguera's wife at the time of his trial, Francesca Mozqueda, confirmed this conflict. According to Mozqueda's declaration, "Ms. Salinas made it very clear. . . that she was in charge of the case[,] i.e., the defense

attorneys, because she was paying the attorneys to do whatever she said.” Mozqueda also “questioned Ms. Salinas on several occasions why she had chosen to hire her divorce attorney, Mr. Pereyda, to handle Bill’s murder case. She told me . . . that she only trusted him because he would protect the family. She stated on several occasions that Mr. Pereyda would do whatever she wanted.” This evidence was sufficient for a reasonable fact finder to conclude that there was a conflict of interest.

Second, Noguera provided sufficient evidence from which a reasonable fact finder could conclude that counsel’s performance was adversely affected by the conflict of interest because Pereyda did not pursue plausible alternative strategies that would have revealed embarrassing information about Salinas and her family. The California Supreme Court’s implicit holding to the contrary is, therefore, an unreasonable application of *Cuyler*.

Salinas’s declaration also speaks to this issue. She explained that the conflict actually affected Pereyda’s representation because “[i]t was a condition of accepting the case that Bill was to be proven innocent.” For this reason, “from the outset [Pereyda] never asked or discussed Billy’s mental problems and the hell [her] son experienced in growing up in [their] family.” She specified that she blocked any investigation into Noguera’s mental health. When Noguera asked for doctors to examine him because “he wanted to know why he did the things he did,” and “he thought he was crazy,” Salinas “told Billy that there would be no psychiatric examination, that [he] was not crazy.” Even though Noguera “said [she] knew he did it, so why all the games,” Salinas “told him just to listen to [her] attorney, who would get him out.” Because “[she] was paying the bills for Billy’s defense,” she “told [Noguera] [she] was not

about to put out any money on a mental examination, and that Mr. Pereyda knew the only defense was proving his innocence.”

Mozqueda’s declaration confirms that Salinas actually affected Pereyda’s representation: when Mozqueda asked Noguera why his attorneys were not pursuing a mental health defense, Noguera told her that whenever he asked them about pursuing one, “they would tell him to concentrate on looking for people who could say he was a great guy, not crazy.” Noguera also told Mozqueda that “he was not consulted but . . . instructed by his mother and his attorneys to refuse any type of settlement since there were no eyewitnesses or physical evidence,” and that “[b]y accepting a plea bargain, his mother stated that everyone would say he committed the homicide and people would look at her as a bad mother.”

Although Pereyda’s declaration does not speak to the third-party fee agreement conflict, it partially corroborates much of Salinas’s declaration. Pereyda’s declaration confirms that Salinas paid his fees and that Pereyda’s strategy conformed with Salinas’s conditions of representation: at no time did Pereyda reveal any embarrassing information about Salinas or her family, or concede that Noguera was guilty. No part of Pereyda’s declaration conflicts with Salinas’s. He stated that “[t]he defense we presented was that Jovita was not an obstacle to Bill and Dominique’s relationship and that Bill did not commit the crime. We focused all of our investigative efforts on trying to prove these two points.” Pereyda confirmed that the defense “did not have [Noguera] or any member of his family interviewed by a mental health professional; nor did [counsel] explore family and social background to determine whether the family dynamics could

have had a bearing on his culpability.” Counsel “did not investigate Dominique or her family to determine whether she had any other motives for killing her mother,” despite the fact “[t]here was no strategic reason for not doing so,” and even though Pereyda believed “the motives alleged by the prosecution did not seem sufficient to result in parricide.” Pereyda also explained:

Our strategy during the penalty phase was to present Bill in a positive light to the jury. We looked for witnesses who could say good things about him. We did not investigate the case to determine whether through his emotionally impoverished history or background we could explain to the jury the environmental or genetic factors that could have lead to the crime. In short, we did not explore his family situation or background to obtain potentially mitigating evidence.

Pereyda’s declaration confirms that none of his strategic decisions were based in his experience or knowledge about capital litigation; indeed, he specified that “[t]his was [his] first capital case,” and “[a]t the time [he] was retained [he] was not totally familiar with capital litigation, [and] particularly penalty phase strategy and tactics.”

The declaration provided by Pereyda’s court-appointed co-counsel, Benjamin Campos, underscores that Campos did not cure any conflict impacting Pereyda. He explained that “[b]ecause of [his] relative inexperience and Mr. Pereyda’s greater experience [Campos] deferred to [Pereyda] on most questions of trial tactics and strategy.” He also confirmed that the defense “conducted no investigation regarding Mr. Noguera’s mental state, and never retained a

psychologist, psychiatrist, or neurological expert to determine whether the client was suffering from any mental problems at the time of the homicide or during the pretrial and trial proceedings.” Additionally, he stated that he had “read the declaration of Lorenzo Pereyda and agree[d] that the statements made therein concerning the trial are true.”

In addition to the declarations discussed above, Pereyda’s actions throughout the representation corroborate the evidence that he operated under an actual conflict of interest and that his representation was adversely affected. For instance, he never attempted to investigate the motive for the crime when the alleged motive, murder for financial gain, was the only special circumstance that rendered the case death eligible.

As set forth in greater detail in the majority opinion’s discussion of Claim 10, Pereyda’s failure to investigate the abundance of available evidence regarding Noguera’s mental health, family history, or drug use was contrary to a defense counsel’s basic duties at the penalty phase of a capital case. *See Bemore v. Chappell*, 788 F.3d 1151, 1171 (9th Cir. 2015) (“[T]rial counsel must inquire into a defendant’s social background, family abuse, mental impairment, physical health history, and substance abuse history. . . . Where counsel is aware of potentially mitigating evidence, he or she must investigate that evidence, absent a reasonable strategic reason not to do so.” (citations and quotations omitted)). Indeed, at the penalty phase, trial counsel instead chose to investigate and present only favorable evidence regarding Noguera’s childhood involvement in sports and extracurricular activities, which was highly “unlikely to be persuasive to a jury that had just decided that [he] had carried out a grizzly murder.” *Id.* at 1172. This choice was particularly suspicious because

Pereyda very well could have highlighted both that Noguera was a good person *and* that he suffered from mental health issues, was traumatized by his childhood, and had turned to using steroids and drugs. If anything, presenting both categories of mitigation would have made for an even more compelling case because it would have conveyed to the jury that Noguera tried to be a good person, even despite the difficulties he had encountered.

Further, as set forth in Claim 14, despite receiving three invitations to do so, counsel declined to attend a pre-trial conference with the district attorney's committee that reviews decisions to seek the death penalty. The invitation did not require the defendant to plead guilty, and it merely offered counsel an opportunity to address and present mitigating circumstances that may exist to the committee. The fact that Pereyda declined to attend when the district attorney alleged only one special circumstance in the case, and there was an abundance of available mitigating evidence, further supports the conclusion that the defense only ever considered pursuing an innocence defense.

The entirety of the representation demonstrates that Pereyda was conflicted. Had there been no conflict, surely, he would have at least attempted to investigate or examine other available strategies, such as countering the prosecution's alleged motive, presenting a mental-state defense, or emphasizing the role of mitigation evidence at the penalty phase. Minimal investigation into any one of these topics would have unveiled an entirely different case: one in which no alibi was likely to hold up in court, but one where the death penalty probably should have been off the table. All signs indicate that Salinas blocked Pereyda from conducting any reasonable investigation into alternative defenses. Therefore, Pereyda could not make informed,

strategic decisions to guide the defense. Although Pereyda's declaration does not expressly admit that the third-party fee agreement actually affected his representation, a fact finder could reasonably infer this conclusion from the sum total of his actions. Therefore, I conclude that Noguera stated a *prima facie* case that defense counsel labored under an actual conflict of interest that adversely affected counsel's representation, and the California Supreme Court's summary denial of Noguera's conflict of interest claim was an unreasonable application of *Cuyler* and *Wood*.

C

When § 2254(d) is satisfied, we review a petitioner's constitutional claim *de novo*. *See Panetti v. Quarterman*, 551 U.S. 930, 953 (2007). In doing so, we review the district court's findings of fact for clear error. *See Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573–74 (1985). Outside the confines of § 2254(d), we apply *Cuyler* to conflicts involving third-party fee agreements. *See United States v. Wells*, 394 F.3d 725, 733–34 (9th Cir. 2005). Applying *Cuyler* to the district court's factual findings, and the evidence in the record, I conclude that Noguera has demonstrated that he is entitled to relief upon *de novo* review.

The district court made a number of factual findings in concluding that Pereyda operated under an actual conflict of interest and that conflict adversely impacted his performance, and these findings are amply supported by the record. In reaching its conclusion that there was an actual conflict of interest, the court found that "Ms. Salinas retained Mr. Pereyda to represent Petitioner with the understanding that she would control the defense and that Mr. Pereyda would not bring out any of the family's problems, but would exclusively present the false defense that Petitioner was not

the killer.” Salinas and Mozqueda’s declarations, as cited above, support this finding. The court also determined that “[c]learly, Mr. Pereyda could not simultaneously act in the best interest of both clients”—that is, in the best interest of both Salinas and Noguera. This finding, too, is supported by the declarations, as well as the whole of the representation: counsel could provide the jury with an accurate picture of Noguera’s culpability in committing the crime, or he could avoid embarrassing Salinas and her family, but he could not do both.

The district court also made a number of factual findings in concluding that the conflict adversely affected Pereyda’s representation. The district court found that there was “overwhelming evidence of [Noguera’s] participation in the murder,” and consequently, counsel could have—and should have—pursued alternative strategies, such as the role of Noguera’s mental health issues and his substance abuse problem. The court also found that Pereyda failed to investigate evidence “which could have undermined the prosecution’s theory of the case as death eligible,” such as “that Dominique constantly complained to Petitioner about how terrible her mother was to her, and begged him to protect her,” that “in the fall of 1982 Dominique had become pregnant with Petitioner’s child; Petitioner and Dominique were excited and had shared the news with Petitioner’s family; Jovita had subsequently forced Dominique to have an abortion; and the chain of events sent Petitioner into despair,” and that “Petitioner may have suffered from brain-damage and mental illness that may have influenced his decision-making, and was also under the influence of steroids and other substances when he committed the crime.”

The record supports these findings. The prosecution had overwhelming evidence that Noguera was involved in the

murder: the state presented extensive evidence of the bad blood between Noguera and Jovita, including testimony that Jovita insisted that Dominique get an abortion, even though Noguera and Dominique wanted to keep the baby, and testimony that, at one point, Jovita considered hiring a hit man to kill Noguera. The prosecution also presented testimony that Noguera had sought help getting a gun a few months before the murder. Additionally, the prosecution offered testimony of a conversation about Noguera and Dominique's plan to kill Jovita that closely tracked the actual circumstances of the murder. Another witness testified that he had seen the tonfa found at the crime scene in Noguera's car before the murder. And an odontology expert testified that the bite mark on Jovita's thigh was highly consistent with Noguera's teeth.

The Pereyda, Salinas, and Campos declarations, along with the other declarations attached as exhibits to Noguera's habeas petition, support the remainder of the district court's findings with respect to Pereyda's failure to investigate. They confirm that the defense did not investigate Noguera's mental illness or his family and social background, nor did the defense investigate any alternative motives. The declarations of mental health professionals show that Noguera suffered from mental illness, and that his condition was likely exacerbated by steroid and drug use. The declaration of Noguera's father, Guillermo Noguera, confirms that Guillermo introduced Noguera to steroids when Noguera was only fourteen years old, and that Noguera continued to use steroids as he got older. And the declarations of Noguera's father and sister, in addition to the declaration of his mother, confirm that Noguera was raised in an abusive and toxic household in which Noguera's mother and father physically and emotionally abused each other and their children. Thus, the record confirms that

Pereyda's loyalty to Salinas prevented him from pursuing alternative strategies or putting on additional mitigation evidence. Therefore, as the district court found, Pereyda undermined the defense and "obscured extensive available mitigation evidence . . . in favor of presenting Ms. Salinas in the most positive light."

Accordingly, the record substantially supports the findings of the district court. Pursuant to *Wood* and this Court's precedent regarding third-party fee agreement conflicts of interest, and in light of the district court's findings and an independent review of the record, I conclude that Pereyda's representation was adversely affected by an actual conflict of interest resulting from the third-party fee agreement with Salinas. Noguera has demonstrated that Pereyda's representation violated his Sixth Amendment right to counsel and that he is entitled to relief on this claim upon de novo review.

II

A

The Supreme Court has recognized that "the Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial," *Strickland v. Washington*, 466 U.S. 668, 684 (1984), and "[f]or that reason, the Court has recognized that the right to counsel is the right to the effective assistance of counsel," *id.* at 686 (quotations and citation omitted). Counsel can "deprive a defendant of the right to effective assistance[] simply by failing to render adequate legal assistance." *Id.* (quotations and citation omitted). "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial

process that the trial cannot be relied on as having produced a just result.” *Id.*

“An ineffective assistance claim has two components: A petitioner must show that counsel’s performance was deficient, and that the deficiency prejudiced the defense.” *Wiggins v. Smith*, 539 U.S. 510, 521 (2003). “To establish deficient performance, a petitioner must demonstrate that counsel’s representation ‘fell below an objective standard of reasonableness.’” *Id.* (quoting *Strickland*, 466 U.S. at 688). “[T]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.” *Id.* (quoting *Strickland*, 466 U.S. at 688). To demonstrate prejudice, a petitioner “must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.*

When considering ineffective assistance claims under § 2254, courts must be “doubly deferential” and the “question ‘is not whether a federal court believes the state court’s determination’ under the *Strickland* standard ‘was incorrect but whether that determination was unreasonable—a substantially higher threshold.’” *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009) (quoting *Schrivo v. Landigan*, 550 U.S. 465, 473 (2007)).

Although “a court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy,” *Strickland*, 466 U.S. at 689 (quotations and citation omitted), “counsel has a duty to make

reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary,” *id.* at 691. Strategic choices “made after less than complete investigation” are entitled to less deference than those made “after thorough investigation of law and facts relevant to plausible options,” which are “virtually unchallengeable.” *Id.* at 690–91.

Because the record demonstrates that Noguera’s counsel was constitutionally ineffective under *Strickland*, I would also grant relief as to Claims 4, 6, and 7.

B

In Claim 4 of his habeas petition, Noguera alleges that Pereyda was constitutionally ineffective in failing to investigate and present mental state defenses at the guilt phase of his trial. As with his conflict claim, with his ineffective assistance claims, Noguera must satisfy the demands of § 2254(d)(1). He has done so by demonstrating that the California Supreme Court’s denial of this claim on the merits was an unreasonable application of *Strickland*, and for the same reasons, he has shown that he is entitled to relief upon de novo review.

“Under *Strickland*, counsel’s investigation must determine trial strategy, not the other way around.” *Weeden v. Johnson*, 854 F.3d 1063, 1070 (9th Cir. 2017) (citing *Bemore*, 788 F.3d at 1166–67); *see also Wiggins*, 539 U.S. at 522 (discussing *Williams v. Taylor*, 529 U.S. 362 (2000), explaining that there, the Court “applied *Strickland* and concluded that counsel’s failure to uncover and present voluminous mitigating evidence at sentencing could not be justified as a tactical decision to focus on Williams’ voluntary confessions, because counsel had not ‘fulfill[e]d their obligation to conduct a thorough investigation of the

defendant's background.'" (quoting *Williams*, 529 U.S. at 396)). "[C]ounsel may not 'settle[] early on an alibi defense,' without investigating potential mental health defenses: 'strategic decisions . . . [must] be reasonable and informed.'" *Bemore*, 788 F.3d at 1167 (quoting *Jennings v. Woodford*, 290 F.3d 1006, 1014 (9th Cir. 2002)); *see also Phillips v. Woodford*, 267 F.3d 966, 978 (9th Cir. 2001) ("Counsel's failure to consider an alternative defense cannot be considered 'strategic' where counsel has 'failed to conduct even the minimal investigation that would have enabled him to come to an informed decision about what defense to offer.'" (quoting *Sanders v. Ratelle*, 21 F.3d 1446, 1456 (9th Cir. 1994))).

Pereyda's performance was constitutionally deficient because he selected an innocence defense without adequately investigating alternative defenses. He focused all of his efforts on proving that Noguera did not commit the crime without conducting any investigation into Noguera's mental health and potentially available mental-state defenses. Although Pereyda's options were somewhat limited—in 1981 and 1982, the California legislature and electorate abolished the diminished capacity defense, *see People v. Saille*, 54 Cal.3d 1103, 1111–12 (1991)—he could have presented “[e]vidence of mental disease, mental defect, or mental disorder” in order to explain “whether or not the accused actually formed a required specific intent, premeditated, deliberated, or harbored malice aforethought, when a specific crime is charged.” Cal. Penal Code § 28(a). Because Noguera was charged with a specific intent crime—first degree murder—Pereyda could have put on evidence to demonstrate that Noguera did not form the requisite specific intent: malice aforethought. In particular, the defense could have demonstrated that Noguera did not form malice aforethought by presenting evidence of Noguera's mental

defects, evidence of the volatile effects of the substances he was using at the time, and evidence of the terrible relationship between Noguera and Jovita to frame the murder as a crime of passion.

Although *People v. Mozingo*, 34 Cal.3d 926 (1983) applies with slightly less force because the diminished capacity defense was subsequently abolished, its proposition still stands: counsel renders ineffective assistance when he fails to investigate potentially available mental-health defenses. *Mozingo* emphasizes that counsel should not be excused “from undertaking sufficient investigation of possible defenses to enable counsel to present an *informed* report and recommendation to his client.” *Id.* at 934. *Mozingo* therefore should have put Pereyda on notice that he had an obligation to present an informed recommendation to Noguera regarding any possible mental-state defenses. *See Jennings*, 290 F.3d at 1016.

Noguera has also demonstrated that his defense was prejudiced by counsel’s actions because, had Pereyda investigated and presented the available mental-state evidence, there was a reasonable probability that the jury would have convicted Noguera of second-degree murder or manslaughter rather than first-degree premeditated murder. The available evidence would have supported a mental-state defense: Noguera was an eighteen year old boy with frontal-lobe damage that impaired his ability to control his impulses and who was “prone to irrational, impulsive actions;” he had psychological issues causing paranoia and a tendency to misunderstand situations and perceive people as threatening; and he took drugs that exacerbated his natural impairments at the encouragement of his father. Had this evidence been presented, along with evidence of Noguera’s strained relationship with Jovita—and in particular, that Jovita had

forced Dominique to abort Noguera's unborn child and had sexually abused Dominique—Pereyda could have successfully re-cast his defense as murder in the heat of passion.

Moreover, even if this strategy had not succeeded, and the jury had still convicted Noguera of first-degree murder, as discussed in more detail below, the jury would have been more likely to find the financial gain special circumstance inapplicable, or alternatively, it might have determined that life without parole was the appropriate sentence at the penalty phase of Noguera's trial. Even if this approach had not assisted Noguera at the guilt phase, because it would have painted a much more sympathetic (and accurate) picture of Noguera, it was very likely to have helped him avoid a death sentence. *See Bemore*, 788 F.3d at 1168 (“Had [counsel] conducted an appropriate investigation, [counsel] might have determined that a mental health defense, even if a longshot at the guilt phase, was the superior choice in view of the impending penalty phase,” because in capital cases where “the evidence of guilt is substantial, avoiding execution may be the best and only realistic result possible.” (quotations and citations omitted)).

Therefore, Noguera has demonstrated that the state court's rejection of his claim that Pereyda's failure to investigate and present mental-state defenses was an unreasonable application of *Strickland* and that he is entitled to relief upon de novo review.

C

In Claims 6 & 7, Noguera alleges that Pereyda was constitutionally ineffective in his failure to investigate and present evidence in support of alternative motives for the homicide to undermine the prosecution's first-degree

murder theory and the financial gain special circumstance that made him eligible for the death penalty. The California Supreme Court's denial of this claim on the merits was an unreasonable application of *Strickland*, and Noguera has demonstrated that he is entitled to relief upon de novo review.

For many of the same reasons set forth in the previous section, Noguera has demonstrated that his counsel's failure to investigate and present additional evidence was constitutionally deficient. However, counsel's duty to investigate is even more critical when it concerns one of the prosecution's aggravating circumstances that makes a defendant eligible for the death penalty. For instance, in *Rompilla v. Beard*, 545 U.S. 374 (2005), the Supreme Court held that there was an "obvious reason" that Rompilla's lawyers' performance was constitutionally deficient: they failed to obtain and read Rompilla's prior conviction files when the lawyers "knew the Commonwealth intended to seek the death penalty by proving Rompilla had a significant history of felony convictions indicating the use or threat of violence, an aggravator under state law." *Id.* at 383. The Court reached this conclusion even though Rompilla's lawyers had conducted a significant investigation, interviewed five members of Rompilla's family regarding his upbringing, and "[t]here were times when Rompilla was even actively obstructive," in the investigation. *Id.* at 381. The Court reasoned that "[w]ithout making efforts to learn the details and rebut the relevance of the [aggravating factor: the earlier crimes], a convincing argument for [counsel's trial strategy: residual doubt] was certainly beyond any hope." *Id.* at 386.

This Court has also underscored the importance of counsel's duty to investigate and challenge the

circumstances that render a case death-eligible. Like Noguera, the defendant in *White v. Ryan*, 895 F.3d 641 (9th Cir. 2018), was sentenced to death because of one aggravating factor: that he had committed the murder for pecuniary gain based on insurance proceeds. *Id.* at 648. White’s counsel at resentencing failed to challenge the pecuniary gain aggravator because he mistakenly believed that the issue had been resolved on direct appeal. *Id.* at 666. We held that this was “objectively unreasonable in light of *Strickland* and *Wiggins*,” and that the state court’s “contrary conclusion was an unreasonable application of those cases,” *id.* at 670, because counsel had “no strategic reason . . . not to have challenged the pecuniary gain factor,” and because counsel “made no attempt to uncover—let alone examine—evidence rebutting a pecuniary motive,” *id.* at 666.

As in *Rompilla* and *White*, Pereyda’s performance was constitutionally deficient because he failed to investigate and present evidence to refute the circumstances that made the case death-eligible. Pereyda knew the State planned to allege the financial gain special circumstance to make Noguera’s case death-eligible, yet he made no attempt to investigate or present alternative motives to rebut the foundation for the special circumstance, and the defense relied solely on “Noguera’s testimony that he did not know about Navarro’s assets and a general critique of Abram’s testimony.”

While the State argues that this can be justified as a strategic decision, Pereyda himself confirmed it was not. *See Harrington v. Richter*, 562 U.S. 86, 109 (2011) (“[C]ourts may not indulge ‘post hoc rationalization’ for counsel’s decisionmaking that contradicts the available evidence of counsel’s actions.” (quoting *Wiggins*, 539 U.S. at 526–27)). In his declaration, Pereyda stated that “[t]here

was no strategic reason” the defense “did not investigate Dominique or her family to determine whether she had any other motives for killing her mother,” besides the prosecution’s theory “that Bill and Dominique conspired to kill Jovita in order to end her interference with their relationship and obtain the proceeds of her estate.” Pereyda admits that he did not think that “the motives alleged by the prosecution [were] sufficient to result in parricide,” but he still declined to pursue additional investigation. “[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation,” but here, there was no reasonable professional judgment to support Pereyda’s decision not to investigate. *Strickland*, 466 U.S. at 690–91. Therefore, the “failure to investigate” here cannot be justified “simply by invoking strategy.” *Weeden*, 854 F.3d at 1070. Moreover, the record demonstrates that Pereyda’s failure to investigate was particularly egregious because it was guided not merely by counsel’s uninformed strategic choice, but by Salinas’s insistence that he pursue an innocence defense to spare her personal embarrassment.

Noguera has also demonstrated that the failure to investigate and present evidence regarding motive prejudiced his defense. Noguera argues that Pereyda could have presented evidence addressing his mental health and how Dominique pressured him to commit the murder. According to Noguera, Dominique would have testified about suffering abuse and exploitation at Jovita’s hands, including that Jovita sexually assaulted Dominique and forced her to take pornographic photographs starting at a very young age. Dominique also would have testified that she pressured Noguera to solve these problems for her, and manipulated him into killing Jovita. For instance, in her

sworn declaration, Dominique stated that she “manipulated Noguera by telling him that if he really loved me, he would take care of it.” This evidence mirrors the evidence that counsel failed to investigate and present at trial in *White*—that White’s girlfriend “repeatedly pressured White into perpetrating the crime on her behalf”—which we held prejudiced the defense. 895 F.3d at 672–73. The evidence of prejudice here is even stronger than in *White*, however, because the evidence that financial gain motivated Noguera to kill Jovita is significantly weaker. In *White*, the prosecution provided evidence that the defendant had stated that “he expected [his girlfriend] to give him \$100,000, presumably from the insurance proceeds,” 895 F.3d at 673, upon the death of the victim, but here, the prosecution presented only the testimony of Ricky Abrams. Abrams stated that, “[Noguera] said that when everything is finished, that I could come stay with [Noguera and Dominique], if I want. . . . Because the house would be passed on to the daughter after the mom’s death.” Thus, the only financial gain alleged was that Noguera anticipated having a place to live after Jovita’s death.

Presented with evidence that Dominique pressured Noguera to kill Jovita in order to protect her from Jovita’s ongoing abuse, there is a reasonable probability that at least one juror would have harbored a reasonable doubt that the murder was carried out for financial gain and, even if that juror voted to convict Noguera of first-degree premeditated murder, that juror might have found the special circumstance allegation not true. *See* Cal. Penal Code § 190.4(a). This is sufficient to demonstrate prejudice.

Noguera has demonstrated that the state court’s rejection of his claim that Pereyda’s failure to investigate and present evidence regarding the alleged financial gain special

circumstance was an unreasonable application of *Strickland* and that he is entitled to relief upon de novo review.

III

This case illustrates the continuing importance of *Cuyler* prophylaxis to remedy conflicts of interest: it demonstrates how a conflict of interest can permeate an entire representation, resulting in serious errors throughout the initial investigation and strategy development that can bleed into both the guilt and penalty phases of a capital trial. Not only does the record demonstrate that Pereyda labored under a conflict of interest that adversely affected his representation, such that Noguera is entitled to relief under *Cuyler*, but Pereyda's resulting errors were so grave they rose to the level of ineffective assistance. The Sixth Amendment gives defendants a right to representation free from conflicts of interest that does not fall below an objective standard of reasonableness. Pereyda's representation ticked neither box, and his conduct "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686.

For these reasons, I would affirm the district court's opinion as to Claims 1, 4, 6, and 7, in addition to Claim 10, and affirm the district court's judgment vacating the conviction. I join the majority as to Claims 10, 14, 16, 40, 61, and the cross-appeal.

Therefore, I respectfully concur in part and dissent in part.

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings**Judgment**

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)**Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)****(1) A. Purpose (Panel Rehearing):**

- A party should seek panel rehearing only if one or more of the following grounds exist:
 - ▶ A material point of fact or law was overlooked in the decision;
 - ▶ A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
 - ▶ An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ▶ Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ▶ The proceeding involves a question of exceptional importance; or
- ▶ The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms*.

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
 - ▶ Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Jean Green, Senior Publications Coordinator);
 - ▶ and electronically file a copy of the letter via the appellate ECF system by using “File Correspondence to Court,” or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

Form 10. Bill of Costs

Instructions for this form: <http://www.ca9.uscourts.gov/forms/form10instructions.pdf>

9th Cir. Case Number(s)

Case Name

The Clerk is requested to award costs to (*party name(s)*):

I swear under penalty of perjury that the copies for which costs are requested were actually and necessarily produced, and that the requested costs were actually expended.

Signature

Date

(use "s/[typed name]" to sign electronically-filed documents)

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Principal Brief(s) (Opening Brief; Answering Brief; 1st, 2nd, and/or 3rd Brief on Cross-Appeal; Intervenor Brief)	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>
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*Example: Calculate 4 copies of 3 volumes of excerpts of record that total 500 pages [Vol. 1 (10 pgs.) + Vol. 2 (250 pgs.) + Vol. 3 (240 pgs.)] as:

No. of Copies: 4; Pages per Copy: 500; Cost per Page: \$.10 (or actual cost IF less than \$.10);
TOTAL: $4 \times 500 \times \$.10 = \200 .

APPENDIX

B

FILED

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

OCT 12 2021

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

WILLIAM A. NOGUERA,

No. 17-99010

Petitioner-Appellee,

D.C. No. 2:94-cv-06417-CAS
Central District of California,
Los Angeles

v.

RONALD DAVIS, Warden,

ORDER

Respondent-Appellant.

WILLIAM A. NOGUERA,

No. 18-99000

Petitioner-Appellant,

D.C. No. 2:94-cv-06417-CAS

v.

RONALD DAVIS, Warden,

Respondent-Appellee.

Before: THOMAS, Chief Judge, and GRABER and BADE, Circuit Judges.

Judges Graber and Bade have voted to deny the petition for panel rehearing.

Judge Thomas would grant the petition for panel rehearing. The panel has voted to deny the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App.

P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied.

No. _____

IN THE
Supreme Court of the United States

WILLIAM A. NOGUERA,

Petitioner,

v.

RON DAVIS, WARDEN,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

CERTIFICATE OF SERVICE

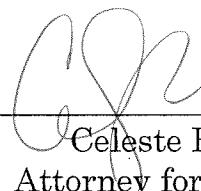
I, Celeste Bacchi, a Deputy Federal Public Defender in the Office of the Federal Public Defender who was appointed as counsel for Petitioner under the Criminal Justice Act, 18 U.S.C. § 3006(A)(b), hereby certify that on December 15, 2021, a copy of **MOTION FOR EXTENSION OF TIME TO FILE PETITION FOR WRIT OF CERTIORARI** was mailed postage prepaid to:

The names and addresses of those served are as follows:

Meredith S. White
Office of the Attorney General
600 W. Broadway, Suite 1800
San Diego, CA 92101
Telephone: (619) 645-9069

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 15, 2021.



Celeste Bacchi*
Attorney for Petitioner
**Counsel of Record*