

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

**APPENDIX IN SUPPORT OF
PETITION FOR A WRIT OF CERTIORARI**

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App. No.	Document	Page
1.	<i>Noguera v. Davis</i> , No. 17-99010, U.S. Court of Appeals for the Ninth Circuit. Order denying petition for rehearing entered October 12, 2021	1-2
2.	<i>Noguera v. Davis</i> , No. 17-99010 and 18-99000, U.S. Court of Appeals for the Ninth Circuit. Opinion entered July 20, 2021	3-95
3.	<i>Noguera v. Davis</i> , No. 94-6417, U.S. District Court for the Central District of California. Judgment entered November 17, 2017	96-97
4.	<i>Noguera v. Davis</i> , No. 94-6417, U.S. District Court for the Central District of California. Final order granting petition for writ of habeas corpus, entered November 17, 2017	98-286
5.	<i>In re William Adolf Noguera on Habeas Corpus</i> , No. S136826, California Supreme Court. Order Denying Petition for a Writ of Habeas Corpus entered October 10, 2007	287
6.	<i>People v. Noguera</i> , No. S005170, California Supreme Court. Order denying petition for rehearing entered March 10, 1993	288
7.	<i>People v. Noguera</i> , No. S005170, California Supreme Court. Order Affirming Judgment, entered December 28, 1992	289-314
8.	Declaration of Lorenzo Pereyda, September 25, 1992 (<i>PWHC Ex. G</i>)	315-324
9.	Declaration of Sarita Salinas, May 7, 1996 (<i>PWHC Ex. AA</i>)	325-337
10.	Declaration of Benjamin Campos, September 25, 1992 (<i>PWHC Ex. O</i>)	338-339
11.	Declaration of Francesca Mozqueda, May 18, 1996 (<i>PWHC Ex. GG</i>)	340-351
12.	Declaration of Sarita Perez, May 7, 1996 (<i>PWHC Ex. G</i>)	352-359

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

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U.S. COURT OF APPEALS

WILLIAM A. NOGUERA,

Petitioner-Appellee,

v.

RONALD DAVIS, Warden,

Respondent-Appellant.

No. 17-99010

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

ORDER

WILLIAM A. NOGUERA,

Petitioner-Appellant,

v.

RONALD DAVIS, Warden,

Respondent-Appellee.

No. 18-99000

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

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.

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

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 unpersuasive.

“[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 *Schriro v. Landrigan*, 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 Peryeda’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**

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9th Cir. Case Number(s)

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JS-6

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

WILLIAM A. NOGUERA,

Petitioner,

v.

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

Respondent.

CASE NO. CV94-6417-CAS

DEATH PENALTY CASE

JUDGMENT

IT IS HEREBY ORDERED that Petitioner William Noguera's petition for writ of habeas corpus be **CONDITIONALLY GRANTED** and that the judgment of conviction and sentence of death in the matter of *People v. William Noguera*, Case No. C-53691, in the California Superior Court of Orange County, be **VACATED**.

IT IS FURTHER ORDERED that Respondent shall release Petitioner William Noguera from custody within 120 days hereof unless, within 120 days of the date of this judgment, the State of California grants Petitioner a new trial on all guilt, special circumstance, and penalty issues in accordance with applicable California law and the United States Constitution.

'O'

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

WILLIAM A. NOGUERA,
Petitioner,
v.
RON DAVIS, Warden of California
State Prison at San Quentin,
Respondent.

CASE NO. CV94-6417-CAS
DEATH PENALTY CASE

ORDER

I. BACKGROUND

Petitioner William A. Noguera is currently in the custody of the California Department of Corrections and Rehabilitation pursuant to a judgment of the Superior Court of California, Orange County, following his April 29, 1987 conviction of the first-degree murder (Cal. Pen. Code §187(a)) of Jovita Navarro, the mother of Petitioner's girlfriend, Dominique. (RT 8312.) The financial gain special circumstance allegation (Cal. Pen. Code §190.2, subd. (a)(1)) was found true. (RT 8313.) The jury also found Petitioner used a dangerous and deadly weapon in the murder of Ms. Navarro (Cal. Pen. Code §12022(b)). (RT 8313-15.)

On May 18, 1987, the penalty phase of Petitioner's capital trial began. The jurors began penalty phase deliberations at 3:05 p.m. on May 21, 1987 and

1 adjourned at 4:30 p.m. (RT 8711.) The following afternoon, on May 22, 1987, the
2 jury returned a verdict of death. (RT 8717-18.) On January 29, 1988, the trial
3 court heard and denied Petitioner's Motion for New Trial and for Modification of
4 the Verdict, heard and denied Petitioner's Request to Strike the Special
5 Circumstance, and sentenced Petitioner to death. (RT 8787-8874.)

6 On December 28, 1992, the California Supreme Court affirmed Petitioner's
7 conviction and death sentence on direct appeal. *See People v. Noguera*, 4 Cal.4th
8 599 (1992). The California Supreme Court denied Petitioner's petition for
9 rehearing on March 10, 1993. (Dkt. No. 148, Lodgment No. 8.) The United States
10 Supreme Court denied Petitioner's petition for writ of certiorari on June 30, 1994.
11 *Noguera v. California*, 512 U.S. 1253 (1994).

12 Petitioner filed his initial state habeas petition in the California Supreme
13 Court on November 16, 1992. (Dkt. No. 148, Lodgment No. 4.) The California
14 Supreme Court summarily denied the petition on September 29, 1993, with three
15 justices noting their opinions that an order to show cause should issue. *In re*
16 *Noguera*, No. S029779. (Dkt. No. 336, Lodgment No. 3.)

17 Almost one year later, Petitioner initiated federal habeas corpus proceedings
18 by filing a Request for Appointment of Counsel and Stay of Execution in the
19 United States District Court for the Central District of California. (Dkt. Nos. 1-2.)
20 The Court appointed Rober Bryan and Nicholas C. Arguimbau on January 27,
21 1995. (Dkt. No. 11.) Petitioner filed a 91-claim federal habeas petition on July 26,
22 1996, and, just four days later, Mr. Arguimbau filed an Urgent Motion to
23 Withdraw as Counsel. (Dkt. Nos. 99, 101-104.) The Court granted Mr.
24 Arguimbau's Motion on August 5, 1996. (Dkt. No. 106.) On July 7, 1997,
25 Petitioner moved to stay and abey the federal proceedings pending exhaustion of
26 31 unexhausted claims in state court. (Dkt. No. 154.) After initially dismissing
27 the petition for failure to exhaust state remedies on October 28, 1997, the Court
28 granted in part petitioner's motion for reconsideration on December 23, 1997, but

1 denied Petitioner's Motion to Hold Proceedings in Abeyance. (Dkt. No. 174.)

2 On January 12, 1998, Petitioner filed an Amended Petition for Writ of
3 Habeas Corpus, excluding the 31 unexhausted claims. (Dkt. Nos. 175-76.) He
4 filed his first exhaustion petition in the California Supreme Court on March 2,
5 1998, raising the unexhausted claims. (Dkt. No. 336, Lodgment 4.) While the
6 exhaustion petition was pending in state court, the parties proceeded to litigate the
7 merits of the first amended federal petition.¹ Respondent filed an Answer to the
8 Amended Petition on September 9, 1998; and on February 9, 1999, Petitioner filed
9 a Traverse to the State's Answer to the Amended Petition for Writ of Habeas
10 Corpus. (Dkt. Nos. 180, 187-88.) On February 23, 1999, Petitioner filed a Motion
11 for Evidentiary Hearing, which the Court denied on April 14, 2000, after a
12 December 10, 1999 hearing. (Dkt. Nos. 190, 211, 216.) In its denial order, the
13 Court ruled that Petitioner was not entitled to an evidentiary hearing on Claims 2,
14 4, and 60 of the first amended petition because those claims were without merit.
15 (Dkt. No. 216.) The Court determined that, as to the remaining claims, the record
16 was sufficiently developed to decide those claims without evidentiary hearing.
17 (Dkt. No. 216.)

18 The parties filed supplemental briefs on the remaining claims in the first
19 amended petition and, on August 31, 2001, the parties appeared for oral argument
20 on the remaining claims. (Dkt. Nos. 225, 236, 227, 228, 245.) During oral
21 argument, the Court noted that, on careful examination of the record and in view
22 of changes in the law since the Court's October 28, 1997 Order, some of the
23 claims in the first amended petition which the Court believed to be exhausted,
24 might not be exhausted. The Court invited supplemental briefing, and the parties
25 filed additional briefs on the question. (Dkt. Nos. 247, 248, 250.)
26

27 ¹ The Court denied Petitioner's motion requesting that the parties not be required to
28 litigate federally until completion of exhaustion proceedings in state court. (Dkt.
Nos. 183-84.)

1 Meanwhile, the California Supreme Court denied petitioner's exhaustion
2 petition on October 17, 2001. *In re Noguera*, No. S068360. (Dkt. No. 336
3 Lodgment 8.) Subsequently, on November 29, 2001, Petitioner filed a Motion for
4 Leave to File Second Amended Petition. (Dkt. No. 249.) On April 9, 2003, the
5 Court dismissed the first amended petition as a partially unexhausted, "mixed"
6 petition and denied the motion to file the second amended petition because it
7 included the same unexhausted claims as the first amended petition. (Dkt. No.
8 256; see also, Dkt. No. 262.) The Court also invited Petitioner to file a fully
9 exhausted Third Amended Petition; and, on June 9, 2003, Petitioner
10 simultaneously filed petitions in state and federal court. (Dkt. No. 258; Dkt. No.
11 336, Lodgment 9.) On July 28, 2003, this Court granted Petitioner's Motion to
12 Hold Proceedings in Abeyance Pending Determination by State Court of
13 Petitioner's Exhaustion Petition. (Dkt. Nos. 258, 259, 262, 263.) While
14 Petitioner's third state petition was pending, he filed a fourth state petition on
15 August 29, 2005. (Dkt. No. 336, Lodgment 13.) The third and fourth state habeas
16 petitions were both denied on October 10, 2007. *In re Noguera*, No. S116529; *In*
17 *re Noguera*, No. S136826. (Dkt. No. 336, Lodgments 12 & 15.) Petitioner
18 notified the Court of the denials in a letter dated October 20, 2007, and this Court
19 vacated the stay on November 5, 2007. (Dkt. Nos. 272, 273.)

20 On February 22, 2008, this Court again stayed the proceedings in this action
21 due to Petitioner's then-pending request for substitution of federal habeas counsel
22 and, on March 3, 2008, Robert R. Bryan filed a Request to Withdraw as Attorney
23 for Petitioner. (Dkt. Nos. 284, 292.) The Court appointed the Federal Public
24 Defender as advisory counsel on March 4, 2008, and on July 21, 2008, granted
25 Bryan's request to withdraw. (Dkt. No. 286, 305.) The Office of the Federal Public
26 Defender for the Central District of California was appointed as counsel for
27 Petitioner on August 14, 2008. (Dkt. No. 307.)

28 Petitioner filed the operative Fourth Amended Petition for Writ of Habeas

Corpus on March 9, 2009. (Dkt. Nos. 317, 318.) Respondent filed an Answer on November 6, 2009, and Petitioner filed a Traverse on January 19, 2010. (Dkt. Nos. 330, 338.) The parties began litigating discovery issues in 2010. However, after the United States Supreme Court issued its decision in *Cullen v. Pinholster*, 563 U.S. 170 (2011), on April 4, 2011, this Court ordered Respondent to file a motion to dismiss, identifying on a claim by claim basis those claims Respondent contends are subject to summary dismissal without discovery or an evidentiary hearing. (Dkt. No. 351.) Respondent filed a Motion to Dismiss on February 6, 2012. (Dkt. No. 355.) Petitioner filed an Opposition to Respondent's Motion to Dismiss on June 20, 2012, and Respondent filed a reply on October 16, 2012. (Dkt. No. 361.) On November 2, 2012, Petitioner filed a Surreply, and Respondent filed a Reply Response to the Surreply on November 26, 2012. (Dkt. Nos. 366, 368.)

On March 7, 2013, the case was reassigned from the calendar of Judge Stotler to the calendar of Judge Snyder for all further proceedings. (Dkt. No. 369.)

II. STATEMENT OF FACTS

This factual summary is taken in large part from the California Supreme Court's summary of the facts in its December 28, 1992 opinion. Pursuant to 28 U.S.C. §§2254(d)(2), (e)(1), the state court's summary of facts is presumed correct. To the extent that Petitioner does not present clear and convincing evidence to the contrary, the Court adopts the factual recitations set forth by the state appellate court. *See Vasquez v. Kirkland*, 572 F.3d 1029, 1031 n. 1 (9th Cir. 2009) ("We rely on the state appellate court's decision for our summary of the facts of the crime.")

A. Guilt Phase Evidence

1. *The murder of Jovita Navarro: the prosecution's case*

Sometime between 11:30 on the night of April 23, 1983, and 4:30 the following morning, Jovita Navarro was murdered in the bedroom of her La Habra

1 bungalow. La Habra police found Jovita's body after being summoned by a "911"
2 call from Mindy Jackson, Jovita's next-door neighbor. After securing the area,
3 investigating officers went to the Jackson residence where they interviewed
4 Dominique Navarro, Jovita's 16-year-old daughter. Dominique told them she had
5 returned from a date with her then-18-year-old boyfriend around 2:00 that
6 morning; after chatting briefly with her mother, who was reading in bed, and
7 removing her makeup, Dominique had gone to bed and to sleep. She was
8 awakened a few hours later, she said, by muffled noises coming from her mother's
9 adjacent bedroom.

10 After a few minutes, Dominique heard her mother cry out, "get out, mi hija
11 ("hija" is Spanish for "daughter"), get out, mi hija." Frightened, and unsure what
12 was afoot in the darkened house, Dominique told Mindy Jackson that she sat at the
13 end of her bed for "about 5 to 15 minutes," before running blindly down the hall
14 and out the back door. As she ran, she heard a "thumping" sound coming from her
15 mother's bedroom, followed by what sounded like the footsteps of someone close
16 behind her.

17 Reaching Mindy Jackson's house, Dominique banged on the door until
18 Jackson answered. In tears and near hysteria, according to Jackson, Dominique
19 said that someone was hurting her mother; she begged Jackson to return to the
20 house with her. Jackson refused. Instead, she managed to telephone 911.
21 Authorities logged in the emergency call at 4:43 a.m.

22 To the casual observer, the murder scene suggested that Jovita had been
23 killed in the course of a combined rape and burglary. Her body was found lying
24 across the bed, her feet touching the floor. Her nightgown had been pulled up
25 around her neck, and a pair of blue women's underpants was wadded between her
26 thighs. The contents of the bedroom were in disorder—bedding and blankets had
27 been pulled from the bed and thrown haphazardly on the floor; a jewelry box,
28 normally resting on a dresser, was found upended on the hall floor, its contents of

1 costume jewelry scattered along the hallway.

2 Jovita had been badly beaten, mainly on the face and head. She had suffered
3 extensive facial injuries, including dental and eye damage from at least 18 blows
4 to the face and head; her skull had multiple depressed fractures and her scalp had
5 been loosened and torn by the force of the beating; her nose almost touched her
6 left cheek and “defensive wounds” were evident on her arms and hands. On her
7 left thigh, examiners found oval shaped wounds.² Blood was spattered on the
8 walls, furniture, and ceiling of the bedroom.

9 The pathologist who examined the body testified that the proximate cause of
10 Jovita Navarro's death was not the beating but asphyxiation—induced by pressing
11 a rounded object against her throat with such force that her larynx was crushed,
12 choking off her airway. Extensive cyanosis, or blueing, of her lips and pinpoint
13 hemorrhaging beneath her eyelids confirmed that Jovita had, in effect, been
14 strangled. Had she not died from a lack of oxygen, the pathologist concluded, the
15 severity of the beating would have resulted in her death.

16 In the bedroom, La Habra police investigators found a “tonfa,” a martial arts
17 weapon fashioned from red oak and resembling a police baton; it lay shattered in
18 two pieces, testimony to the savagery of the beating. In a neighboring yard, police
19 recovered a piece of wood shaped like a broom handle, with traces of blood on it.
20 In another yard, they found a bloodstained tan leather glove; bloodstains were also
21 found on a cinder block wall adjoining a nearby lot. The bloodstains on the tonfa,
22 the wooden dowel, and the glove were the same type as Jovita's. An analysis of
23 fibers removed from the brick wall and the glove were consistent with those found
24 on the bedroom blanket.

25 La Habra and Orange County authorities began an extensive forensic

26
27 ² At trial, extensive testimony by forensic odontologists was presented by both sides, pro and
28 con, as to whether the wounds were human bite marks and, if so, when they were inflicted. The
prosecution placed in evidence casts of the teeth of 12 individuals, including Petitioner, to support
its claim that Petitioner had bitten Jovita in the act of killing her.

1 investigation of the crime scene. As a result, investigators concluded that much of
2 the evidence pointing to a burglary and rape/murder of Jovita had been faked. An
3 autopsy failed to reveal the presence of sperm in Jovita's vagina. An analysis of
4 vaginal swabs was consistent with a finding that the victim might have had
5 intercourse several hours earlier the preceding evening, but there was no external
6 evidence of sexual trauma consistent with a forcible rape. Tests of the blue
7 underwear for semen or other stains indicative of forcible sex were negative.

8 Although the bedroom appeared to have been rifled, nothing of value was
9 missing, including a clear plastic change purse stuffed with small bills that the
10 intruder could not have overlooked. The jewelry box had been knocked from its
11 place and its contents scattered, but none of the jewelry had been taken. An
12 analysis of the blood-spattering pattern on the bed linen suggested that it had been
13 removed from the bed and arranged on the floor *after* the murder, rather than
14 during a struggle. Moreover, the spatter analysis indicated that Jovita had probably
15 been murdered *before* the contents of the bedroom had been upended. Finally,
16 investigators could find no evidence that Jovita's killer had gained entry into the
17 house by force.

18 The on-scene criminalist, examining the body at 6:30 that morning, initially
19 estimated the time of death at between three and six hours prior to his
20 examination, or between 12:30 and 3:30 a.m. Although routine examinations for
21 lividity and rigor mortis—two crude measures used to approximate time of
22 death—confirmed that estimate, it was later revised upward, to 4:45 a.m., based on
23 Dominique's statement to the police that she had heard her mother cry out around
24 4:30 that morning.

25 After conducting an autopsy on the morning of April 24, the examining
26 pathologist concluded on the basis of the quantity and state of the contents of her
27 stomach that Jovita died sometime between 12:30 and 2:30 that morning. Another
28 criminalist, who observed the body at the autopsy, testified that the 4:45 a.m. time

1 of death stated in the certificate of death was based on Dominique's account of the
2 murder. Although that hour was not substantially out of line with the results of the
3 lividity and rigor tests, had it not been for Dominique's statement the condition of
4 the body suggested that death had occurred between three and seven hours earlier,
5 or between 11:30 the preceding evening and 3:30 that morning.³

6 An inquiry into Jovita's financial circumstances disclosed that she carried
7 \$13,000 in life insurance and at the time of her death had approximately \$14,000
8 in accumulated retirement benefits from her job as an Orange County welfare
9 clerk. The house, with a market value of around \$90,000, had an existing
10 mortgage balance of \$7,000; Jovita carried mortgage insurance in the event of her
11 death. Dominique was her sole heir.

12 As their investigation deepened, police learned from interviews with
13 Margaret Garcia, a coworker, and Mindy Jackson that relations between Jovita and
14 Dominique's boyfriend, the Petitioner, were not always pleasant. Jovita had
15 quarreled with both over Dominique's repeated violations of curfew hours, over
16 her pregnancy and subsequent abortion, and over what Jovita regarded as a steep
17 decline in Dominique's schoolwork and attendance beginning with the onset of her
18 relationship with Petitioner. Garcia and Jackson both testified that Jovita was
19 planning to sell the house and move to the beach, or to enlist Dominique in the
20 Army, in an attempt to separate her from Petitioner. According to Garcia, Jovita
21 had considered hiring a "hit man" to kill Petitioner. About two weeks before her
22 death, Garcia said, Jovita told her that she had awakened in the middle of the night
23 to find the front door open and all the outside lights off. Jovita found Dominique
24 wandering the house; Dominique told her that she had opened the front door, but
25 could not explain why.

26 About two or three weeks before Jovita's murder, Jackson had witnessed her
27

28 ³ As of 2 a.m. on April 24, 1983, the seasonal change from standard to daylight saving time occurred; clocks were set forward by one hour.

1 screaming into the telephone and had seen Dominique in the bathroom crying.
2 Jovita had slammed down the handset and said that she “hated” Petitioner and
3 didn't want to hear his name again. “If he [Petitioner] is going to use his karate on
4 me, he has another thing coming,” Jackson reported Jovita as saying.

5 Through interviews with Dominique and Petitioner, authorities learned that
6 on the night of Jovita's death the two had gone to a party in West Covina about
7 7:00. They left around 11:30 that evening, they told police, and went for a
8 hamburger with a friend; after dropping their friend off, they parked for an hour or
9 two, returning to Jovita's house between 1:30 and 2:00 a.m. Dominique let herself
10 in, locked the front door, opened a sliding glass door at the rear of the house in
11 order to let the family dogs out, and turned off the outside lights. After chatting
12 briefly with her mother, she went to bed.

13 Petitioner told police that after leaving Dominique's house, he went home.
14 Because he had missed the 1:30 curfew set by his mother, he had to knock on the
15 front door to get in. His grandmother, who was watching television with his
16 mother, let him in. After talking with them and being lectured by his mother about
17 being late, he went to bed.

18 La Habra police also interviewed Peter LaCombe, a diesel mechanic
19 employed by the county who had been dating Jovita for about two weeks before
20 her death. LaCombe had spent the evening of April 23 with Jovita at her house.
21 The two ate a substantial dinner around 7:30 and then danced and watched
22 television. Around 11:00 that evening, LaCombe testified, he left for home.

23 From interviews with the adjoining neighbor, Mindy Jackson, police learned
24 that Jackson and her husband had entertained a friend, Tom Brooks, on the night
25 of the murder. All three had heard loud noises coming from the Navarro house
26 around 11:00 p.m. Brooks testified that he had gone outside to investigate but had
27 noticed nothing remarkable; the house was dark and the sliding glass door at the
28 rear was closed. Later that night, they heard what Brooks described as “really

1 radical noises” next door. The three had gone outside about 1:45 a.m. They heard
2 Jovita's two dogs barking and growling; there were no lights either outside or
3 inside the Navarro house.

4 Despite discrepancies in the accounts given by Dominique and Petitioner
5 and others interviewed, and suspicions presented by the forensic analyses, police
6 made no arrests in the case until late in the year. In December, the police inspector
7 assigned to the investigation, Sergeant Keltner, received a tip from Steve Arce, an
8 acquaintance of Petitioner, that Ricky⁴ Abram might have information relevant to
9 the homicide investigation. Keltner interviewed Abram on December 14, 1983, at
10 the Ione Juvenile Detention Facility near Sacramento, where Abram was an
11 inmate. He tape-recorded most of their conversation.

12 In substance, Abram testified at trial that he decided to disclose his
13 knowledge of the murder scheme after Keltner told him of his possible criminal
14 liability for Jovita's murder. Abram told the jury that in March 1983, a few weeks
15 after he first met Petitioner, the two had driven in Petitioner's car to pick up
16 Dominique at her house. On the way over, Petitioner told Abram that he intended
17 to kill Dominique's mother. He asked for Abram's help in borrowing a shotgun for
18 that purpose. After picking up Dominique, the three drove to Bob's Big Boy, a
19 nearby restaurant. There, according to Abram, they discussed in detail Petitioner's
20 plan to murder Jovita.

21 The murder, Abram testified, would be staged to look as if Jovita had been
22 killed by a burglar in the middle of the night. Dominique's role would be to let the
23 two men into the house; Abram would fake the burglary and take any items of
24 value; Petitioner would kill Jovita with a shotgun blast. Petitioner and Dominique
25 would then have intercourse, Abram said, after which Dominique, feigning a rape,
26 would run hysterically next door to report the break-in and murder/rape. For his
27

28 ⁴ Record documents and pleadings refer to Mr. Abram alternatively as “Ricky” and “Rickie.” For simplicity sake, the Court is using the spelling found in the Reporter’s Transcript.

1 part in the crime, Petitioner promised Abram \$5,000 from the \$25,000 obtained
2 from “the mother's insurance.” In addition to his share of the insurance, Abram
3 told the jury, Petitioner promised he could live in Jovita's house with Petitioner
4 and Dominique, since “the house would be passed on to the daughter after the
5 mom's death.”

6 After leaving the restaurant and returning Dominique to her house,
7 Petitioner dropped Abram off. In early April, Abram was arrested for auto theft,
8 convicted and imprisoned. He testified that he did not see Petitioner or
9 Dominique again until the trial, regarded the murder scheme as a “joke,” and did
10 not learn of Jovita's death until Keltner told him.

11 Police interviews with others provided additional evidence of Petitioner's
12 involvement in the murder. Steve Arce told the jury of a fight he had with
13 Petitioner around the Easter preceding Jovita's death. Petitioner had used his feet
14 to quickly knock Arce to the ground. Arce had also seen tonfas in Petitioner's car
15 and had seen Petitioner spinning a tonfa in his hand. He had seen Petitioner
16 wearing tan leather motorcycle gloves on occasion, and had seen him with Ricky
17 Abram. He also related an incident about a month before Jovita's death in which
18 Petitioner kicked two individuals in a street encounter, knocking one of them to
19 the ground in “thirty seconds maybe,” using martial arts techniques. A couple of
20 weeks before the murder, Arce had heard Petitioner complain about Jovita's
21 interference in his relationship with Dominique; Petitioner had said that he wanted
22 “to kill that bitch,” referring to Jovita.

23 In the months following Jovita's death, investigators learned, Dominique
24 spoke frequently with Petitioner by telephone from an uncle's house, where she
25 was now living. Once, the uncle testified, he overheard Dominique complain after
26 completing a call from Petitioner that she did not want to call the family attorney
27 again; she was upset, her uncle said. The attorney, Dominique's cousin, confirmed
28 that Dominique made a growing number of telephone calls to him in the months

1 following Jovita's death; her questions centered on the disposition of the family
2 home and details concerning the amount of Jovita's insurance, the sums due
3 creditors, and any surplus in the estate; Dominique was "very emphatic," he
4 testified, that she did not want the house to be sold. That June, the attorney
5 attended a meeting with Petitioner, his mother, Dominique, and another lawyer at
6 which the possibility of Dominique's legal emancipation was discussed.

7 In December 1983, authorities arrested Dominique and Petitioner. Charged
8 with one count of conspiracy to commit murder and one count of first degree
9 murder, Dominique was tried as a juvenile, convicted and sentenced to the custody
10 of the Youth Authority; her conviction was affirmed on appeal.

11 **2. The defense case.**

12 Petitioner testified in his defense. His relations with Jovita were "fair," he
13 said; sometimes they got along well, sometimes not. He had lived at the Navarro
14 residence for a few months in 1982 with Jovita's consent. The three regularly had
15 dinner out about once a month. Petitioner denied any involvement in Jovita's
16 death. He had talked to Ricky Abram once about selling him an automobile
17 engine; they had gone to Bob's Big Boy with Dominique. While they had lunch,
18 Dominique had complained that her mother had restricted her for coming home
19 late. He never saw Abram again. Petitioner had studied martial arts as a young
20 teenager, but had not earned a black belt and had no training in the use of a tonfa;
21 nor had he ever owned one. He had been badly stabbed in the thigh in a fight in
22 June of 1982, still walked with a limp and had difficulty stretching one of his legs.
23 He had never had any knowledge of Jovita's life insurance.

24 On the night of Jovita's murder, Petitioner testified, he had gone with
25 Dominique to a party in West Covina. After a hamburger with a friend, the two
26 had parked for awhile. He dropped Dominique off at her house around 2:00 that
27 morning, went home and, after talking with his mother and grandmother, went to
28 bed. About 3:30 a.m., he heard a knock on his window. It was Margaret Noone, a

1 friend; he let her in and she stayed in bed with him for about an hour before
2 leaving by the window. Around 6:00 a.m., Dominique had telephoned; she was
3 very upset; Petitioner dressed and left immediately for her house.

4 Petitioner's sister supported his testimony regarding the injury to his leg and
5 the fact that he had never received training in or owned a tonfa. His grandmother
6 confirmed that Petitioner had arrived home around 2:00 on the morning of Jovita's
7 murder.

8 Petitioner's mother testified that he returned home at exactly 2:00 on the
9 morning of April 24, 1983—she had been watching a program on Spanish
10 television and remembered the time. She spoke to Petitioner briefly as to why he
11 was late. Later that night, Petitioner's mother heard the sound of voices in her
12 son's room. Through the door, she asked Petitioner who was there; he told her to
13 go to sleep and later refused to tell her the identity of his visitor. Asked about the
14 meeting with Dominique's attorney in June of 1983, at which Dominique's legal
15 emancipation was discussed, Mrs. Noguera testified that she had earlier
16 accompanied Dominique to the Social Security office in an effort to help her
17 receive some benefits—she had been without any income in the five months since
18 her mother's death. A previous attorney had done nothing, and Dominique needed
19 help.

20 Margaret Noone testified that around 3:00 a.m. on April 24, 1983, she had
21 climbed into the window of Petitioner's bedroom and stayed for about one and
22 one-half hours. She left when she heard someone knocking on the bedroom door.

23 Two of Petitioner's friends testified to prior conversations with Ricky
24 Abram and Steve Arce. Wilbur Boring told the jury that in December of 1983,
25 after he had implicated Petitioner in Jovita's murder, Abram had told him that “he
26 [Petitioner] got what he deserved; he put me in jail so I put him in jail.” Patrick
27 Reese testified that Arce had told him that he cooperated with the police in
28 exchange for immediate release on a felony charge; Arce had observed a pair of

1 nunchuku sticks in Petitioner's possession, not tonfas, and had told Reese that he
2 (Arce) should not have told the police some of the things he told them.

3 **3. *Rebuttal.***

4 The prosecution recalled Margaret Noone to the stand. She stated that, in
5 testifying on behalf of Petitioner, she had “lied ... [about] basically almost
6 everything” because she “was getting threats if I didn't say something like that
7 [i.e., her alibi testimony] something would happen to me or my family because
8 [Petitioner] has such powerful friends, even though he's in jail.” She had seen
9 nunchuku sticks in Petitioner's car, and he liked to “mess around with them.”
10 Noone told the jury that she had been granted immunity from prosecution by the
11 People.

12 In addition, the trial court took judicial notice that Dominique had been
13 called as a witness by the prosecution, had refused to testify, and been adjudged in
14 contempt of court. A deputy marshal testified that shortly after Dominique was
15 held in contempt, he heard Petitioner say to another inmate that Dominique “did a
16 good job and tell her I love her.”

17 **B. Penalty Phase Evidence**

18 **1. *The prosecution's case.***

19 John Antenucci testified that in August 1983, he placed a newspaper
20 advertisement to sell a used Volkswagen. Accompanied by a friend, Petitioner
21 responded to the advertisement and expressed an interest in buying the
22 automobile. The three went for a test drive, during which Petitioner stopped the
23 car and told Antenucci to get out because his friend “has a gun.” Petitioner's
24 friend displayed a handgun and threatened to shoot Antenucci, who managed to
25 grab the car keys and escape.

26 **2. *The defense case.***

27 Petitioner called 15 witnesses, including a former employer, his high school
28 girlfriend, and several friends of his family. Several witnesses testified that

1 Petitioner's family was very close until his parents were divorced in 1980. His
2 mother testified that Petitioner, who had hunted, fished, and gone on motorcycle
3 trips with his father, appeared to take the divorce hard; he became quieter, more
4 serious, less playful. She asked the jury to spare her son's life. Petitioner's sister
5 and grandmother also asked the jury not to impose the death penalty.

6 Several witnesses testified to Petitioner's participation in the California Blue
7 Jacket Cadette Corps, a youth organization modeled on the Navy. Junior high
8 school authorities testified to his participation in such sports as basketball, track,
9 softball, and football; elementary school employees testified that Petitioner's
10 parents had been involved actively in his schooling.

11 **III. STANDARDS OF REVIEW**

12 Because Petitioner's original §2254 habeas petition was filed after April 24,
13 1996, the Antiterrorism and Effective Death Penalty Act ("AEDPA"), codified in
14 28 U.S.C. §2254, applies to petitioner's claims. *Woodford v. Garceau*, 538 U.S.
15 202, 210 (2003) (holding that applicability of the AEDPA depends on whether the
16 petitioner filed an application for habeas relief seeking an adjudication on the
17 merits before or after the AEDPA's effective date); *see also Lindh v. Murphy*, 521
18 U.S. 320, 322 (1997).

19 Under the AEDPA, relitigation of any claim adjudicated on the merits in
20 state court is barred unless a petitioner can show that the state's adjudication of his
21 claim: "(1) resulted in a decision that was contrary to, or involved an unreasonable
22 application of, clearly established Federal law, as determined by the Supreme
23 Court of the United States; or (2) resulted in a decision that was based on an
24 unreasonable determination of the facts in light of the evidence presented in the
25 State court proceeding." 28 U.S.C. §2254(d); *Harrington v. Richter*, 562 U.S. 86,
26 98 (2011); *Williams v. Taylor*, 529 U.S. 362, 412-13 (2000). If a petitioner
27 satisfies either subsection (1) or (2) for a claim, then the federal court considers
28 the claim de novo. *See Panetti v. Quarterman*, 551 U.S. 930, 953 (2007) (when

1 section 2254(d) is satisfied, “[a] federal court must then resolve the claim without
2 the deference AEDPA otherwise requires.”); *Frantz v. Hazey*, 533 F.3d 724, 737
3 (9th Cir. 2008).

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

12 The “contrary to” and “unreasonable application” clauses of section 2254(d)
13 have separate and distinct meanings. *Williams v. Taylor*, 529 U.S. at 404. The
14 Supreme Court explained that a state court decision is “contrary to our clearly
15 established precedent if the state court applies a rule that contradicts the governing
16 law set forth in our cases or if the state court confronts a set of facts that are
17 materially indistinguishable from a decision of th[e] Court and nevertheless arrives
18 at a result different from our precedent.” *Lockyer v. Andrade*, 538 U.S. 63, 73
19 (2003) (internal quotations omitted). A state court decision is an “unreasonable
20 application” of federal law if the state court identifies the correct governing legal
21 principle from the Supreme Court’s decisions but unreasonably applies that
22 principle to the facts of the petitioner’s case. *Williams v. Taylor*, 529 U.S. at 414;
23 *Lockyer*, 538 U.S. at 75. “The ‘unreasonable application’ clause requires the state
24 court decision to be more than incorrect or erroneous. The state court’s
25 application of clearly established law must be objectively unreasonable.” *Lockyer*,
26 538 U.S. at 75 (internal citation omitted); *Richter*, 562 U.S. at 101. “While the
27 ‘objectively unreasonable’ standard is not self-explanatory, at a minimum it
28 denotes a great[] degree of deference to the state courts.” *Clark v. Murphy*, 331

1 F.3d 1062, 1068 (9th Cir.), *cert. denied*, 540 U.S. 968 (2003). The United States
 2 Supreme Court made clear in *Richter* that “[a] state court's determination that a
 3 claim lacks merit precludes federal habeas relief so long as ‘fairminded jurists
 4 could disagree’ on the correctness of the state court's decision.” *Richter*, 562 U.S.
 5 at 101 (citing *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)).

6 Further, under §2254(d)(2), a decision adjudicated on the merits in a state
 7 court will not be overturned on factual grounds unless it is objectively
 8 unreasonable in light of the evidence presented in the state-court proceeding. 28
 9 U.S.C. §2254(d)(2). Factual determinations by state courts are presumed correct
 10 absent clear and convincing evidence to the contrary. 28 U.S.C. §2254(e)(1);
 11 *Cudjo v. Ayers*, 698 F.3d 752, 762 (9th Cir. 2012) (“[T]he statement of facts from
 12 the last reasoned state court decision is afforded a presumption of correctness that
 13 may be rebutted only by clear and convincing evidence.”), *cert. denied*, 133 S.Ct.
 14 2735 (2013). Thus, this Court must defer to the state court's factual findings
 15 unless a defect in the process is so apparent that “any appellate court ... would be
 16 unreasonable in holding that the state court's factfinding process was adequate.”
 17 *Hibbler v. Benedetti*, 693 F.3d 1140, 1146-47 (9th Cir. 2012), *cert. denied*, 133
 18 S.Ct. 1262 (2013); *Taylor v. Maddox*, 366 F.3d 992, 1000 (9th Cir.), *cert. denied*,
 19 543 U.S. 1038 (2004).

20 In this case, many of Petitioner’s claims were raised in his state petitions to
 21 the California Supreme Court, and summarily denied. In such a case where the
 22 state court decision is unaccompanied by an explanation, “the habeas petitioner’s
 23 burden still must be met by showing there was no reasonable basis for the state
 24 court to deny relief.” *Richter*, 562 U.S. at 98; *Walker v. Martel*, 709 F.3d 925, 939
 25 (9th Cir.), *cert. denied*, __ U.S. __, 134 S.Ct. 514 (2013). The Supreme Court has
 26 stated that “a habeas court must determine what arguments or theories supported
 27 or . . . could have supported, the state court’s decision;” the court must not
 28 “overlook[] arguments that would otherwise justify the state court’s result . . .”

1 *Richter*, 562 U.S. at 102. “Crucially, this is not a de novo review of the
 2 constitutional question,” as “even a strong case for relief does not mean the state
 3 court’s contrary conclusion was unreasonable.” *Walker v. Martel*, 709 F.3d at 939
 4 (quoting *Richter*, 562 U.S. at 102); see also *Murray v. Schriro*, 745 F.3d 984, 996-
 5 97 (9th Cir. 2014). Section 2254(d) provides “a difficult to meet and highly
 6 deferential standard for evaluating state-court rulings, which demands that the
 7 state-court decisions be given the benefit of the doubt.” *Pinholster*, 563 U.S. at
 8 181 (internal quotations omitted).

9 Respondent contends that the California Supreme Court’s denial of
 10 Petitioner’s state habeas petition was, on its face, “on the merits,” and, as such,
 11 Petitioner must overcome §2254(d)’s relitigation bar. Respondent maintains that
 12 Petitioner cannot demonstrate that the state court’s resolution of his claims was
 13 unreasonable under either §2254(d)(1) or (d)(2).

14 Petitioner argues, on the other hand, that the California Supreme Court’s
 15 “process and analysis of his claims were unreasonable in light of California’s
 16 special procedures for resolving habeas petitions.” (Dkt No. 361, Response at 9.)
 17 He notes that the California Supreme Court’s failure to issue an OSC in his case,
 18 under California law, necessarily means that the Court found that – assuming the
 19 truth of Petitioner’s allegations and drawing all legitimate inferences in his favor –
 20 he had *not* made a prima facie case for relief on any of his claims. The summary
 21 denial, Petitioner suggests, was a final determination that is not entitled to
 22 deference because (1) it is not a merits determination such that 2254(d) applies;⁵

23
 24 ⁵ Petitioner argues that the California Supreme Court’s failure to issue an OSC (1) implies the
 25 California Supreme Court “presumed the regularity of the proceedings over the truthfulness of
 26 [Petitioner’s] allegations, thereby holding him to a higher standard than is required for the
 27 establishment of a prima facie claim under federal law”; and (2) demonstrates the “curious
 28 distinction that the California procedures make between OSC grants and summary denials” such
 that “a finding of sufficiency [is] tentative and non-binding, while a finding of insufficiency
 strengthens the underlying conviction and sentence and is unreviewable and binding.” (Dkt. No.
 361, Response at 14-16.) Petitioner contends that “the fact that Noguera presented sufficient
 factual allegations to make a prima facie case and the CSC summarily found that he did not
 suggests that application of the *Duvall* presumptions, rather than analysis of Noguera’s claims
 under the applicable federal law, was determinative.” (Dkt No. 361, Response at 17.)

(2) the California Supreme Court’s failure to issue an OSC constitutes an unreasonable interpretation and application of clearly established federal law under §2254(d)(1)⁶; and (3) if the state court based its denial of claims on factual findings or credibility determinations counter to Noguera’s allegations and evidence, its decision amounts to an unreasonable determination of facts under §2254(d)(2).⁷ As such, Petitioner suggests that §2254(d) and *Pinholster* have no relevancy to this Court’s review of his claims.

Respondent rejects Petitioner’s “process-based” theory as an attempt to “broaden federal review beyond whether state court factual findings were reasonable ‘in light of the evidence presented in the State court proceeding.’” (Dkt. No 365, Response to Opposition at 15.)

IV. REVIEW OF CLAIMS

A. Conflict of Interest

1. *Legal Standard*

“Where a constitutional right to counsel exists, our 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); *see also Cuyler v. Sullivan*, 446 U.S. 335 (1980). The United States Supreme Court recognizes the unique nature of claims that arise out of a conflict of interest and does not impose on such claims the *Strickland v. Washington*, 466 U.S. 668, 687 (1984) two-pronged standard for ineffective assistance of counsel claims. Rather, prejudice is presumed if the petitioner demonstrates that his attorney “actively represented

⁶ Citing *Nunes v. Mueller*, 350 F.3d 1045, 1054-55 (9th Cir. 2003) (finding state court’s failure to issue an OSC and hold an evidentiary hearing to be an unreasonable application of clearly established federal law where petitioner’s allegations clearly made out a prima facie case of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984).)

⁷ Citing *Nunes*, again, Petitioner suggests “federal courts need not defer to state-court fact-findings made in the absence of an evidentiary hearing.” (Dkt No. 361, Response at 21.) He argues that the Supreme Court’s 2010 decision in *Wellons v. Hall*, 558 U.S. 220, 223 n. 3 (2010), and its more recent opinion in *Brumfield v. Cain*, ___ U.S. ___, 135 S.Ct. 2269 (2015), confirm that AEDPA does not require blind deference to inadequate state-court fact-findings. (Dkt. No. 361, Response at 21 and Dkt No. 373, Notice of Recent Supreme Court Authority.)

1 conflicting interests” and that “an actual conflict of interest adversely affected his
 2 lawyer’s performance.” *Sullivan*, 446 U.S. at 348, 350; *see also Wood*, 450 U.S. at
 3 272-73; *Strickland*, 466 U.S. at 692; *Mickens v. Taylor*, 535 U.S. 162, 168 (2002).
 4 Conflicts can also arise from successive representation, particularly when a
 5 substantial relationship exists between the cases, such that the “factual contexts of
 6 the two representations are similar or related.” *Trone v. Smith*, 621 F.2d 994, 998
 7 (9th Cir.1980); *see also Fitzpatrick v. McCormick*, 869 F.2d 1247, 1252 (9th
 8 Cir.1989). The Supreme Court, however, has left open the question whether
 9 conflicts in successive representation that affect an attorney's performance require
 10 a showing of prejudice for reversal. *See Mickens*, 535 U.S. at 176.

11 **2. CLAIM 1: Lead Defense Counsel Suffered from a Conflict of**
 12 **Interest Due to His Representation of Petitioner’s Mother**
 13 **and Because of Her Financial Control Over the Defense**

14 In Claim 1, Petitioner alleges that his rights under the First, Fourth, Fifth,
 15 Sixth, Eighth and Fourteenth Amendments to the United States Constitution were
 16 violated because his trial attorney, Lorenzo Pereyda, suffered from an undisclosed
 17 and unwaived conflict of interest that permeated the entire trial and adversely
 18 affected the representation Petitioner received. He argues that counsel’s conduct
 19 violated his rights to the effective assistance of counsel, an impartial jury, a
 20 reliable special circumstance determination, a fair and reliable guilt and penalty
 21 determination, confrontation and cross-examination, Equal Protection and Due
 22 Process. (Dkt. 317 at 37-49.)

23 Petitioner raised this claim in his November 16, 1992, initial state habeas
 24 petition (Dkt. No. 148, Lodgment 4 at 57-64), and again in his June 9, 2003,
 25 exhaustion petition (Dkt. No. 336, Lodgment 9 at 11-42). On both occasions, the
 26 California Supreme Court summarily denied the claim on the merits. (Dkt. No.
 27 336, Lodgments 3 & 12.) In 2003, the California Supreme Court alternatively
 28 denied the claim as untimely, successive, and as having previously been raised in

1 the 1992 petition. (Dkt. No. 336, Lodgment 12.)

2 In moving to dismiss Claim 1, Respondent contends that Petitioner has
3 failed to meet his burden of showing that the California Supreme Court's
4 resolution of the claim amounted to an unreasonable application of clearly
5 established Federal law, or an unreasonable determination of the facts in light of
6 the evidence presented in the state court proceeding and, as such, Petitioner is
7 barred from relitigating the claims in federal court. 28 U.S.C. §2254(d);
8 *Pinholster*, 563 U.S. at 181-82. This Court disagrees.

9 a. *Facts Presented to the California Supreme Court*

10 (1) *Initial State Habeas Petition*

11 Petitioner first raised the issue of counsel's alleged conflict of interest in
12 Claim III of his initial state habeas petition. In the 1992 petition, Petitioner
13 presented the following facts:

- 14 – Petitioner's mother, Sarita Salinas, retained Pereyda in 1979 to represent her in
- 15 the divorce action she brought against Petitioner's father, Guillermo Noguera.
- 16 – Pereyda represented Salinas in very acrimonious proceedings, through which he
- 17 became privy to confidential information regarding the turmoil that pervaded the
- 18 Noguera household and the emotional problems of both of Petitioner's parents.
- 19 – During their attorney-client relationship, Salinas told Pereyda that her husband
- 20 was violent, had threatened her with bodily harm and death on many occasions,
- 21 and had audio tapes detailing sexual acts involving animals. She also confided her
- 22 concerns that Guillermo's actions were having a negative effect on her children.
- 23 – Salinas subsequently retained Pereyda to represent Petitioner in his capital trial.
- 24 – Pereyda was unable to present evidence of Petitioner's home life because to do
- 25 so would have violated his on-going duty of loyalty to Salinas.

26 In support of Claim III, Petitioner submitted a Declaration of A. Lorenzo
27 Pereyda (Exhibit I), in which Mr. Pereyda stated:

- 28 – His law practice included criminal law and general civil litigation, including

1 family law.

2 – He had never before tried a death penalty case.

3 – He has known the Noguera family for many years and has Petitioner since he
4 was twelve or thirteen years old.

5 – He was retained to represent Petitioner’s mother in connection with her bitter
6 and acrimonious divorce from Petitioner’s father. The litigation began in 1979 and
7 ended in 1983.

8 – Ms. Salinas told Mr. Pereyda that Guillermo was violent and had a bad temper
9 and that she had concerns that his actions were negatively impacting her children.

10 – At the time he was retained to represent Petitioner, Mr. Pereyda “was not totally
11 familiar with capital litigation, particularly penalty phase strategy and tactics.”

12 – Mr. Pereyda never explained to Petitioner that he had a legal conflict due to his
13 prior representation of Salinas; and he never obtained a waiver of that conflict.

14 – The vast majority of Pereyda’s trial preparation in Petitioner’s case was spent on
15 guilt-phase issues. Pereyda did no mental health investigation in connection with
16 the guilt phase and did not explore Petitioner’s social history to determine how
17 family dynamics may have impacted his culpability.

18 – Pereyda’s strategy for the penalty phase was to focus on the positive aspects of
19 Petitioner’s life, and present him in a favorable light. Pereyda did not investigate
20 the case to determine whether Petitioner’s troubled background could have
21 contributed to the crime, or mitigated punishment.

22 – Pereyda was a potential witness during the penalty phase as he could have
23 testified regarding mitigating information he learned about the family during the
24 divorce proceedings.

25 (2) *Third State Habeas Petition*

26 Petitioner again raised the conflict of interest issue in his 2003 state habeas
27 petition in which he presented additional facts in support of the claim, including
28 Declarations from his father (Exhibit D), his sister (Exhibit G), his mother (Exhibit

1 AA), and his wife (Exhibit GG). Petitioner alleged that not only was his mother a
2 former client of Mr. Pereyda, to whom he owed an ongoing ethical and legal duty
3 of confidentiality and loyalty, she was also paying Petitioner's legal fees and
4 influencing his representation. In particular, Petitioner alleged:

5 – In retaining Pereyda, Ms. Salinas still considered him to be her attorney,
6 obligated first to her. (Exhibit AA.) Moreover, she was outspoken regarding her
7 control over Petitioner's defense and Mr. Pereyda's role as protector for her
8 family. (Exhibit GG.)

9 – Mr. Pereyda had an on-going ethical and legal duty to Ms. Salinas and a
10 fundamental obligation not to reveal information disclosed in confidence during
11 the divorce proceedings.

12 – Ms. Salinas retained Mr. Pereyda to represent Petitioner on the condition that he
13 not bring out any of the family's problems, but exclusively present the false
14 defense that Petitioner was not the killer. (Exhibit G, Exhibit AA.)

15 – Ms. Salinas advised Mr. Pereyda that he was not to use any of the information he
16 learned about the family during the divorce proceedings in Petitioner's defense
17 case. (Exhibit AA.)

18 – Mr. Pereyda could not pursue viable mental health defenses and did not have
19 Petitioner examined by a mental health expert because Ms. Salinas prohibited Mr.
20 Pereyda from using information he "knew about [Petitioner] and the family . . . in
21 [Petitioner's] defense." (Exhibit AA.)

22 – Mr. Pereyda could not question Ms. Salinas regarding her behavior which
23 contributed to Petitioner's mental health problems.

24 – Mr. Pereyda could not present evidence of the violence and abuse perpetrated by
25 Ms. Salinas and other members of the family. (Exhibit D, Exhibit G.)

26 – Although Petitioner told his mother that he thought he was crazy, and asked her
27 for help, she told him there would be no mental health examinations, and that he
28 was not crazy. She told him, "just listen to my attorney, who would get him out."

1 (Exhibit AA.)

2 – Salinas told Petitioner it did not matter that his defense team knew that he killed
3 Jovita, “[her] attorney was going with the innocence defense.” (Exhibit AA.)

4 – Petitioner’s father did not trust Mr. Pereyda because he was Salinas’ divorce
5 attorney. (Exhibit D.)

6 – Neither Mr. Pereyda nor Mr. Campos attended a special circumstance/penalty
7 conference on the case at which the case could have settled at a penalty less than
8 death. According to Petitioner, “he was not consulted but rather instructed by his
9 mother and his attorneys to refuse any type of settlement. . . . By accepting a plea
10 bargain, his mother stated that everyone would say he committed the homicide and
11 people would look at her as a bad mother.” (Exhibit GG at 7.)

12 – Mr. Pereyda never disclosed his conflict of interest to Petitioner and there was
13 no waiver. (Exhibit I.)

14 In light of the conflict, Petitioner argued, Mr. Pereyda failed to provide
15 petitioner with constitutionally adequate representation.

16 b. California Supreme Court’s Post Card Denial Was
17 Premised on an “Unreasonable Determination of the
18 Facts” Within the Meaning of §2254(d)(2)

19 To demonstrate that the state court erred under §2254(d)(2), “the petitioner
20 must establish that the state court’s decision rested on a finding of fact that is
21 ‘objectively unreasonable.’” *Hibbler v. Benedetti*, 693 F.3d at 1146, quoting
22 *Lambert v. Blodgett*, 393 F.3d 943, 972 (9th Cir. 2004) and citing *Miller El v.*
23 *Cockrell*, 537 U.S. 322, 340 (2003) and *Taylor v. Maddox*, 366 F.3d at 999. The
24 question “is not whether a federal court believes the state court’s determination
25 was incorrect but whether that determination was unreasonable – a substantially
26 higher threshold.” *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007); *Wood v. Allen*,
27 558 U.S. 290, 301 (2010); *Brumfield v. Cain*, 135 S.Ct. at 2277.

28 In *Hibbler*, the Ninth Circuit noted that “[c]hallenges under §2254(d)(2) fall

1 into two main categories. First, a petitioner may challenge the substance of the
2 state court's findings and attempt to show that those findings were not supported
3 by substantial evidence in the state court record. Second, a petitioner may
4 challenge the fact-finding process itself on the ground that it was deficient in some
5 material way." *Hibbler*, 693 F.3d at 1146 [citations omitted]; *see also Taylor v.*
6 *Maddox*, 366 F.3d at 999 (concluding that "unreasonable determination" in
7 §2254(d)(2) may be based on a contention "that the [state court] finding is
8 unsupported by sufficient evidence, that the process employed by the state court is
9 defective, or that no finding was made by the state court at all." (citations
10 omitted).) "Thus, if a petitioner challenges the substance of the state court's
11 findings. . . [the federal court] must be convinced that an appellate panel,
12 applying the normal standards of appellate review, could not reasonably conclude
13 that the finding is supported by the record." *Hibbler*, 693 F.3d at 1146, *citing*
14 *Taylor v. Maddox*, 366 F.3d at 1000. "Similarly, when the challenge is to the state
15 court's procedure, 'mere doubt as to the adequacy of the state court's findings of
16 fact is insufficient; [the court] must be satisfied that *any* appellate court to whom
17 the defect [in the state court's fact-finding process] is pointed out would be
18 unreasonable in holding that the state court's fact-finding process was adequate.'" *Hibbler*, 693 F.3d at 1146-47, *citing Lambert v. Blodgett*, 393 F.3d at 972. It is
19 relevant to remember, *Pinholster* itself was a summary denial case. "The ultimate
20 issue is whether the state's fact-finding procedures were reasonable; this is a fact-
21 bound and case-specific inquiry." *Hibbler*, 693 F.3d at 1147. The state court does
22 not act unreasonably in denying relief without holding an evidentiary hearing "so
23 long as the state court could have reasonably concluded that the evidence already
24 adduced was sufficient to resolve the factual question." *Id.*

25
26 This Court finds that Petitioner has satisfied his burden under AEDPA,
27 showing that the state court's decision was premised on either "an unreasonable
28 application of clearly established federal law" or an "unreasonable determination

1 of the facts” within the meaning of §2254(d). On the record before this Court --
2 the record presented to the California Supreme Court in state habeas corpus
3 proceedings -- Petitioner has demonstrated that his trial attorney “actively
4 represented conflicting interests” and that the conflict “adversely affected his
5 lawyer’s performance.” *Sullivan*, 446 U.S. at 350. The evidence presented to the
6 California Supreme Court in two state habeas corpus actions – including
7 declarations from both Mr. Pereyda and Ms. Salinas – indicated that Mr. Pereyda
8 was influenced in his basic strategic decisions by the interests of the third party
9 who hired him, petitioner’s mother. Pereyda labored under an actual conflict of
10 interest throughout his representation of Petitioner, triggering the California
11 Supreme Court’s duty to inquire further. Assuming Petitioner’s allegations, and
12 the declarations submitted in support thereof, to be true (*see Pinholster*, 563 U.S.
13 at 188 n. 12), nothing more was required for a prima facie case. *See Nunes*, 350
14 F.3d at 1054 (taking petitioner’s claims “at face value,” petitioner “clearly made
15 out a prima facie case of ineffective assistance” where petitioner claimed his
16 “attorney gave him the wrong information and advice about the state’s plea offer”
17 and that if he had “been informed accurately” he would have taken the plea offer).

18 “Under California law, the California Supreme Court’s summary denial of a
19 habeas petition on the merits reflects the court’s determination that ‘the claims
20 made in th[e] petition do not state a prima facie case entitling the petitioner to
21 relief.’ ” *Pinholster*, 563 U.S. at 188 n. 12 (quoting *In re Clark*, 5 Cal.4th 750, 770
22 (1993)). As noted, the evidence Petitioner presented was sufficient to raise a
23 doubt as to Mr. Pereyda’s representation and suggest that he labored under a
24 conflict of interest that adversely affected his performance. *Sullivan*, 446 U.S. at
25 348. Nevertheless, the California Supreme Court twice summarily rejected the
26 claim. (Dkt. No. 336, Lodged Docs. 3 & 8.) There was no reasonable basis for the
27 California Supreme Court’s decisions. *See Pinholster*, 563 U.S. at 187-88 (where
28 there has been a summary denial, petitioner satisfies §2254 by showing ““there

1 was no reasonable basis' for the California Supreme Court's decision") (quoting
2 *Richter*, 562 U.S. at 98). As such, the California Supreme Court's denials of this
3 claim were based on "an unreasonable application of clearly established federal
4 law" or an "unreasonable determination of the facts" within the meaning of
5 §2254(d), and are not entitled to AEDPA deference.

6 This Court must now proceed to evaluate Petitioner's claim de novo.
7 *Panetti v. Quarterman*, 551 U.S. 930 (2007) (when "the requirement set forth in §
8 2254(d)(1) is satisfied[, a] federal court must then resolve the [constitutional]
9 claim without the deference AEDPA otherwise requires"); *see also Rompilla v.*
10 *Beard*, 545 U.S. 374, 390 (2005) (reviewing the prejudice requirement for an
11 ineffective assistance of counsel claim de novo after identifying a § 2254(d)(1)
12 error in the state court's evaluation of the performance requirement); *Wiggins v.*
13 *Smith*, 539 U.S. 510, 534 (2003) (similar); *Penry v. Johnson*, 532 U.S. 782, 795
14 (2001) (holding that even if the state court's decision was contrary to Supreme
15 Court case law, "that error would justify overturning Penry's sentence only if
16 Penry could establish that the error" was prejudicial under the pre-AEDPA
17 standard for evaluating prejudice); *Williams*, 529 U.S. at 406 (explaining that
18 when a federal habeas court identifies a "contrary to" error, it "will be
19 unconstrained by § 2254(d)(1)").

20 Clearly established federal law holds that an actual conflict of interest arises
21 where an attorney represents multiple clients with divergent interests. *See, e.g.,*
22 *Sullivan*, 446 U.S. at 348; *Mickens v. Taylor*, 535 U.S. at 166–69; *Holloway v.*
23 *Arkansas*, 435 U.S. 475, 487–90 (1978); *Glasser v. United States*, 315 U.S. 60,
24 75–76 (1942), *superseded by rule on other grounds*, *Bourjaily v. United States*,
25 483 U.S. 171 (1987). Conflicts can also arise from successive representation.
26 *Mickens*, 535 U.S. at 175-76; *Lewis*, 391 F.3d at 989 (applying Sixth Amendment
27 analysis to question of successive representation); *Trone v. Smith*, 621 F.2d at 998;
28 *see also Fitzpatrick v. McCormick*, 869 F.2d at 1252. The Sixth Amendment does

1 not protect against a “mere theoretical division of loyalties.” *Mickens*, 535 U.S. at
2 171. Rather, it protects against conflicts of interest that adversely affect counsel's
3 performance. *Id.* at 172 n. 5. Indeed, in *Mickens*, the Court held that “actual
4 conflict” is defined by the effect a potential conflict had on counsel's performance.

5 In *Wood v. Georgia*, three indigent defendants convicted of distributing
6 obscene materials had their probation revoked for failure to make monthly
7 installment payments on their fines. In reviewing the case, the United States
8 Supreme Court found that the record suggested the root of the problem might be
9 the “divided loyalties of their counsel.” 450 U.S. at 263. At all times during the
10 proceedings against them, the defendants had been represented by a lawyer for
11 their employer (the owner of the “adult” theater and bookstore that purveyed the
12 obscenity), and the employer paid the attorney’s fees and had promised to pay the
13 fines. However, when the employer declined to make installment payments on the
14 fines, and because their attorney “ha[d] acted as the agent of the employer and
15 ha[d] been paid by the employer, [the Court found that] the risk of conflict of
16 interest . . . [was] evident.” *Id.* at 267. The record suggested that the employer’s
17 interest in reducing the fines he would have to pay for his indigent employees in
18 the future diverged from the defendants’ interest in obtaining leniency or paying
19 lesser fines to avoid imprisonment. The Supreme Court found that the possibility
20 that counsel was actively representing the conflicting interests of the employer and
21 employee-defendants “was sufficiently apparent at the time of the revocation
22 hearing to impose upon the court a duty to inquire further.” *Id.* at 272. The Court
23 remanded to the trial court “to determine whether the conflict of interest that th[e]
24 record strongly suggest[ed,] actually existed” because, on the record before it, the
25 Court could not “be sure whether counsel was influenced in his basic strategic
26 decisions by the interests of the employer who hired him.” *Id.* at 272-73.

27 The present record is sufficient to determine that Mr. Pereyda operated
28 under an actual conflict of interest in representing Petitioner. Mr. Pereyda had an

1 on-going ethical and legal duty to Petitioner's mother, and a fundamental
2 obligation not to reveal information disclosed in confidence during the divorce
3 proceedings. Ms. Salinas retained Mr. Pereyda to represent Petitioner with the
4 understanding that she would control the defense and that Mr. Pereyda would not
5 bring out any of the family's problems, but would exclusively present the false
6 defense that Petitioner was not the killer. (Exhibit G, Exhibit AA.) Clearly, Mr.
7 Pereyda could not simultaneously act in the best interest of both clients. In his
8 declaration, Mr. Pereyda admits that he represented Petitioner's mother in her
9 divorce from Petitioner's father; that he never explained to Petitioner that he had a
10 legal conflict due to his prior representation of Petitioner's mother; and that he
11 never obtained a waiver of that conflict. The Court finds that Petitioner has
12 established that Mr. Pereyda did, in fact, have an unwaived conflict of interest in
13 representing Petitioner. The ultimate question, then, is whether the conflict
14 adversely impacted Mr. Pereyda's performance as Petitioner's capital defense
15 attorney. This Court finds that the answer to that question is yes.

16 First, Petitioner was adversely affected by Mr. Pereyda's failure to attend a
17 pre-trial special circumstance/penalty conference at which the case could have
18 settled at a penalty less than death. There is no explanation for such a failure,
19 except that facilitating a plea for Petitioner was contrary to his mother's expressed
20 personal interests. Petitioner "was not consulted but rather instructed by his
21 mother and his attorneys to refuse any type of settlement. . . . By accepting a plea
22 bargain, his mother stated that everyone would say he committed the homicide and
23 people would look at her as a bad mother." (Exhibit GG at 7.)

24 Accordingly, Petitioner was negatively impacted by Mr. Pereyda's approach
25 to his guilt-phase defense. Despite overwhelming evidence of Petitioner's
26 participation in the murder, and Mr. Pereyda's personal knowledge of Petitioner's
27 family and mental health problems, Mr. Pereyda failed to investigate and present
28 evidence which could have undermined the prosecution's theory of the case as

1 death eligible. Counsel failed to investigate and discover evidence that Dominique
 2 constantly complained to Petitioner about how terrible her mother was to her, and
 3 begged him to protect her.⁸ Counsel failed to investigate and present evidence that,
 4 in the fall of 1982 Dominique had become pregnant with Petitioner's child;
 5 Petitioner and Dominique were excited and had shared the news with Petitioner's
 6 family; Jovita had subsequently forced Dominique to have an abortion; and the
 7 chain of events sent Petitioner into despair.⁹ Counsel failed to investigate and
 8 present evidence that Petitioner may have suffered from brain-damage and mental
 9 illness that may have influenced his decision-making,¹⁰ and was also under the
 10 influence of steroids and other substances when he committed the homicide.¹¹
 11 Rather, despite damaging witness statements from Ricky Abram, Steve Arce,
 12 Margaret Garcia, and Mindy Jackson, Mr. Pereyda instead presented a doomed
 13 innocence defense accompanied by a coerced alibi witness. While such an
 14 approach would normally inspire confusion and curiosity, under the circumstances
 15 of Petitioner's representation counsel's rationale is evident. As Ms. Salinas told
 16 Petitioner, it did not matter that his defense team knew that he killed Jovita, "[her]
 17 attorney was going with the innocence defense." (Exhibit AA.)

18 Furthermore, Petitioner was adversely affected by Mr. Pereyda's failure to
 19 adequately investigate and present a thorough mitigation case. At Ms. Salinas's

21 ⁸ In her declaration, Dominique states "I complained to [Petitioner] almost every time I saw him,
 22 telling him how terrible my life was with my mother. I tried to use him to solve my problems. [¶]
 23 I was also filled with rage, hurt, and confusion that I wanted my mother out of my life. I constantly
 pressured [Petitioner] to come up with a solution. I manipulated him by telling him that if he really
 loved me, he would take care of it. (Exh. A, ¶¶16-17.)

24 ⁹ Petitioner's sister attests that "[a]fter [Petitioner] learned that Dominique's mother had forced
 25 her to have an abortion, he was really upset. He talked about it constantly. He cried, and talked
 later about how Jovita had destroyed and murdered their baby." (Exh. G, ¶¶60-61.)

26 ¹⁰ Mr. Pereyda did not have Petitioner examined by a mental health expert because Ms. Salinas
 27 prohibited Mr. Pereyda from using information he "knew about [Petitioner] and the family . . . in
 [Petitioner's] defense." (Exhibit AA.)

28 ¹¹ Throughout the federal habeas petition, Petitioner admits to having committed the homicide.
See e.g., Dkt. No. 317 at 43 (¶116); 72 (¶193); 89 (¶239); 90 (¶240); 92-93 (¶244-45).

1 direction, Mr. Pereyda focused his penalty phase presentation on the positive
 2 aspects of Petitioner's life. Mr. Pereyda thereby obscured extensive available
 3 mitigating evidence, detailing the reality of Petitioner's struggles and challenges,
 4 in favor of presenting Ms. Salinas in the most positive light.

5 Having considered the arguments and evidence presented in connection
 6 with Claim 1 of Petitioner's federal habeas petition, the Court concludes that
 7 Petitioner is entitled to habeas corpus relief on his conflict of interest claim. As the
 8 Supreme Court has noted, "inherent dangers that arise when a criminal defendant
 9 is represented by a lawyer hired and paid by a third party" including: the risk "that
 10 the lawyer will prevent his client from . . . taking . . . actions contrary to the [third
 11 party's] interest" and the risk that the lawyer will defer to the third-party's goals
 12 while sacrificing the defendant's best interests. *Wood*, 450 U.S. at 268-69. These
 13 dangers manifested in Petitioner's case. Mr. Pereyda operated under an actual
 14 conflict of interest that adversely affected Petitioner's representation. Claim 1 of
 15 Petitioner's federal habeas corpus petition is GRANTED.

16 **3. CLAIM 3: The Defense Suffered from an Ethical Conflict of**
 17 **Interest Due to Paralegal Irma Soto's Unethical Conduct**

18 In Claim 3 of Petitioner's Fourth Amended Petition he argues that he was
 19 deprived of his Sixth Amendment right to the effective assistance of counsel
 20 because Mr. Pereyda failed to properly supervise paralegal Irma Soto. He
 21 contends that Ms. Soto carried on a romantic relationship with Petitioner and
 22 smuggled mind-altering drugs to him at the Orange County Jail before and during
 23 trial, to the detriment of his defense. Petitioner suggests that his use of the drugs
 24 "had a debilitating effect upon his mental state and competence" during critical
 25 proceedings and the romantic entanglement "negatively affected [Ms. Soto's]
 26 relationship with key defense witnesses." (Dkt. No. 361 at 51, Docket No. 317 at
 27 53.) He argues that counsel were responsible for Ms. Soto's actions which
 28 undermined his defense. Simultaneously, Petitioner argues that Ms. Soto's conduct

1 created a conflict of interest that adversely affected Petitioner's representation
2 within the meaning of *Sullivan*. (Dkt. No. 317 at 55-56.)

3 Petitioner raised this claim before the California Supreme Court in Claim 1
4 of his March 2, 1998, exhaustion petition. (Dkt. No. 336, Lodgment 4.) The
5 California Supreme Court summarily denied the claim on the merits and
6 alternatively denied the claim as untimely on October 17, 2001. (Dkt. No. 336,
7 Lodgment 8.)

8 Respondent denies the factual allegations Petitioner makes in support of this
9 claim and argues that Petitioner has failed to establish that the California Supreme
10 Court's resolution of the claim contradicted or unreasonably applied controlling
11 United States Supreme Court authority, or made any unreasonable determination
12 of the facts, and, as such, he is barred from relitigating the claim in federal court.
13 28 U.S.C. §2254(d); *Cullen v. Pinholster*, 563 U.S. at 181-82. This Court agrees.

14 a. *Facts Presented to the California Supreme Court*

15 Petitioner alleged the following facts to the California Supreme Court in his
16 1998 exhaustion petition:

- 17 – Irma “Uribe” Soto worked for Mr Pereyda as “a legal employee and legal
18 runner” before and during Petitioner’s trial.
- 19 – Ms. Soto was privy to confidential and privileged information related to
20 Petitioner and his case, including case files, defense strategy, defense witnesses,
21 anticipated testimony, and potential problems.
- 22 – Ms. Soto communicated with witnesses by telephone, correspondence, and in
23 person.
- 24 – During pretrial and trial proceedings, Ms. Soto expressed her love for Petitioner
25 and her desire to marry him and have children. She also became involved with his
26 family on a personal level and referred to them as family.
- 27 – Ms. Soto had pictures taken of herself, which she gave to Petitioner while he
28 was in the Orange County Jail.

- 1 – Ms. Soto led Petitioner’s family to believe that she “did everything on the case”
2 and that without her, Petitioner would lose his case and would be executed.
3 – Ms. Soto obtained a court order allowing her to have contact visits with
4 Petitioner, at which she smuggled mind-altering drugs to Petitioner inside
5 highlighter pens.
6 – Petitioner ingested the drugs which compounded his pre-existing mental and
7 organic problems, rendering him incompetent during crucial proceedings.
8 – When Petitioner rejected her overtures, because he was in love with Francesca
9 Mozqueda, Ms. Soto vowed to damage his defense and later bragged about
10 accomplishing her goal.
11 – Petitioner’s family believed that Ms. Soto could see to it that Petitioner was
12 convicted and executed, and urged Ms. Mozqueda to stop seeing him.
13 – Ms. Soto became romantically involved with one of the defense attorneys and an
14 Orange County jail deputy during Petitioner’s trial.
15 – Petitioner’s attorneys knew about Ms. Soto’s conduct, but were not concerned.

16 In support of the claim, Petitioner submitted declarations from his former
17 brother-in-law, Fabian Perez (Exhibit LL), his sister (Exhibit G), his mother
18 (Exhibit AA), his father (Exhibit D), his wife (Exhibit GG), prisoners from the
19 Orange County Jail (Exhibits EE, FF), Ms. Soto’s ex-husband (Exhibit KK), a
20 wife of one of the Orange County Jail prisoners (Exhibit HH), and a friend of Ms.
21 Soto’s (Exhibit JJ).

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b. California Supreme Court's Adjudication of Petitioner's Claim Was Neither an "Unreasonable Application of Clearly Established Federal Law" nor an "Unreasonable Determination of the Facts" Within the Meaning of §2254(d)

Accepting the factual allegations in the petition as true, this Court finds that Petitioner is not entitled to relief on either of his claims concerning the improper conduct of Irma Soto. The Court finds that the California Supreme Court's summary denial of the claim was neither an unreasonable application of clearly established federal law, nor an unreasonable determination of the facts, within the meaning of §2254(d), such that Petitioner is entitled to de novo review in federal habeas corpus proceedings.

While ineffective assistance of counsel claims generally require the petitioner to show deficient representation and prejudice, we "forgo individual inquiry into whether counsel's inadequate performance undermined the reliability of the verdict" in instances "where assistance of counsel has been denied entirely or during a critical stage of the proceeding." *Mickens*, 535 U.S. at 166. Circumstances of such magnitude may "arise when the [petitioner's] attorney actively represented conflicting interests." *Id.* at 166; *see also Sullivan*, 446 U.S. at 348. In order to establish a Sixth Amendment violation under the *Sullivan* exception, the petitioner must demonstrate that "an actual conflict of interest adversely affected his lawyer's performance." *Sullivan*, 446 U.S. at 348. As clarified in *Mickens*, an actual conflict is not "something separate and apart from adverse effect." *Mickens*, 535 U.S. at 172 n. 5. Rather, "[a]n 'actual conflict,' for Sixth Amendment purposes, is a conflict of interest that adversely affects counsel's performance." *Id.* Thus, even if Petitioner can establish an actual conflict of interest, he cannot obtain relief unless he can show that his attorneys conflict adversely affected his performance. *Id.* at 162.

1 While the impropriety of Ms. Soto's alleged conduct during pretrial and trial
2 proceedings, if true, is shocking, Petitioner has failed to demonstrate that Ms.
3 Soto's behavior had any effect on defense counsel's performance, or the outcome
4 of the trial.

5 First, with respect Petitioner's claim that Ms. Soto's alleged romantic
6 interest in him during pretrial and trial proceedings amounted to a conflict of
7 interest for his attorneys, this Court finds the Ninth Circuit's holding in *Earp v.*
8 *Ornoski*, 431 F.3d 1158, dispositive. In *Earp*, Petitioner carried on a romantic
9 relationship with one of his trial attorneys before and during his capital trial. In
10 federal habeas corpus, *Earp* argued that he was deprived of the effective assistance
11 of counsel because his intimate relationship with his counsel created a conflict of
12 interest in her duties as counsel and her personal interests in the relationship.
13 Holding the California Supreme Court's finding of no conflict was neither
14 contrary to, nor an unreasonable application of, clearly established federal law, the
15 Court of Appeals noted, "[t]he Supreme Court has never held that the *Sullivan*
16 exception applies to conflicts stemming from intimate relations with clients." *Id.*
17 at 1184-85 (citations omitted). Here, Ms. Soto's romantic interest in Petitioner did
18 not create a conflict of interest for his trial attorneys. Petitioner presents no
19 evidence suggesting his attorneys failed to act in his best interest nor that Ms.
20 Soto's involvement with Petitioner had any adverse impact on his defense.
21 Rather, Petitioner makes a series of conclusory allegations, unsupported by
22 sufficient evidence. *Jones v. Gomez*, 66 F.3d 199, 204-05 (9th Cir. 1995)
23 (conclusory allegations unsupported by a statement of specific facts do not warrant
24 habeas relief); see *Blackledge v. Allison*, 431 U.S. 63, 75 n. 7 (1977) (summary
25 disposition of habeas petition appropriate where allegations are vague or
26 conclusory; "the petition is expected to state facts that point to a real possibility of
27 constitutional error") (citation, internal quotations and brackets omitted); *Wood v.*
28 *Bartholomew*, 516 U.S. 1, 8 (1995) (per curiam) (granting a habeas corpus

1 petition “on the basis of little more than speculation” is improper); *Cooks v.*
2 *Spalding*, 660 F.2d 738, 740 (9th Cir. 1981) (per curiam) (claim that “amounts to
3 mere speculation” does not warrant habeas corpus relief), *cert. denied*, 455 U.S.
4 1026 (1982); *see also* Rules 2(c)(1), (2), Rules Governing Section 2254 Cases in
5 the United States District Courts (federal habeas corpus petition must “specify all
6 the grounds for relief available to the petitioner” and must “state the facts
7 supporting each ground”).

8 Second, with respect to Ms. Soto’s alleged smuggling of drugs to Mr.
9 Noguera while he was in the Orange County Jail, Petitioner has failed to provide
10 sufficient evidence his trial attorneys were aware of Ms. Soto’s conduct, or that
11 her conduct prejudiced the defense in any way. While Petitioner proffers the
12 declaration of Petitioner’s wife, Francesca Mozqueda, in support of his contention
13 that counsel knew of Ms. Soto’s drug smuggling, her declaration does not support
14 this supposition. In the declaration Ms. Mozqueda generally states that she “told
15 Mr. Campos *what Irma was doing*. . . and how damaging it was to Bill’s defense . .
16 . [and] Mr. Campos simply said, ‘okay.’ ” (Exhibit GG at 8.) Ms. Mozqueda’s
17 statement is vague and, if anything, refers to threats Ms. Soto allegedly made to
18 get Ms. Mozqueda to stop seeing Petitioner. “Because Irma was creating a lot of
19 problems for me with my parents (embarrassing my mother with her best friend,
20 telling her family about Bill’s case and telling Bill lies about me), *I finally told Mr.*
21 *Campos what Irma was doing*.” (Exhibit GG at 8.)

22 There is no evidence to support the suggestion that counsel were made
23 aware of illegal drug smuggling activities on the part of their employee and simply
24 responded “okay.” In fact, it is highly dubious that any attorney, upon being
25 informed of their employee’s illegal conduct, would turn a blind eye. With respect
26 to “non-lawyer assistants,” an attorney has an ethical responsibility to “make
27 reasonable efforts to ensure that the person’s conduct is compatible with the
28 professional obligations of the lawyer.” ABA Rule 5.3(b). Moreover, “a lawyer

1 shall be responsible for conduct of such person that would be a violation of the
 2 Rules of Professional Conduct if engaged in by a lawyer if: (1) the lawyer orders
 3 or, with the knowledge of the specific conduct ratifies the conduct involved; or (2)
 4 the lawyer knows of the conduct at a time when its consequences can be
 5 avoided or mitigated but fails to take reasonable remedial action.” ABA Rule
 6 5.3(c). Ms. Mozqueda’s conclusory declaration is insufficient evidence to support
 7 Petitioner’s allegation that his trial counsel were aware of Ms. Soto’s drug
 8 smuggling, and did nothing.

9 Moreover, Petitioner fails to allege how his decision to ingest illicit drugs
 10 violated his constitutional rights or “seriously affected his mental health” so as to
 11 implicate questions of competency. Whether or not Ms. Soto smuggled drugs,
 12 according to Ms. Mozqueda’s declaration, Petitioner sought and obtained illicit
 13 drugs from numerous sources and “often called [her] from jail while he was drunk
 14 and/or on drugs.” (Exhibit GG at 4, 6-7 (“Bill took drugs before and during the
 15 trial. There were two occasions in which two of Bill’s friends were caught trying
 16 to smuggle drugs into the jail. One involved a girl who mailed marijuana and
 17 another a boy. Bill’s mother told me she had split open the soles of Bill’s shoes
 18 and inserted drugs inside. She then had one of Bill’s friends take clothing and the
 19 shoes to the jail for court the following day.”)

20 Petitioner has failed to establish that the California Supreme Court’s
 21 resolution of Claim 3 contradicted or unreasonably applied clearly established
 22 federal law, or made an unreasonable determination of the facts. Claim 3 is
 23 DENIED.

24 **B. Ineffective Assistance of Counsel**

25 **1. *Standard for Relief for Ineffective Assistance of Counsel***
 26 ***Claims***

27 The Sixth Amendment guarantees the right to effective assistance of
 28 counsel. *Strickland v. Washington*, 466 U.S. at 686. “The benchmark for judging

1 any claim of ineffectiveness must be whether counsel's conduct so undermined the
2 proper functioning of the adversarial process that the trial cannot be relied on as
3 having produced a just result.” *Id.* To establish ineffective assistance of counsel,
4 Petitioner must demonstrate that (1) counsel's performance was deficient and (2)
5 the deficient performance prejudiced the defense. *Id.* at 687.

6 To prove deficient performance, petitioner must demonstrate that counsel's
7 representation fell below an objective standard of reasonableness under prevailing
8 professional norms. *Id.* at 688; *see also Yarborough v. Gentry*, 540 U.S. 1 (2003)
9 (per curium); *cf. Bobby v. Van Hook*, 558 U.S. 4, 13-14 (2009) (per curium) (Alito,
10 J., concurring) (noting that guidelines such as those promulgated by the American
11 Bar Association, purporting to establish what reasonable attorneys would do, may
12 be helpful but are not the test for determining whether counsel's choices are
13 objectively reasonable). The relevant inquiry is not what defense counsel could
14 have done, but rather whether the choices made by defense counsel were
15 reasonable. *See Babbitt v. Calderon*, 151 F.3d 1170, 1173 (9th Cir.1998), *cert.*
16 *denied*, 525 U.S. 1159 (1999). “Judicial scrutiny of counsel's performance must
17 be highly deferential. . . . A fair assessment of attorney performance requires that
18 every effort be made to eliminate the distorting effects of hindsight.” *See*
19 *Strickland*, 466 U.S. at 689; *Wildman v. Johnson*, 261 F.3d 832, 838 (9th
20 Cir.2001); *Sanders v. Ratelle*, 21 F.3d 1446, 1456 (9th Cir.1994). The Court
21 “must indulge a strong presumption that counsel's conduct falls within the wide
22 range of professional assistance; that is, the defendant must overcome the
23 presumption that, under the circumstances, the challenged action might be
24 considered sound trial strategy.” *Strickland*, 466 U.S. at 689 (internal quotation
25 omitted); *Pinholster*, 563 U.S. at 191.

26 To establish that counsel's deficient performance prejudiced the defense,
27 Petitioner must show “that there is a reasonable probability that, but for counsel's
28 unprofessional errors, the result of the proceeding would have been different. A

1 reasonable probability is a probability sufficient to undermine confidence in the
2 outcome.” *Strickland*, 466 U.S. at 694. “The benchmark for judging any claim of
3 ineffectiveness must be whether counsel’s conduct so undermined the proper
4 functioning of the adversarial process that the trial cannot be relied on as having
5 produced a just result.” *Id.* at 686. The defendant must show that counsel's errors
6 were so serious as to deprive the defendant of a fair trial, a trial whose result is
7 reliable. *Id.* at 688.

8 As both prongs of the *Strickland* test must be satisfied to establish a
9 constitutional violation, a failure to satisfy either requires a petitioner’s ineffective
10 assistance of counsel claim be denied. *Strickland*, 466 U.S. at 697. A federal
11 habeas court considering an ineffective assistance claim need not address the
12 prejudice prong of the *Strickland* test “if the petitioner cannot even establish
13 incompetence under the first prong.” *Siripongs v. Calderon*, 133 F.3d 732, 737
14 (9th Cir.), *cert. denied*, 525 U.S. 839 (1998). Conversely, the court “need not
15 determine whether counsel's performance was deficient before examining the
16 prejudice suffered by the defendant as a result of the alleged deficiencies.”
17 *Strickland*, 466 U.S. at 697.

18 As the Supreme Court highlighted in *Richter*, meeting *Strickland*’s high
19 standard is all the more difficult under the AEDPA. “The pivotal question is
20 whether the state court's application of the *Strickland* standard was unreasonable.
21 This is different from asking whether defense counsel's performance fell below
22 *Strickland*'s standard.” *Richter*, 562 U.S. at 101. The rule of *Strickland*, i.e., that a
23 defense counsel's effectiveness is reviewed with great deference, coupled with
24 AEDPA's deferential standard, results in a “doubly” deferential judicial review
25 process. *See Pinholster*, 563 U.S. at 202; *Cheney v. Washington*, 614 F.3d 987,
26 995 (9th Cir.2010).

27 Surmounting *Strickland*’s high bar is never an easy task. . . . Even
28 under *de novo* review, the standard for judging counsel’s
representation is a most deferential one. Unlike a later reviewing
court, the attorney observed the relevant proceedings, knew of

1 materials outside the record, and interacted with the client, with
 2 opposing counsel, and with the judge. It is all too tempting to
 3 second-guess counsel's assistance after conviction or adverse
 4 sentence. The question is whether an attorney's representation
 5 amounted to incompetence under prevailing professional norms, not
 6 whether it deviated from best practices or most common custom.

7 Establishing that a state court's application of *Strickland* was
 8 unreasonable under §2254(d) is all the more difficult. The standards
 9 created by *Strickland* and §2254(d) are both highly deferential, and
 10 when the two apply in tandem, review is doubly so. The *Strickland*
 11 standard is a general one, so the range of reasonable applications is
 12 substantial. Federal habeas courts must guard against the danger of
 13 equating unreasonableness under *Strickland* with unreasonableness
 14 under §2254(d). When §2254(d) applies, the question is not whether
 15 counsel's actions were reasonable. The question is whether there is
 16 any reasonable argument that counsel satisfied *Strickland's*
 17 deferential standard.

18 *Richter*, 562 U.S. at 105 (internal quotations and citations omitted).

19 **2. CLAIM 4: Petitioner's Trial Counsel Failed to Investigate**
 20 **and Present Available Mental State Defenses, Including**
 21 ***Diminished Actuality, Insanity, Intoxication, and***
 22 ***Unconsciousness, and to Request Related Instructions***

23 In Claim 4, Petitioner alleges that his rights under the First, Fourth, Fifth,
 24 Sixth, Eighth and Fourteenth Amendments were violated by his trial attorney's
 25 failure to investigate and present mental state defenses at the guilt phase of his
 26 capital trial. (Dkt. No. 317 at 56-73.)

27 Petitioner raised this claim as Claim 2 of his March 2, 1998, exhaustion
 28 petition in the California Supreme Court. (Dkt. No. 336, Lodgment 4 at 36-86.)
 On October 17, 2001, the California Supreme Court summarily denied the claim
 on the merits and alternatively denied the claim as untimely. (Dkt. No. 336,
 Lodgment 8.)

Respondent argues that Petitioner has failed to establish that the California
 Supreme Court's resolution of the claim contradicted or unreasonably applied
 controlling United State Supreme Court authority, or made any unreasonable

1 determination of the facts, so as to get out from under the relitigation bar
2 contained in 28 U.S.C. §2254(d). However, because this claim is integrally related
3 to Claim 1, and Petitioner's contention that Mr. Pereyda's conflict of interest
4 prevented him from investigating and presenting any evidence casting Petitioner
5 or the family in a negative light, the Court grants relief with respect to Claim 4.

6 **3. CLAIM 5: Defense Counsel Failed to Investigate, Seek a**
7 **Hearing on and Present Evidence that Petitioner was**
8 **Mentally Incompetent During Crucial Pretrial and Trial**
9 **Proceedings**

10 Claim 5 of the Fourth Amended Petition argues that Petitioner's convictions
11 and sentences violate the Fifth, Sixth, Eighth, and Fourteenth Amendments to the
12 United States Constitution, because his trial attorney failed to investigate and
13 present "readily available evidence" that Petitioner was mentally incompetent
14 during crucial pretrial and trial proceedings. (Dkt. No. 317 at 73-78.)

15 Petitioner raised this claim before the California Supreme Court in Claim 3
16 of his March 2, 1998, exhaustion petition. (Dkt. No. 336, Lodgment 4 at 86-96.)
17 The California Supreme Court summarily denied the claim on the merits and
18 alternatively denied the claim as untimely and barred under *In re Dixon*, 41 Cal.2d
19 756, 759 (1953) because they should have been raised on appeal. (Dkt. No. 336,
20 Lodgment 8.)

21 Respondent contends that Petitioner has failed to establish that the
22 California Supreme Court's resolution of the claim contradicted or unreasonably
23 applied controlling United States Supreme Court authority, or made any
24 unreasonable determination of the facts, and, as such, he is barred from relitigating
25 the claim in federal court. 28 U.S.C. §2254(d); *Pinholster*, 563 U.S. at 181-82.
26 Because Petitioner fails to provide evidence to buttress his claim of *incompetence*,
27 this Court finds that the California Supreme Court was not unreasonable in
28 rejecting the claim on the merits.

a. Facts Presented to the California Supreme Court

Review of Petitioner's 1998 exhaustion petition reveals a number of conclusory statements alleged as facts in support of Claim 3. For example, Petitioner alleged "[t]here was substantial evidence available to trial counsel that Petitioner was mentally incompetent." Moreover, Petitioner claimed he "was unable to understand the nature of the criminal proceedings" and "unable to assist counsel in conducting a defense in a rational manner, due to mental disorders, mental illnesses, and the ingestion of mind-altering drugs." (Dkt. No. 336, Lodgment 4 at 87.) In addition, Petitioner alleged:

- "During relevant court proceedings, Petitioner was irrational and out-of-contact with reality."
- "Petitioner suffered at all relevant times from a debilitating mental illness and thought disorder."
- Counsel did not have Petitioner psychologically or psychiatrically evaluated and reasonable evaluations would have revealed incompetency.
- Had counsel conducted a minimally competent investigation, they would have learned Petitioner was mentally incompetent.
- Petitioner's mental illness was substantially compounded and aggravated by his drug use during pretrial and trial proceedings.
- Petitioner "was in and out of reality."

In support of Claim 3, Petitioner submitted declarations from three former inmates in the Orange County Jail (Exhibits DD, EE, and FF), his mother (Exhibit AA), his wife (Exhibit GG), a psychiatrist (Exhibit B), and a psychologist (Exhibit Y).

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b. California Supreme Court's Adjudication of Petitioner's Claim was Not Unreasonable Within the Meaning of §2254(d)

Underlying Petitioner's claim of ineffective assistance is the assumption that he was, indeed, incompetent, such that trial counsel's failure to investigate and present evidence of that incompetence was "deficient" performance and "prejudicial." Thus, in order to find the California Supreme Court's summary denial "unreasonable" within the meaning of §2254(d), this Court must find that Petitioner presented evidence of Petitioner's incompetence. However, as discussed below, *infra* section IV.C., this Court finds that Petitioner's claim of incompetence is unsupported by the evidence. Claim 5 is DENIED.

4. CLAIMS 6 and 7: Petitioner's Trial Counsel Unreasonably (1) Failed to Investigate Any Other Motive for the Homicide, Other than that Relied Upon by the Prosecution; (2) Failed to Present Available Evidence that the Homicide Was Caused by Very Different Reasons that Could Not Have Reasonably Resulted in a Finding of First Degree Murder with a Special Circumstance; and (3) Failed to Investigate and Rebut False Prosecution Assertions Regarding the Victim, Jovita Navarro, Her Daughter, Dominique Navarro, and the Homicide

In Claims 6 and 7, Petitioner alleges that his rights under the First, Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments were violated by his trial attorney's failure to investigate and present evidence in support of alternative motives for the homicide that would have belied the prosecution's first degree murder theory and defeated the financial gain special circumstance allegation that made Petitioner eligible for the death penalty. (Dkt. No. 317 at 78-96.)

Petitioner raised these issues for the first time in state court in Claim 1 of his initial state habeas petition. (Dkt. No. 148, Lodgment 4 at 10- 36.) The California

1 Supreme Court summarily rejected the claim on the merits. (Dkt. No. 336,
 2 Lodgment 3.) Petitioner raised these claims again as Claims 4 and 5 of his March
 3 2, 1998, exhaustion petition in the California Supreme Court. (Dkt. No. 336,
 4 Lodgment 4 at 96-138.) On October 17, 2001, the California Supreme Court
 5 summarily denied the claims on the merits and alternatively denied the claims as
 6 untimely. (Dkt. No. 336, Lodgment 8.)

7 Respondent contends that Petitioner has failed to establish that the
 8 California Supreme Court's resolution of Claims 6 and 7 contradicted or
 9 unreasonably applied controlling United State Supreme Court authority, or made
 10 any unreasonable determination of the facts, so as to get out from under the
 11 relitigation bar contained in 28 U.S.C. §2254(d).

12 Because these claims are integrally related to Claim 1, and Petitioner's
 13 contentions that Ms. Salinas controlled the defense and, consequently, Mr.
 14 Pereyda's conflict of interest prevented him from investigating and presenting a
 15 proper defense or any evidence casting Petitioner or the family in a negative light,
 16 the Court grants relief with respect to Claims 6 and 7.

17 **5. CLAIM 8: Petitioner's Trial Counsel Unreasonably Failed to**
 18 **Object to the Prosecutor's Improper and Prejudicial**
 19 **Arguments and Evidence**

20 In Claim 8, Petitioner argues that Mr. Pereyda provided constitutionally
 21 deficient representation in failing to object to multiple improper arguments made
 22 by the prosecutor during penalty phase closing argument. Petitioner cites the trial
 23 record and broadly asserts that "counsel had no tactical reason for failing to object
 24 to these acts of prosecutorial misconduct," such that "counsel's performance fell
 25 below an objective standard of reasonableness" and Petitioner suffered prejudice
 26 at the guilt and penalty phases of the trial. (Dkt. No. 317 at 100-101.)

27 As discussed *infra*, Petitioner raised the underlying prosecutorial
 28 misconduct claims before the California Supreme Court on direct appeal, and

1 argued that his attorneys were ineffective for failing to object. (Dkt. No. 148,
2 Lodgment 1.) The state court found Petitioner had forfeited all but one of the
3 prosecutorial misconduct claims due to the failure to object, and also found all of
4 the claims to be without merit because, in each instance, the prosecutor acted
5 properly. *People v. Noguera*, 4 Cal.4th 599, 638, 643-47 (1992). Petitioner raised
6 the prosecutorial misconduct claims again in his June 9, 2003, exhaustion petition.
7 (Dkt. No. 336, Lodgment 9.) The California Supreme Court summarily denied the
8 claims on the merits and alternatively denied the claims as untimely, repetitive,
9 and *Dixon* barred. (Dkt No. 336, Lodgment 12.) Petitioner raised the ineffective
10 assistance claim for the first time as Claim 9 in his initial state habeas petition, and
11 again as Claim 3 of the 2003 exhaustion petition. (Dkt. No. 148, Lodgment 4 at
12 88-91; Dkt. No. 336, Lodgment 9 at 93-96.) On both occasions, the Court
13 summarily denied the claim on the merits and, with respect to the exhaustion
14 petition, alternatively denied the claim as untimely and successive. (Dkt. No. 336,
15 Lodgments 3 & 12.)

16 Respondent argues that Petitioner has failed to meet his burden of showing
17 that the California Supreme Court's resolution of Claim 8 contradicted or
18 unreasonably applied controlling United States Supreme Court authority, or made
19 any unreasonable determination of the facts, and, as such, he is barred from
20 relitigating the claim in federal court. 28 U.S.C. §2254(d); *Pinholster*, 563 U.S. at
21 181-82. This Court agrees.

22 Because there was no reversible misconduct on the part of the prosecutor in
23 making his penalty phase closing argument, as discussed *infra*, it was not deficient
24 performance for defense counsel to fail to object. *Strickland* and its progeny do
25 not require trial counsel to make futile objections; thus, the decisions of
26 Petitioner's counsel were reasonable under these circumstances. *See Sanders*, 21
27 F.3d at 1456; *Miller v. Keeney*, 882 F.2d 1428, 1434 (9th Cir. 1989) (finding that a
28 challenge to a futile objection fails both prongs of *Strickland*). Moreover, as the

1 Ninth Circuit explained in *United States v. Necochea*, 986 F.2d 1273 (9th Cir.
 2 1993), “[b]ecause many lawyers refrain from objecting during opening statement
 3 and closing argument, absent egregious misstatements, the failure to object during
 4 closing argument and opening statement is within the ‘wide range’ of permissible
 5 professional legal conduct.” *Id.* at 1281. Under *Necochea*, trial counsel’s
 6 decision not to object to the prosecutor’s comments, possibly to avoid highlighting
 7 them, was a reasonable strategic decision. *Cunningham v. Wong*, 704 F.3d 1143,
 8 1159 (9th Cir.), *cert. denied*, ___ U.S. ___, 134 S.Ct. 169 (2013).

9 Under *Strickland*’s second prong, even if counsel should have objected,
 10 there is no reasonable likelihood that the outcome of the proceeding would have
 11 been different. The trial judge properly instructed the jury that closing arguments
 12 are not evidence. (CT 1379; RT 8678.) Petitioner has failed to demonstrate that
 13 the California Supreme Court’s denial of this claim contradicted or unreasonably
 14 applied controlling United States Supreme Court authority, or amounted to an
 15 unreasonable determination of the facts under section 2254(d). Claim 8 is
 16 DENIED.

17 **6. CLAIM 9: Petitioner’s Trial Counsel Unreasonably Failed to**
 18 ***Seek Recusal of the Trial Judge***

19 In Claim 9, Petitioner argues that his trial counsel provided constitutionally
 20 deficient representation in failing to seek recusal of the trial judge. Petitioner
 21 suggests that the trial court made inappropriate remarks throughout the trial which
 22 demonstrated a bias against the defense. (Dkt. No. 317 at 101-107.)

23 Petitioner raised this claim for the first time in state court as Claim 6 of his
 24 March 1998 exhaustion petition. (Dkt. No. 336, Lodgment 4 at 139-42.) The
 25 California Supreme Court summarily denied the claim on the merits and
 26 alternatively denied the claim as untimely. (Dkt. No. 336, Lodgment 8.)

27 Respondent argues that Petitioner has failed to show that the California
 28 Supreme Court’s resolution of the claim contradicted or unreasonably applied

1 controlling United States Supreme Court authority, or made an unreasonable
2 determination of the facts. 28 U.S.C. §2254(d).

3 Under California law, “[a] judge shall be disqualified if . . . [f]or any reason
4 . . . [a] person aware of the facts might reasonably entertain a doubt that the judge
5 would be able to be impartial.” Code Civ. Proc. § 170.1, subd. (a)(6)(A)(iii). “The
6 standard for disqualification ... is fundamentally an objective one.” *United Farm*
7 *Workers of America v. Superior Court*, 170 Cal.App.3d 97, 104 (1985). Thus,
8 “[d]isqualification is mandated if a reasonable person would entertain doubts
9 concerning the judge's impartiality.” *Christie v. City of El Centro*, 135
10 Cal.App.4th 767, 776 (2006). “While this objective standard clearly indicates that
11 the decision on disqualification not be based on the judge's personal view of his
12 own impartiality, it also suggests that the litigants' necessarily partisan views not
13 provide the applicable frame of reference.” *United Farm Workers*, 170 Cal.App.3d
14 at 104 (fn.omitted). “[M]ost matters relating to judicial disqualification [do] not
15 rise to a constitutional level.” *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868,
16 876 (2009). “[T]he due process clause should not be routinely invoked as a ground
17 for judicial disqualification. Rather, it is the exceptional case presenting extreme
18 facts where a due process violation will be found.” *People v. Freeman*, 47 Cal.4th
19 993, 1005 (2010).

20 In making his claim regarding the trial court's alleged bias in favor of the
21 prosecution, and against the defense, Petitioner cites: remarks the judge
22 made to the jury regarding the prosecutor's wife's pregnancy-related problems; his
23 comment during a bench conference, after limiting cross-examination of
24 prosecution witness Abram, referencing the inevitable appeal; an inappropriate
25 comment the judge made during cross-examination of prosecution witness
26 Jackson; and a statement the court made outside the presence of the jury regarding
27 Petitioner's alibi witness. Petitioner argues that the court's “comments injected an
28 inappropriate note of levity into proceedings where Petitioner's life was at stake,

1 and they put Petitioner's counsel on notice of the court's bias against Petitioner
 2 and the need to make a motion for recusal." (Dkt. No. 317 at 107.) Petitioner
 3 argues that this bias violated his due process right to a fair trial.

4 To demonstrate ineffective assistance of counsel for failure to seek recusal,
 5 a petitioner must show that his attorney provided constitutionally deficient
 6 representation and, as a result, the petitioner suffered prejudice. There is a "strong
 7 presumption that counsel's conduct falls within the wide range of acceptable
 8 professional assistance." *Strickland*, 466 U.S. at 689.

9 Petitioner has failed to demonstrate that the California Supreme Court's
 10 denial of this claim contradicted or unreasonably applied controlling United States
 11 Supreme Court authority, or amounted to an unreasonable determination of the
 12 facts under section 2254(d). The state court could have reasonably concluded that
 13 none of the judge's remarks biased the jury in the prosecution's favor, such that
 14 the judge should have been recused, and such that trial counsel's failure to object
 15 to the remarks constituted ineffective representation. Failure to make a futile
 16 objection does not constitute ineffective assistance of counsel. *See, e.g., James v.*
 17 *Borg*, 24 F.3d 20, 27 (9th Cir.), *cert. denied*, 513 U.S. 935 (1994); *Morrison v.*
 18 *Estelle*, 981 F.2d 425, 429 (9th Cir. 1992), *cert. denied*, 508 U.S. 920 (1993).
 19 Moreover, the California Supreme Court could have reasonably concluded that
 20 Petitioner failed to meet his burden of demonstrating that he suffered prejudice
 21 from the judge's remarks. Claim 9 is DENIED.

22 **7. CLAIM 10: Trial Counsel Failed to Investigate and Present**
 23 ***Available Mitigating Evidence at the Penalty Phase***

24 In Claim 10, Petitioner alleges that his rights under the Fifth, Sixth, Eighth
 25 and Fourteenth Amendments were violated by his trial attorney's failure to
 26 investigate and present available mitigating evidence at the penalty phase. (Dkt.
 27 No. 317 at 107-21.)

28 Petitioner first raised this claim in state court as Claim 2 of his initial state

1 habeas petition. (Dkt. No. 148, Lodgment 4 at 36-57.) On September 29, 1993, the
 2 California Supreme Court summarily denied the claim on the merits. (Dkt. No.
 3 336, Lodgment 3.) Petitioner raised the claim again as Claim 4 of his June 2003,
 4 exhaustion petition in the California Supreme Court. (Dkt. No. 336, Lodgment 9 at
 5 50-74.) The California Supreme Court again summarily denied the claim on the
 6 merits and, alternatively, denied the claim as untimely, barred for having
 7 previously been raised and rejected in a prior petition, and successive. (Dkt. No.
 8 336, Lodgment 12.)

9 Respondent contends that Petitioner has failed to establish that the
 10 California Supreme Court's resolution of the claim contradicted or unreasonably
 11 applied controlling United State Supreme Court authority, or made any
 12 unreasonable determination of the facts, so as to get out from under the relitigation
 13 bar contained in 28 U.S.C. §2254(d).

14 Because these claims are integrally related to Claim 1, and Petitioner's
 15 contention that Mr. Pereyda's conflict of interest prevented him from investigating
 16 and presenting any evidence casting Petitioner or the family in a negative light, the
 17 Court grants relief with respect to Claim 10.

18 **8. CLAIM 11: Trial Counsel Failed to Investigate and Present**
 19 ***Evidence that Would Have Significantly Undermined the***
 20 ***Credibility of the Prosecution's Key Witness, Ricky Abram***

21 In Claim 11, Petitioner argues that his trial counsel provided
 22 constitutionally deficient representation in failing to investigate and present
 23 evidence undermining the credibility of the prosecution's "key witness," Ricky
 24 Abram. Petitioner suggests counsel could have presented psychiatric evidence
 25 from Mr. Abram's medical file from California Youth Authority and expert
 26 testimony suggesting Mr. Abram was an unreliable witness. (Dkt. No. 317 at 123-
 27 28.) Petitioner argues that but for his counsel's failure to impeach Abram, the jury
 28 "would have been unable to convict Petitioner of first degree homicide or sentence

1 him to death based on Abram's weak testimony." (Dkt. No. 317 at 129.)

2 Petitioner first raised this claim in state court as Claim 4 of his initial state
3 habeas petition. (Dkt. No. 148, Lodgment 4 at 64-76.) On September 29, 1993, the
4 California Supreme Court summarily denied the claim on the merits. (Dkt. No.
5 336, Lodgment 3.) Petitioner raised the claim again as Claim 5 of his June 2003,
6 exhaustion petition in the California Supreme Court. (Dkt. No. 336, Lodgment 9 at
7 74-90.) The California Supreme Court summarily denied the claim on the merits
8 and, alternatively, denied the claim as untimely and successive. (Dkt. No. 336,
9 Lodgment 12.)

10 Respondent contends that Petitioner has failed to establish that the
11 California Supreme Court's resolution of the claim contradicted or unreasonably
12 applied controlling United State Supreme Court authority, or made any
13 unreasonable determination of the facts, so as to get out from under the relitigation
14 bar contained in 28 U.S.C. §2254(d). Respondent notes that trial counsel sought to
15 undermine Mr. Abram's credibility at trial, including questioning him regarding
16 his mental state after he was arrested, held in custody, and medicated due to stress,
17 depression, and emotional and sleeping problems.¹² (RT 5028-30, 5034-35, 5069-
18 70.) Mr. Abram testified that he was housed in the hospital unit, taking anti-
19 depressants and other medication which caused him to be drowsy for long periods
20 of time.¹³ (RT 5071, 5073.) He admitted he was going through some memory loss,
21 but denied telling an investigator that he had "made up some rather wild stories."
22 (RT 5036-38.)

23 In evaluating the reasonableness of a state court's rejection of a claim of
24

25 ¹² Outside the presence of the jury, the prosecutor noted his concern that Mr.
26 Abram's doctor-patient privilege be protected, and revealed that Mr. Abram "was
27 undergoing psychiatric counseling because he attempted to commit suicide," and
28 had been labeled as schizophrenic. (RT 5032.)

¹³ The trial court denied Mr. Pereyda's request to question Mr. Abram about his
suicide attempts, noting that he would need an expert to say that people who are
depressed aren't truthful. (RT 5072.)

1 ineffective assistance of counsel, this Court must give trial counsel “the benefit of
2 the doubt” and must “affirmatively entertain the range of possible reasons” he may
3 have had for proceeding as he did. *Pinholster*, 563 U.S. at 196. Nevertheless,
4 assuming without deciding that counsel provided deficient representation in
5 failing to present available evidence that could have undermined the credibility of
6 Mr. Abram, Petitioner has not demonstrated that the California Supreme Court
7 was unreasonable in finding he suffered no prejudice.

8 At trial, Abram testified consistently with statements he made to police,
9 regarding a meeting he had with Petitioner and Dominique in March 1983. On the
10 way to pick up Dominique at her house, Petitioner asked Abram for his help in
11 Petitioner’s plan to kill Jovita. After they picked up Dominique, the three drove to
12 Bob’s Big Boy, where they all discussed the plan to murder Jovita. According to
13 Abram, Petitioner wanted the murder scene to look like Jovita had been killed by a
14 burglar in the middle of the night, and Dominique raped. Petitioner would kill
15 Jovita with a shotgun and have intercourse with Dominique, while Abram staged
16 the house, taking any items of value. Dominique’s role was to let the two men in
17 the house and, after the murder, to run hysterically to neighbors, reporting the
18 break-in, rape, and murder. Abram testified that Petitioner promised him \$5,000
19 (from the \$25,000 sum Petitioner and Dominique expected to get from Jovita’s
20 insurance) and the opportunity to live in Jovita’s house with Petitioner and
21 Dominique because “the house would be passed on to the daughter after the
22 mom’s death.” In early April, Abram was arrested for auto theft, convicted and
23 imprisoned. He was in custody at the time Jovita was murdered, and did not learn
24 of her death until Detective Keltner interviewed him on December 14, 1983, at the
25 Ione Juvenile Detention Facility. (RT 4930-80.)

26 The evidence presented at trial corroborated Abram’s statements and
27 testimony about the robbery/murder plan he discussed with Petitioner and
28 Dominique at Big Boy. After the killing, Dominique ran to neighbors, acting

1 hysterically and claiming an intruder had entered. (RT 5437, 5445.) Moreover,
2 there was evidence Dominique was very interested in the financial benefits to her
3 resulting from her mother's death. (RT 6162, 6164.) There was no evidence
4 introduced at trial that supported a motive for Abram to lie or wrongly implicate
5 Petitioner. Moreover, there was no evidence that Abram's statement to police was
6 provided to him by detectives. At time of his interview, Abram's California Youth
7 Authority supervisor, Jeff Harada, was present. (RT 5108, 5110-11.) Harada
8 testified that Detective Keltner did not provide details of the crime before he
9 began recording Abram's statement. (RT 5124.)

10 While perhaps Petitioner's trial counsel could have presented additional
11 evidence impeaching Abram, this Court does not find that the California Supreme
12 Court was unreasonable in determining that this cumulative evidence would not
13 have changed the jury's verdict. Evidence that Mr. Abram suffered from
14 Borderline Personality Disorder and was treated for mental health problems while
15 in the California Youth Authority would not have resulted in a different verdict in
16 this case. The California Supreme Court's finding of no constitutional error was
17 not an unreasonable application of clearly established federal law under section
18 2254(d)(1), nor an unreasonable determination of the facts under section
19 2254(d)(2). Claim 11 is DENIED.

20 **9. CLAIM 12: Trial Counsel Failed to Present Evidence that**
21 **Prosecution Expert Witness Norman Sperber Perjured**
22 **Himself**

23 In Claim 12, Petitioner argues that trial counsel provided constitutionally
24 deficient representation in failing to present evidence that one of the prosecution's
25 bite-mark experts, Dr. Norman Sperber, perjured himself when he testified that he
26 was the chief forensic dentist for the FBI. (Dkt. No. 317 at 132, citing RT 6206.)
27 Petitioner contends that, because there were dueling experts on the bite mark
28 issue, and "the credibility of the experts testifying on the issue was a key factual

1 determination for the jury,” impeachment of Dr. Sperber would have undermined
2 the prosecution’s case, providing the jury reasonable doubt regarding the origin of
3 Jovita’s leg injury, and altering the verdict in Petitioner’s trial. (Dkt. No. 317 at
4 133.)

5 Petitioner first raised this claim in state court as Claim 7 of his initial state
6 habeas petition. (Dkt. No. 148, Lodgment 4 at 84-87.) On September 29, 1993,
7 the California Supreme Court summarily denied the claim on the merits. (Dkt. No.
8 336, Lodgment 3.) Petitioner raised the claim again as Claim 6 of his June 2003,
9 exhaustion petition in the California Supreme Court. (Dkt. No. 336, Lodgment 9 at
10 90-93.) The California Supreme Court summarily denied the claim on the merits
11 and, alternatively, denied the claim as untimely and successive. (Dkt. No. 336,
12 Lodgment 12.)

13 Respondent contends that Petitioner has failed to establish that the
14 California Supreme Court’s resolution of the claim contradicted or unreasonably
15 applied controlling United State Supreme Court authority, or made any
16 unreasonable determination of the facts, so as to get out from under the relitigation
17 bar contained in 28 U.S.C. §2254(d). Respondent suggests that it is not clear that
18 Dr. Sperber provided false testimony and, in fact, “his testimony in context
19 suggests otherwise” because his work with the FBI “was but part of a long
20 curriculum vitae” that demonstrated he “was a consultant to a number of
21 organizations.” (Dkt. No. 330 at 42.) Respondent argues that “[e]vidence he was a
22 consultant to the FBI, rather than a regular employee, would not have contradicted
23 his trial testimony,...would not have impeached him... [and] would have had no
24 effect on the trial.” (Dkt. No. 330 at 43.)

25 An examination of the trial record reveals that Dr. Sperber testified in
26 Petitioner’s trial on March 19, 1987. (RT 6186.) After discussing Dr. Sperber’s
27 occupation as “a dentist in general practice,” the prosecutor asked Dr. Sperber
28 about his specialty in forensic odontology. (RT 6202.) Dr. Sperber explained his

1 area of expertise to the jury, and the prosecutor followed up by asking Dr. Sperber
2 if he was “associated at all with any coroner’s facilities.” (RT 6205.) In response,
3 Dr. Sperber indicated that he was the chief forensic dentist for San Diego and
4 Imperial Counties, for the missing persons system for the California Department of
5 Justice, and for the United States Department of Justice, in particular, the FBI. (RT
6 6205-06.) With reference to the FBI, Dr. Sperber described his involvement in
7 creating a national system for identifying people who are either alive or dead. (RT
8 6206.)

9 While Petitioner contends the evidence demonstrates that prosecution’s
10 expert provided false testimony, this Court cannot agree. In context, it is clear that
11 Dr. Sperber did not claim to be an “employee” of the FBI. Rather, and in fact, he
12 told the jury that he had a general dentistry practice and was associated various
13 law enforcement agencies, including the FBI, for which he created computer
14 systems designed to help identify individuals through dental data. The testimony
15 related to his work with the FBI was part of a list of roles he played in various
16 state and federal law enforcement agencies. While Dr. Sperber did state that he
17 was “chief forensic dentist” for the FBI, there is no reason to believe that this
18 testimony misled the jury to think that Dr. Sperber was an FBI employee, rather
19 than a consultant, nor is there reason to believe that this was the jury’s
20 understanding. As such, the California Supreme Court was not unreasonable in
21 finding that Petitioner’s trial attorney did not provide deficient representation in
22 failing to present evidence that Dr. Sperber “perjured himself.” Moreover,
23 Petitioner failed to demonstrate that he suffered any prejudice from counsel’s
24 alleged failure. As Respondent points out, evidence Dr. Sperber was a consultant
25 to the FBI would not have contradicted or impeached him and would not have
26 resulted in a different verdict in this case. The California Supreme Court’s finding
27 of no constitutional error was not an unreasonable application of clearly
28 established federal law under section 2254(d)(1), nor an unreasonable

determination of the facts under section 2254(d)(2). Claim 12 is DENIED.

10. CLAIM 13: Petitioner's Trial Counsel Unreasonably Failed to Make Adequate Objections to Prejudicial and Inadmissible Testimony During the Guilt Phase of Trial

In Claim 13, Petitioner argues that his trial attorney failed to make "adequate objections" to "highly prejudicial arguments and evidence" during the guilt phase of the trial. (Dkt No. 317 at 135.) He cites 17 examples in subclaims (a)-(q). (Dkt. No. 317 at 136-38.)

Petitioner first raised this claim as Claim 7 of his June 2003, exhaustion petition in the California Supreme Court. (Dkt. No. 336, Lodgment 9 at 93-96.) The California Supreme Court summarily denied the claim on the merits and, alternatively, denied the claim as untimely and successive. (Dkt. No. 336, Lodgment 12.)

Respondent contends that Petitioner has failed to establish that the California Supreme Court's resolution of the claim contradicted or unreasonably applied controlling United State Supreme Court authority, or made any unreasonable determination of the facts, so as to get out from under the relitigation bar contained in 28 U.S.C. §2254(d).

"An attorney's failure to object to the admission of inadmissible evidence is not necessarily ineffective" but is presumed to be sound trial strategy which a Petitioner must overcome. *Morris v. California*, 966 F.2d 448, 456 (9th Cir. 1991), *cert. denied*, 506 U.S. 831 (1992). Trial counsel may have chosen not to object, but this Court "need not determine the actual explanation for trial counsel's failure to object, so long as his failure to do so falls within the range of reasonable representation." *Id.*; see e.g., *United States v. Molina*, 934 F.2d 1440, 1448 (9th Cir. 1991) ("From a strategic perspective...many trial lawyers refrain from objecting during closing argument to all but the most egregious misstatements by opposing counsel on the theory that the jury may construe their objections to be a

1 sign of desperation or hyper-technicality.”). Moreover, a petitioner must
2 demonstrate that any objection—assuming sustained—would have altered the
3 outcome at trial. *See Jackson v. Brown*, 513 F.3d 1057, 1082 (9th Cir. 2008)
4 (“[E]ven if [counsel's] failure to object was deficient, we cannot find that, but for
5 his errors, there is a reasonable probability that the jury would not have still
6 convicted [the petitioner].”).

7 a. *Failure to Object to Motion in Limine*

8 Petitioner claims that his trial attorney should have objected to the
9 prosecutor’s motion to preclude the defense from mentioning in opening
10 statements, Ricky Abram’s California Youth Authority psychiatric records and his
11 misdemeanor record. (Dkt. 317 at 136.) Petitioner’s claim is conclusory. *See*
12 *James v. Borg*, 24 F.3d at 26 (“Conclusory allegations which are not supported by
13 a statement of specific facts do not warrant habeas relief.”); *Jones v. Gomez*, 66
14 F.3d at 205 (habeas relief not warranted where claims for relief are unsupported by
15 facts); *see also Gentry v. Sinclair*, 705 F.3d 884, 899-900 (9th Cir.) (rejecting
16 ineffective assistance of counsel claim based on counsel's failure to offer
17 mitigating evidence of petitioner's mental condition because petitioner failed to
18 provide declaration or affidavit from counsel addressing reason counsel failed to
19 present such evidence), *cert. denied*, __ U.S. __, 134 S.Ct. 102 (2013). He fails to
20 explain why counsel should have brought this information up during opening
21 statements, and does not demonstrate that he suffered any prejudice from
22 counsel’s decision not to oppose the motion in limine. Petitioner has not
23 demonstrated that the California Supreme Court’s ruling, finding that he failed to
24 make a showing of ineffective assistance of counsel for failure to object to the
25 motion in limine, was (1) contrary to, or an unreasonable application of clearly
26 established federal law; or (2) premised upon an unreasonable determination of the
27 facts in light of the evidence presented. Accordingly, habeas relief is not
28 warranted. *See* 28 U.S.C. § 2254(d)(1) & (2).

b. Failure to Object to Lack of Foundation

Petitioner argues that trial counsel should have objected to La Habra Police Officer Dennis Guy Serles's testimony regarding Dominique Navarro's bedroom because it lacked foundation. (Dkt. No. 317 at 136, citing RT 4410.) Officer Serles testified that he was the first officer to respond to the crime scene on April 24, 1983. (RT 4394-95.) He waited for backup, and once Sergeant Keltner arrived, they entered the residence together. (RT 4395-96.) In relevant part, Officer Serles testified that he saw signs of struggle in Jovita Navarro's bedroom, but not in any other rooms in the house, including Dominique's bedroom. (RT4410-11.) Petitioner's claim that counsel provided ineffective assistance in failing to make a foundation objection to Officer Serles's testimony is conclusory. The California Supreme Court's conclusion that Petitioner did not demonstrate that trial counsel's performance fell below an objective standard of reasonableness, and that the outcome of Petitioner's trial would not have been effected by a foundation objection, was not contrary to or an unreasonable application of *Strickland*. Accordingly, Petitioner is not entitled to habeas corpus relief on this claim.

c. Failure to Object to Leading Questions

Petitioner claims that trial counsel provided ineffective representation in failing to object to the prosecutor's use of leading questions during his examination of pathologist Richard I. Fukomoto. (Dkt. No. 317 at 136.) Petitioner's claim is conclusory. Not only does Petitioner fail to provide specific examples of the questions he finds objectionable, he fails to indicate how he was prejudiced by counsel's failure to object.¹⁴ Petitioner has not demonstrated that the California Supreme Court's ruling, finding that he failed to make a showing of ineffective assistance of counsel for failure to object to the prosecutor's

¹⁴ The rule against asking leading questions does not apply stringently when an expert witness is being interrogated or when exhibits are being identified. *People v. Campbell*, 233 Cal.App.2d 38, 44(1965) (citing *Bruce v. Western Pipe & Steel Co.*, 177 Cal. 25, 27 (1917)).

1 examination of Dr. Fukomoto, was contrary to or an unreasonable application of
2 *Strickland*. Petitioner is not entitled to habeas corpus relief on this claim.

3 d. Failure to Object to Autopsy Photos

4 Petitioner claims that trial counsel should have objected to the prosecution's
5 introduction of "prejudicial and inflammatory autopsy photos." (Dkt. No. 317 at
6 136.) Once again, Petitioner's claim is conclusory. He does not explain what was
7 prejudicial or inflammatory about any of the photos, or why counsel should have
8 objected. When § 2254(d) applies, "the question is not whether counsel's actions
9 were reasonable. The question is whether there is any reasonable argument that
10 counsel satisfied *Strickland's* deferential standard." *Harrington*, 562 U.S. at 105.
11 Because the extent of Jovita's injuries was highly relevant to the prosecution's
12 case, it was not likely that an objection to the autopsy photos would have been
13 sustained. The failure to object to admissible evidence is not deficient
14 performance. In addition, the evidence against Petitioner was overwhelming such
15 that even had the photos not been introduced, Petitioner was not likely to have
16 received a different result. Accordingly, Petitioner has not demonstrated that the
17 California Supreme Court's ruling, finding that he failed to make a showing of
18 ineffective assistance of counsel for failure to object to the introduction of the
19 autopsy photos, was contrary to or an unreasonable application of *Strickland*.
20 Accordingly, Petitioner is not entitled to habeas corpus relief on this claim.

21 e. Failure to Object to Hearsay During Examination of the
22 Coroner

23 Time of death was a significant issue at trial. The on-scene criminalist, who
24 initially examined Jovita's body provided an initial time of death estimate at
25 between three and six hours prior to his examination, or between 12:30a.m. and
26 3:30a.m. However, based upon Dominique's statement to police regarding the
27 timeline of the evening, and her neighbor Mindy Jackson's 4:43 a.m. 911 call to
28 authorities, the criminalist revised his time of death estimate to 4:45 a.m.

1 Under the defense team's theory of the case, Jovita was attacked at around
2 4:30 a.m, when an intruder entered her home. Dominique heard the commotion in
3 her mother's room, heard her mother scream out to her to "get out," and fled to
4 Mindy Jackson's house. The prosecution's theory of the case relied upon an
5 alternate timeline, in which Petitioner killed Jovita at approximately 2:00 a.m.,
6 after he and Dominique returned from a date. After the killing, the pair staged the
7 crime scene to look as though Jovita was murdered in the course of a rape and
8 burglary, Petitioner returned to his home, and Dominique initiated the charade
9 with her neighbor and police.

10 On direct examination, the prosecution's expert pathologist, Dr. Fukumoto,
11 testified that, based upon the contents of Jovita's stomach, he believed she died
12 within four-hours of her last meal; thus, if she last ate between eight and ten
13 o'clock at night, he estimated her time of death, at the latest, at two o'clock in the
14 morning. (RT 4710-11.)

15 On cross-examination, Petitioner's trial counsel focused much of his
16 questioning on the pathologist's opinion on time of death. Counsel asked Dr.
17 Fukumoto if he, in attempting to estimate Jovita's time of death, "ha[d] some
18 conversations with someone?" The pathologist replied, "yes," and explained that
19 he had conversations with the coroner-investigator who went out to the scene, Mr.
20 King. (RT 4716.) Together, based upon the information they had, Dr. Fukumoto
21 and Mr. King estimated Jovita's time of death at approximately 4:45 a.m. (RT
22 4717.) Subsequently, Dr. Fukumoto testified consistently with that estimate at the
23 preliminary hearing in Petitioner's case, and repeated that testimony at a
24 subsequent proceeding in this matter. (RT 4718.) Dr. Fukumoto admitted that he
25 did not have any way of knowing when Jovita ate for the last time, and affirmed
26 that the 4:45a.m. time of death was fixed after the autopsy. (RT 4721-22.)

27 Petitioner suggests that trial counsel provided constitutionally deficient
28 representation in failing to make a hearsay objection when Dr. Fukumoto provided

1 testimony on redirect regarding statements made by Dominique Navarro, and
 2 deputy coroner King, about the victim's time of death. (Dkt. No. 317 at 136.) In
 3 relevant part, the colloquy to which Petitioner objects went as follows:

4 Q: And isn't it true, Dr. Fukumoto, that Deputy Coroner King received
 5 information from the La Habra Police Department that Dominique Navarro
 6 heard her mother scream at 4:30 in the morning, words to the effect, "Mia,
 7 Mia get out of the house"?¹⁵

8 A: Yes.

9 Q: Now, Dr. Fukumoto, in estimating the time of death, isn't it true that if you
 10 have an eyewitness that actually sees the homicide or hears the homicide,
 11 that is better evidence than, let's say, rigor mortis, lividity, or food that is in
 12 the stomach?

13 A: That's correct.

14 Q: And isn't it true that Deputy Coroner King, at least in the report that you
 15 have read, estimated the time of death based on the statement of the
 16 daughter?

17 * * *

18 A: Yes, sir.

19 (RT 4730-31.)

20 A review of the record demonstrates that this testimony was solicited on
 21 redirect examination, immediately after Petitioner's trial attorney closed his cross-
 22 examination by asking Dr. Fukumoto about the time of death listed on the death
 23 certificate and autopsy report. (RT 4729.) The hearsay was not offered to prove the
 24 truth of the matter asserted, i.e., the victim's time of death. Rather, the prosecution
 25 solicited this information to explain Dr. Fukumoto's preliminary hearing
 26 testimony in Dominique's trial, that the time of death was 4:45a.m.

27 _____
 28 ¹⁵ This statement was also introduced as the statement of a co-conspirator, over defense objection, during the testimony of Officer Keltner. (RT 5174-75.)

1 As Respondent notes, hearsay statements are admissible, when offered by an
2 expert, in reference to his investigation, and when of the type of information
3 reasonably relied upon by such experts in forming opinions. *People v. Nazary*,
4 191 Cal.App.4th 727, 749 (2010) (qualified experts may rely upon and testify to
5 the sources on which they base their opinions, including hearsay of a type
6 reasonably relied upon by professionals in their field), *overruled on other grounds*
7 *in People v. Vidana*, 1 Cal.5th 632, 648 (2016). Dr. Fukumoto relied upon this
8 hearsay in making his initial estimate on time of death. Moreover, and in fact, as
9 Respondent points out, the hearsay supported the defense theory of the case.
10 Petitioner has not demonstrated that the California Supreme Court's ruling,
11 finding that he failed to make a showing of ineffective assistance of counsel for
12 failure to object, was (1) contrary to, or an unreasonable application of clearly
13 established federal law; or (2) premised upon an unreasonable determination of the
14 facts in light of the evidence presented.

15 To the extent that Petitioner contends he was denied his Sixth Amendment
16 right to confront witnesses, this contention is without merit. Counsel was free to
17 cross examine the prosecution's expert, and Petitioner has made no claim that his
18 counsel did so ineffectively. *See United States v. Beltran Rios*, 878 F.2d 1208,
19 1213 (9th Cir.1989) (stating that where a defendant is given ample opportunity to
20 examine an expert whose opinion is based in part on hearsay, no confrontation
21 clause violation occurs); *People v. Sisneros*, 174 Cal.App.4th 142, 153-54 (2009)
22 ("[A]dmission of expert testimony based on hearsay will typically not offend
23 confrontation clause protections because 'an expert is subject to cross-examination
24 about his or her opinions and additionally, the materials on which the expert bases
25 his or her opinion are not elicited for the truth of their contents; they are examined
26 to assess the weight of the expert's opinion.'"); *cf* Fed.R.Evid. 703 (providing that
27 the facts or data upon which an expert bases her opinion need not be admissible in
28 evidence if of a type reasonably relied upon by experts in the particular field), *see*

1 also *United States v. McCollum*, 732 F.2d 1419, 1422 (9th Cir.) (applying Rule
 2 703 to affirm the admission of expert testimony based on hearsay), *cert. denied*,
 3 469 U.S. 920 (1984); *Alejandro v. Brazelton*, No. C 11-4803 CRB (PR), 2013 WL
 4 1729775, at **10-11 (N.D. Cal. April 22, 2013) (expert witness' testimony
 5 concerning the meaning of defendant's tattoos based in part on hearsay statements
 6 from an undisclosed parolee did not violate Confrontation Clause); *Lee v. Gipson*,
 7 No. 11-cv-2855 MCE KJN P, 2012 WL 5349506 (E.D. Cal. Oct. 26, 2012
 8 (concluding that *Crawford* does not undermine the established rule that experts
 9 can testify to their opinions on relevant matters and may relate the information and
 10 sources upon which they rely in forming those opinions)); *Lopez v. Horel*, Civ.
 11 No. 07-4169, 2011 WL 940054, at *11 (C.D. Cal. Jan. 19, 2011) (“Thus,
 12 *Crawford* does not undermine the established rule that experts can testify to their
 13 opinions on relevant matters and may relate the information and sources upon
 14 which they rely in forming those opinions”). The California Supreme Court was
 15 not unreasonable in finding that Petitioner failed to demonstrate a Confrontation
 16 Clause violation. Accordingly, habeas relief is not warranted. See 28 U.S.C. §
 17 2254(d)(1) & (2).

18 f. *Failure to Object to Testimony Regarding Conversation*
 19 *Between Jovita and Dominique Navarro*

20 Citing three-pages of the record, Petitioner suggests that his trial attorney
 21 provided constitutionally deficient representation in failing to object “on federal
 22 constitutional grounds, or under California Evidence Code §352” to Margaret
 23 Garcia’s testimony regarding a conversation between Jovita and Dominique
 24 Navarro. (Dkt. No. 317 at 137.) A review of the record reveals that counsel’s
 25 hearsay objection to the testimony was initially sustained, but subsequently
 26 overruled. (RT 4842, 4844.) Petitioner fails to indicate what constitutional
 27 objection should have been made, or why Evidence Code 352 was implicated. As
 28 such, Petitioner’s claim is conclusory. He fails to demonstrate either deficient

1 performance or prejudice. The California Supreme Court's conclusion that
2 Petitioner did not demonstrate that trial counsel's performance fell below an
3 objective standard of reasonableness and that the outcome of Petitioner's trial was
4 not affected by counsel's failure to object was not contrary to or an unreasonable
5 application of *Strickland*. Accordingly, Petitioner is not entitled to habeas corpus
6 relief on this claim.

7 g. Failure to Object to Testimony Regarding Petitioner's
8 Hospitalization

9 Again citing Margaret Garcia's testimony, Petitioner contends trial counsel
10 should have objected to "hearsay statements allegedly made by Jovita Navarro to
11 the effect that Petitioner had been hospitalized because he had been stabbed."
12 (Dkt. No. 317 at 137.) As Respondent points out, Noguera used the fact that he
13 had been stabbed as part of his defense and, as such, counsel's failure to object to
14 Ms. Garcia's testimony was consistent with his defense strategy. Petitioner fails to
15 provide any explanation as to how counsel's failure to object to this testimony
16 prejudiced him. The California Supreme Court was not unreasonable in finding
17 that Petitioner failed to make a showing of ineffective assistance of counsel for
18 failure to object.

19 h. Failure to Object to Testimony Regarding Insurance

20 Darlene Alves, Group Insurance Coordinator for the Orange County
21 Employee's Association, was called by the prosecution to testify as the custodian
22 of records for Jovita Navarro's insurance with the county. (RT 4913-14.) Ms.
23 Alves testified that Jovita had a \$6,000 life insurance policy, a \$6,000 accidental
24 death policy, and \$1000 in accidental death benefits. (RT 4914.) According to the
25 insurance policies, Dominique Navarro was beneficiary. (RT 4915-16.) Petitioner
26 argues that trial counsel should have made an unspecified constitutional objection
27 and a California Evidence Code §352 objection to this testimony. Petitioner fails
28 to indicate what constitutional objection should have been made, or why Evidence

1 Code 352 was implicated. As such, Petitioner's claim is conclusory. He fails to
 2 demonstrate either deficient performance or prejudice. The California Supreme
 3 Court was not unreasonable in finding that Petitioner failed to make a showing of
 4 ineffective assistance of counsel for failure to object.

5 i. Failure to Seek Limiting Instruction Regarding
 6 Identification of Ricky Abram

7 Prosecution witness Officer Keltner testified on direct examination that he
 8 interviewed Ricky Abram on December 14 1983. (RT 5179) He explained that he
 9 "learned through [his] investigation that there had been a black person seen with
 10 Noguera with a tonfa. And [he] found out that this person was identified as Ricky
 11 Abram." (RT 5179-80.) Petitioner asserts that trial counsel "unreasonably and
 12 inexplicably failed to seek a limiting instruction" with respect to this testimony.
 13 (Dkt. No. 317 at 137.) Petitioner fails to identify the basis for any objection, or
 14 what type of limiting instruction should have been given. As such, Petitioner's
 15 claim is conclusory. He fails to demonstrate either deficient performance or
 16 prejudice. The California Supreme Court was not unreasonable in finding that
 17 Petitioner failed to make a showing of ineffective assistance of counsel for failure
 18 to object.

19 j. Failure to Object to Officer Keltner's Testimony
 20 Regarding Ricky Abram's Statement that the Truth was
 21 that he was Involved in Planning the Homicide

22 On direct examination, Officer Keltner, testified that he had not recorded his
 23 entire conversation with Mr. Abram. (RT 5181.) Officer Keltner stated that the
 24 purpose of his interview with Mr. Abram was to determine whether he had seen
 25 Petitioner with a tonfa or a glove. (RT 5181-82.) The conversation took a different
 26 turn, and Officer Keltner "got the tape recorder out" after "Ricky stated. . . that he
 27 might as well tell [Officer Keltner] the truth. And the truth was that he was
 28 involved in the planning of this homicide." (RT 5182.) Petitioner argues that trial

1 counsel provided constitutionally deficient representation in failing to move to
2 strike this “inadmissible testimony.” (Dkt. No. 317 at 137.) Petitioner fails to
3 demonstrate how he suffered any prejudice from Officer Keltner’s statement and,
4 specifically, what benefit he would have obtained from objecting. The tape
5 recording, on which Mr. Abram recounted the details of his meeting with
6 Petitioner and Dominique at the Big Boy restaurant, had already been played on
7 the record. (RT 5122.) The California Supreme Court was not unreasonable in
8 finding that Petitioner failed to make a showing of ineffective assistance of
9 counsel for failure to object.

10 k. Failure to Object to Hearsay Statements Regarding
11 Teeth Impressions

12 On direct examination, Officer Keltner testified that in the course of his
13 investigation, he learned of bite mark evidence and, as a result, made arrangements
14 to have teeth impressions taken from a number of individuals including Petitioner
15 and Dominique. (RT 5187-88.) With respect to other people from whom
16 impressions were collected, the prosecutor asked Officer Keltner for the rationale
17 behind the collection. (RT 5188.) Citing just a single page of the record,
18 Petitioner argues that trial counsel was ineffective in failing to object to
19 “numerous inadmissible hearsay statements . . . as to why the teeth impressions
20 were taken of certain individuals.” (Dkt. No. 317 at 137, citing RT 5188.)
21 Petitioner’s claim is conclusory. He fails to demonstrate how he suffered any
22 prejudice from Officer Keltner’s statements and what benefit he would have
23 obtained from objecting. The California Supreme Court was not unreasonable in
24 finding that Petitioner failed to make a showing of ineffective assistance of
25 counsel for failure to object.

26 l. Failure to Object to Testimony About Navarro Residence

27 Petitioner contends that his trial attorney provided ineffective representation
28 in failing to object to the testimony of prosecution witness Connie Sue Lowe who

1 testified “about the Navarro residence.” (Dkt. No. 317 at 137-38, citing RT 5262-
 2 82.) Petitioner suggests that counsel should have objected “on federal
 3 constitutional grounds or under California Evidence Code §352.” (Dkt. No. 317 at
 4 137.) Petitioner’s claim is conclusory. Petitioner fails to identify the basis for any
 5 objection, or to demonstrate either deficient performance or prejudice. The
 6 California Supreme Court was not unreasonable in finding that Petitioner failed to
 7 make a showing of ineffective assistance of counsel for failure to object.

8 m. Failure to Object to Testimony About Jovita’s Statements

9 During his direct examination of witness Mindy Jackson, the Navarro’s
 10 neighbor, the prosecutor questioned Ms. Jackson about Jovita’s opinion of
 11 Dominique’s relationship with Petitioner. Ms. Jackson testified that Jovita did not
 12 like them dating “because the two got in trouble together.” (RT 5392-93.) She
 13 went on to say that Dominique had been skipping school, that Jovita planned to
 14 move to make the relationship more difficult to maintain, and that Dominique had
 15 a curfew. (RT 5393-96.) Petitioner argues that trial counsel provided
 16 constitutionally deficient representation in failing to request a limiting instruction
 17 with regard to Jovita’s statements “that Petitioner was a bad influence on . . .
 18 Dominique. . .” (Dkt. No. 3177 at 138.) However, the Court did instruct the jury
 19 during Ms. Jackson’s testimony that, “with regards to the statements by the alleged
 20 victim in the case, Jovita Navarro, to this [Ms. Jackson], [the jury was] to consider
 21 those statements only for the state of mind of the victim and for no other reason.”
 22 (RT 5395-96.) The California Supreme Court’s finding of no constitutional error
 23 was not an unreasonable application of clearly established federal law under
 24 section 2254(d)(1), nor an unreasonable determination of the facts under section
 25 2254(d)(2).

26 n. Failure to Object to Steve Arce’s Testimony Regarding
 27 Statements of Third Parties

28 The prosecution called Steve Arce to testify at Petitioner’s trial. He testified

1 that he had seen the martial arts weapon depicted in People's Exhibits 51A in
2 Petitioner's car. (RT 5752-53.) Mr. Arce also testified that a couple of weeks
3 before Jovita's death, he heard Petitioner say that "Dominique's mom didn't want
4 [Dominique] to go out with him and he wanted to kill [Jovita]." (RT 5754.) Over
5 a defense objection under Evidence Code 352, the Court permitted the prosecution
6 to question Mr. Arce regarding two prior incidents when Petitioner used martial
7 arts. (RT 5758-61.) The trial court found the prejudicial impact of the testimony
8 to be outweighed by its probative value. (RT 5756-57.) On cross-examination,
9 Petitioner's trial attorney questioned Mr. Arce about why, sometime after July 6,
10 1983, he called the La Habra Police for assistance. (RT 5815-16.) In reply, Mr.
11 Arce testified that "some guys came to [his] house threatening [him], telling [him
12 that he] better not testify." (RT 5816.) Subsequently, on redirect, the prosecution
13 asked some follow-up questions about the incident. The court overruled a defense
14 relevancy objection and allowed Mr. Arce to provide additional details about why
15 he called the police. He testified that "guys came up to [his] door and they said if
16 [he] didn't want to end up like Dominique's mom, . . . [he] wouldn't testify." (RT
17 5820.) They mentioned Petitioner's name, and Mr. Arce subsequently told police
18 about the incident. (RT 5820.)

19 Petitioner argues that trial counsel provided ineffective assistance in failing
20 to raise unspecified "federal constitutional or hearsay objections, or objections
21 under Evidence Code §352" to Mr. Arce's testimony about the threats. (Dkt. No.
22 317 at 138.) However, as Respondent notes, evidence of threats made to a witness
23 is admissible where it aids the jury in assessing the witness's credibility. Under
24 state law, evidence a witness was threatened and is afraid to testify is relevant to
25 the credibility of that witness and is therefore admissible. Evid.Code, § 780;
26 *People v. Warren*, 45 Cal.3d 471, 481 (1988). It is not necessary to show threats
27 against the witness were made by the defendant personally. *People v. Green*, 27
28 Cal.3d 1, 19-20 (1980). As such, counsel's performance was not deficient.

1 Moreover, in light of strength of the evidence against Petitioner at trial, Petitioner
 2 fails to demonstrate that he suffered prejudice as a result of counsel's failure to
 3 object. The California Supreme Court's finding of no constitutional error was not
 4 an unreasonable application of clearly established federal law under section
 5 2254(d)(1), nor an unreasonable determination of the facts under section
 6 2254(d)(2).

7 o. Failure to Object to Michael Moore's Testimony
 8 Regarding His Conversation with Steve Arce

9 After Steve Arce testified during the prosecution's case in chief, the defense
 10 called La Habra Police Homicide Investigator Michael Moore to testify regarding
 11 his July 7, 1983 interview of Mr. Arce. (RT 6523.) On cross-examination, the
 12 prosecutor questioned Investigator Moore regarding statements Mr. Arce made
 13 about a fight he had with Petitioner in which Petitioner used martial arts. (RT
 14 6534-35.) Petitioner argues that trial counsel provided ineffective assistance of
 15 counsel in failing to make a hearsay objection to this line of cross-examination.
 16 (Dkt. 317 at 138.) As discussed just above, because Mr. Arce himself testified
 17 regarding the fight, trial counsel could quite reasonably have chosen not to object
 18 to Investigator Moore's testimony regarding the same facts. Moreover, Petitioner
 19 cannot demonstrate that he suffered prejudice as a result of counsel's failure to
 20 object. The California Supreme Court's finding of no constitutional error was not
 21 an unreasonable application of clearly established federal law under section
 22 2254(d)(1), nor an unreasonable determination of the facts under section
 23 2254(d)(2).

24 p. Failure to Object to Use of Phone Company Records to
 25 "Refresh" Witness's Recollection

26 The defense called Petitioner's sister, Sarita Noguera Perez, to testify during
 27 the guilt phase of trial. (RT 6549.) On cross-examination the prosecutor asked Ms.
 28 Perez if she remembered the phone number for the Noguera family's residence on

1 the date of the murder. (RT 6575.) Ms. Perez stated she thought it was 918-6240,
 2 but she “couldn’t tell . . . for sure.” (RT 6575.) The prosecutor subsequently
 3 questioned Ms. Perez regarding People’s Exhibit 106, the phone records of
 4 Antonio Contreras, which indicated “several calls” to the 918-6240 number. (RT
 5 6576.) He asked Ms. Perez if the records refreshed her recollection as to whose
 6 phone number that was, and she said “that was ours.” (RT 6576.) Petitioner
 7 contends that trial counsel provided ineffective assistance in failing to object to
 8 the improper use of the phone company records to refresh Ms. Perez’s recollection
 9 “when her recollection did not need to be refreshed.” (Dkt. No. 317 at 138.)
 10 Petitioner’s claim is entirely without merit. Ms. Perez stated that she was not sure
 11 about the phone number. After the prosecutor showed her the record, she recalled
 12 the number definitively. Petitioner has failed to demonstrate either deficient
 13 performance or prejudice. The California Supreme Court’s finding of no
 14 constitutional error was not an unreasonable application of clearly established
 15 federal law under section 2254(d)(1), nor an unreasonable determination of the
 16 facts under section 2254(d)(2).

17 q. Failure to Object to Hearsay Testimony of Sarita Salinas
 18 Noguera

19 During direct examination of Petitioner’s mother, Sarita Salinas Noguera,
 20 defense counsel asked Ms. Noguera about contacts she had with Dominique after
 21 her mother’s death. (RT 6648-49.) After Ms. Noguera affirmed that Dominique
 22 had called to talk about “her situation,” defense counsel asked “what exactly did
 23 she tell you?” (RT 6649.) The prosecution made a hearsay objection, to which
 24 defense counsel responded that the statement was offered as a “statement of a co-
 25 conspirator.” (RT 6649.) However, because the statement was not offered *against*
 26 a party to the conspiracy, the objection was sustained. (RT 6649-50.) Petitioner
 27 argues that trial counsel provided ineffective assistance in failing to explain that
 28 Dominique’s statements were not being offered for their truth. (Dkt. No. 317 at

1 138.) Trial counsel's arguments, at sidebar, that Dominique's statements fell
2 under an exception to the hearsay rule and were being offered "by way of rebuttal"
3 to the prosecution's contention that "Dominique was continuing to pursue her
4 attorney, drawing the inference she wanted to get the money, get the house," belie
5 Petitioner's contention that Dominique's statements were not being offered for
6 their truth. (RT 6649-50.) Petitioner fails to explain what counsel expected to
7 elicit, and what purpose, other than truth, Dominique's statements would have
8 served. Petitioner has not met his burden under *Strickland* to demonstrate either
9 deficient performance or prejudice. The California Supreme Court's finding of no
10 constitutional error was not an unreasonable application of clearly established
11 federal law under section 2254(d)(1), nor an unreasonable determination of the
12 facts under section 2254(d)(2).

13 Particularly given the other evidence presented at trial, there is nothing to
14 suggest a likelihood that any of the alleged errors discussed in Claim 13 resulted
15 in prejudice. *See United States v. O'Neal*, 937 F.2d 1369, 1376 (9th Cir.1990)
16 (denying ineffective assistance of counsel claim because "[e]ven if defense
17 counsel's failure to call more witnesses fell below the standard of competent
18 representation," evidence of guilt was "strong" and thus defendant could not show
19 prejudice under *Strickland*), *superseded by statute on other grounds as*
20 *recognized by United States v. Sahakian*, 965 F.2d 740, 742 (9th Cir.1992); *Wood*
21 *v. Ryan*, 693 F.3d 1104, 1119 (9th Cir.2012) (denying ineffective assistance- of
22 counsel claim challenging counsel's failure to object to certain evidence because
23 counsel's decisions were consistent with overall trial strategy and "strong
24 evidence" supported jury's verdict in any event), *cert. denied*, __ U.S. __, 134
25 S.Ct. 239 (2013).

26 The California Supreme Court's finding of no constitutional error was not
27 an unreasonable application of clearly established federal law under section
28 2254(d)(1), nor an unreasonable determination of the facts under section

1 2254(d)(2). Claim 13 is DENIED.

2 **11. CLAIM 14: Petitioner's Trial Counsel Unreasonably Failed**
 3 **to Participate in the District Attorney's Pretrial Penalty**
 4 **Evaluation Process Despite Invitations from the District**
 5 **Attorney to Do So**

6 In Claim 14, Petitioner argues that his trial counsel provided ineffective
 7 representation in ignoring pre-trial invitations to participate in hearings to
 8 determine whether Petitioner would face the death penalty. (Dkt. No. 317 at 139-
 9 43.) Petitioner raised this claim for the first time in state court as Claim 7 in his
 10 March 1998 exhaustion petition. (Dkt. No. 336, Lodgment 4 at 142-44.) The
 11 California Supreme Court summarily denied the claim on the merits and,
 12 alternatively, found the claim to be untimely. (Dkt. No. 336, Lodgment 8.)

13 Respondent argues that Petitioner has failed to meet his burden of showing
 14 that the California Supreme Court's resolution of the claims amounted to an
 15 unreasonable application of clearly established Federal law, or an unreasonable
 16 determination of the facts in light of the evidence presented in the state court
 17 proceeding and, as such, Petitioner is barred from relitigating the claims in federal
 18 court. 28 U.S.C. §2254(d); *Pinholster*, 563 U.S. at 181-82.

19 Because this claim is integrally related to Claims 1, 4, 6, 7 and 10, the Court
 20 grants relief with respect to Claim 14.

21 **12. CLAIM 15: Petitioner's Trial Counsel Unreasonably Gave a**
 22 **Closing Argument that Contained Matters Prejudicial to**
 23 **Petitioner**

24 In Claim 15, Petitioner argues that counsel provided deficient representation
 25 during penalty phase closing argument. (Dkt. No. 317 at 143-46.) Petitioner raised
 26 this claim in state court as Claim 8 in his March 1998 exhaustion petition. (Dkt.
 27 No. 336, Lodgment 4 at 144-46.) The California Supreme Court summarily denied
 28 the claim on the merits and, alternatively, found the claims to be untimely. (Dkt.

1 No. 336, Lodgment 8.)

2 Respondent argues that Petitioner has failed to meet his burden of showing
3 that the California Supreme Court's resolution of the claims amounted to an
4 unreasonable application of clearly established Federal law, or an unreasonable
5 determination of the facts in light of the evidence presented in the state court
6 proceeding and, as such, Petitioner is barred from relitigating the claims in federal
7 court. 28 U.S.C. §2254(d); *Pinholster*, 563 U.S. at 181-82. This Court agrees.

8 During his penalty phase closing argument Mr. Pereyda argued:

9 Now, if you have listened to our petition and you grant our
10 petition, Billy will spend the rest of his life in prison.

11 There was an article in the Orange County Register. . . on May
12 18, 1987 headlined as follows: Singleton: How '77 Laws Set Him
13 Free.

14 And they went on to say in the article contained in The Register
15 that he, Lawrence Singleton – I don't know if you recall who he was,
16 but he was convicted of rape and he's the one that dismembered a
17 young girl . . . [¶] [a]nd they went on to say he only spent eight and a
18 half years of a 14-years sentence."

19 That is not going to be Billy's fate. If you give him life, that
20 means that Billy will spend the rest of his life in prison. . .
21 (RT 8671.) Counsel went on to describe all of the things that Petitioner would *not*
22 be able to do in prison, and all of the things in life he would miss out on – things
23 he enjoyed, and things to which he had looked forward. (RT 8671-74.)

24 Petitioner contends that counsel's reference to the infamous Singleton case
25 in Orange County inflamed and horrified the jury, encouraging them to vote of the
26 death penalty, and prejudicing Petitioner. (Dkt. No. 317 at 144-45.) However, read
27 in context, it is clear, as Respondent argues, that "[t]he point of counsel's
28 argument was to impress upon the jury that a life sentence would in fact be terribly

1 punishing to [P]etitioner, and that, unlike Singleton, [P]etitioner would never get
 2 out. . . .” (Dkt. 330 at 53.) Given the context of the case, and the public notoriety
 3 of the Singleton case during the litigation of Petitioner’s capital trial, counsel’s
 4 strategy was not unreasonable.

5 Petitioner also argues that counsel argued “that Petitioner would be better
 6 off dead than with a sentence of life without the possibility of parole.” (Dkt. No.
 7 317 at 144-45.) Counsel did not make such an argument. Rather, counsel made an
 8 effort to describe for the jury the harsh reality of a sentence of life in prison
 9 without possibility of parole. (RT 8671-74.) At no time did counsel suggest that
 10 Petitioner would be better off dead than in prison. He did, however, explain to the
 11 jury that Petitioner was not Lawrence Singleton; he would “spend the rest of his
 12 life in prison.” (RT 8671.) He would never again celebrate holidays or see his
 13 family at home. (RT 8672.) He would never again play the guitar or accordion.
 14 (RT 8672.) He would not have the opportunity to watch his children grow up, or
 15 spend time with them. (RT 8673.) Trial counsel explained that a life without
 16 parole prison sentence for Petitioner meant “spending the rest of his life in a cell”
 17 with only “fear in what the next day brings” as a companion. (RT 8673.) Clearly,
 18 counsel’s strategy was to stress for the jury that life without possibility of parole
 19 was a severe sentence.

20 The California Supreme Court’s finding of no constitutional error was not
 21 an unreasonable application of clearly established federal law under section
 22 2254(d)(1), nor an unreasonable determination of the facts under section
 23 2254(d)(2). Claim 15 is DENIED.

24 **13. CLAIM 16: *The Cumulative Effect of the Ineffective***
 25 ***Assistance of Counsel at the Guilt and Penalty Phases of***
 26 ***Petitioner’s Trial Require that Petitioner’s Conviction and***
 27 ***Death Judgment Be Vacated***

28 In Claim 16, Petitioner argues that he suffered prejudice as a result of the

1 cumulative instances of counsel's alleged ineffective assistance. (Dkt. No. 317 at
 2 146-49.) Petitioner raised this claim for the first time in state court as Claim 9 in
 3 his March 1998 exhaustion petition. (Dkt. 336, Lodgment 4 at 147.) The
 4 California Supreme Court summarily denied the claim on the merits and,
 5 alternatively, found the claims to be untimely. (Dkt. No. 336, Lodgment 8.)

6 Respondent argues that Petitioner has failed to meet his burden of showing
 7 that the California Supreme Court's resolution of the claims amounted to an
 8 unreasonable application of clearly established Federal law, or an unreasonable
 9 determination of the facts in light of the evidence presented in the state court
 10 proceeding and, as such, Petitioner is barred from relitigating the claims in federal
 11 court. 28 U.S.C. §2254(d); *Pinholster*, 563 U.S. at 181-82.

12 In light of this Court's finding, granting relief on Claims 1, 4, 6, 7, 10 and
 13 14, the Court grants relief on Claim 16.

14 **C. Incompetence**

15 **1. *Standard for Relief for Mental Competency Claims***

16 A defendant has a due process right not to be tried while incompetent. *See*
 17 *Drope v. Missouri*, 420 U.S. 162, 172 (1975); *Pate v. Robinson*, 383 U.S. 375, 378
 18 (1966). Competence to stand trial requires (1) "sufficient present ability to consult
 19 with [a] lawyer with a reasonable degree of rational understanding" and (2) "a
 20 rational as well as factual understanding of the proceedings." *Dusky v. United*
 21 *States*, 362 U.S. 402 (1960). When the evidence raises a bona fide doubt about the
 22 defendant's mental competence, due process requires a full competency hearing.
 23 *Pate*, 383 U.S. at 385; *Stanley v. Cullen*, 633 F.3d 852, 860 (9th Cir.2011);
 24 *Hernandez v. Ylst*, 930 F.2d 714, 716 (9th Cir.1991). The question to be asked by
 25 the reviewing court is " 'whether a reasonable judge, situated as was the trial court
 26 judge whose failure to conduct an evidentiary hearing is being reviewed, should
 27 have experienced doubt with respect to competency to stand trial.' " *Stanley*, 633
 28 F.3d at 860 (quoting *de Kaplany v. Enomoto*, 540 F.2d 975, 983 (9th Cir.1976) (en

1 banc)).

2 “[E]vidence of a defendant's irrational behavior, his demeanor at trial, and
3 any prior medical opinion on competence to stand trial are all relevant in
4 determining whether further inquiry is required”; any one of those factors
5 “standing alone may, in some circumstances, be sufficient.” *Drope*, 420 U.S. at
6 180. “There are, of course, no fixed or immutable signs which invariably indicate
7 the need for further inquiry to determine fitness to proceed; the question is often a
8 difficult one in which a wide range of manifestations and subtle nuances are
9 implicated.” *Id.*; accord *McMurtrey v. Ryan*, 539 F.3d 1112, 1118 (9th Cir.2008).

10 The Supreme Court has recognized a due process right to competence
11 during the trial itself. *See Cooper v. Oklahoma*, 517 U.S. 348, 354 (1996); *Medina*
12 *v. California*, 505 U.S. 437, 453 (1992); *Drope v. Missouri*, 420 U.S. at 171; *Pate*
13 *v. Robinson*, 383 U.S. at 378; *cf. Spain v. Rushen*, 883 F.2d 712, 722, 728 (9th
14 Cir.1989) (finding a constitutional violation where severe and prolonged shackling
15 impaired the defendant's mental faculties and ability to communicate with
16 counsel), *cert. denied*, 495 U.S. 910 (1990). A criminal defendant must have “
17 ‘sufficient present ability to consult with his lawyer with a reasonable degree of
18 rational understanding ... [and] a rational as well as factual understanding of the
19 proceedings against him.’ ” *Cooper*, 517 U.S. at 354 (quoting *Dusky v. United*
20 *States*, 362 U.S. at 402). The rationale for the requirement has shifted somewhat
21 over time. Capacity for rational communication once mattered because it meant
22 the ability to defend oneself, *see Faretta v. California*, 422 U.S. 806, 823–26
23 (1975); John H. Langbein, *The Criminal Trial Before the Lawyers*, 45 U. Chi.
24 L.Rev. 263 (1978), while it now means the ability to assist counsel in one's
25 defense, *see Cooper*, 517 U.S. at 354. But whatever the rationale for the
26 requirement, capacity to communicate remains a cornerstone of due process at
27 trial.
28

1 **2. CLAIMS 17 and 18**

2 In Claims 17 and 18, Petitioner argues that he was incompetent to stand trial
3 such that the trial court erred in failing to inquire into his competence (Dkt. No.
4 317 at 149-58) and he was not mentally present during crucial trial proceedings
5 (Dkt. No. 317 at 158-60). He argues that his convictions and sentences violate the
6 Fifth, Sixth, Eighth and Fourteenth Amendments because he lacked ““sufficient
7 present ability to consult with his lawyer with a reasonable degree of rational
8 understanding”” and ““a rational as well as factual understanding of the
9 proceedings against him.”” *Godinez v. Moran*, 509 U.S. 389, 396 (1993) (quoting
10 *Dusky v. United States*, 362 U.S. 402). Petitioner raised these claims in his March
11 1998 exhaustion petition. The California Supreme Court summarily denied the
12 claims on the merits and, alternatively, found the claims to be *Dixon* barred. (Dkt.
13 No. 336, Lodgment 8.)

14 Respondent argues that Petitioner has failed to meet his burden of showing
15 that the California Supreme Court’s resolution of the claims amounted to an
16 unreasonable application of clearly established Federal law, or an unreasonable
17 determination of the facts in light of the evidence presented in the state court
18 proceeding and, as such, Petitioner is barred from relitigating the claims in federal
19 court. 28 U.S.C. §2254(d); *Pinholster*, 563 U.S. at 181-82. This Court agrees.

20 a. *Facts Presented to the California Supreme Court*

21 With respect to his claims of incompetence, Petitioner generally alleged in
22 Claims 10 and 11 of his 1998 exhaustion petition that he was mentally
23 incompetent, unable to understand the nature of the criminal proceedings against
24 him, unable to assist counsel in the conduct of his defense in a rational manner,
25 and “not mentally present during crucial periods of the trial.” Although his
26 exhaustion petition provided some details regarding his alleged pre-existing
27 mental impairments (diagnosed after the filing of the federal petition), and his
28 alleged use of mind-altering drugs during trial, he failed to provide any supporting

1 documentation to establish that his condition prevented him from understanding
 2 the proceedings against him or that he was unable to assist counsel in his defense.
 3 Petitioner did not present any evidence showing that issues involving his
 4 competence should have been known to the trial court such that a *sua sponte*
 5 inquiry should have been made, nor did he provide reason to believe that he was in
 6 fact incompetent at trial. (Dkt. No. 336, Lodgment 4 at 147-57.)

7 In support of the claims, Petitioner submitted declarations from three former
 8 inmates in the Orange County Jail (Exhibits DD (Willie Wisely), EE (Rodney
 9 Beeler), and FF (John Galen Davenport)), his mother (Exhibit AA), his wife
 10 (Exhibit GG), a psychiatrist (Exhibit B (Fred Rosenthal)), and a psychologist
 11 (Exhibit Y (Anne Evans)).

12 b. California Supreme Court's Adjudication of
 13 Petitioner's Claim Was Neither an "Unreasonable
 14 Application of Clearly Established Federal Law" Nor an
 15 "Unreasonable Determination of the Facts" Within the
 16 Meaning of §2254(d)

17 The Court finds that the California Supreme Court's summary denials of
 18 Claims 10 and 11 of the 1998 exhaustion petition were neither an unreasonable
 19 application of clearly established federal law, nor an unreasonable determination
 20 of the facts, within the meaning of §2254(d), such that Petitioner is entitled to de
 21 novo review in federal habeas corpus proceedings. Petitioner points to no
 22 evidence that should have raised a bona fide doubt about his mental competence.
 23 His habeas filing with the state courts pled conclusory allegations, e.g., "[h]e was
 24 unable to understand the nature of the criminal proceedings due to mental
 25 disorders . . ."; "[he] was unable to assist counsel . . ."; "during relevant court
 26 proceedings, Petitioner was irrational and out-of-contact with reality"; "he
 27 suffered at relevant times from a debilitating mental illness . . ."; and his mental
 28 illness "was substantially compounded and aggravated at relevant times by the

1 ingestion of drugs.” (Dkt. No. 336, Lodgment 4 at 148.) Petitioner supported his
2 state habeas claim with declarations from family members and jail inmates who
3 offered observations about Petitioner’s behavior and drug use in the Orange
4 County Jail, and declarations from a forensic psychiatrist and a forensic
5 psychologist who offered their opinions, 18 years post-trial, that they had doubts
6 about Mr. Noguera’s competency to stand trial, largely due to his drug use.
7 Petitioner did not attach a transcript or other evidence of record that would have
8 prompted further inquiry into his mental competence.

9 In fact, as Respondent points out, Petitioner’s claims are belied by the trial
10 record, which includes approximately 167 pages of Noguera’s testimony in which
11 he comes across as rational and aware of many details. (RT 7618-7785.)
12 Moreover, though cited by Petitioner in support of his claim of incompetence,
13 Francesca Mozqueda’s declaration actually portrays Petitioner as a man with a
14 thorough understanding of his situation and the proceedings against him, and a
15 man with sufficient ability to consult with his lawyer with a reasonable degree of
16 rational understanding. *Godinez v. Moran*, 509 U.S. at 396. Ms. Mozqueda noted
17 that Petitioner “would cry and express how desperate and helpless he felt”; he
18 discussed psychological defenses with his attorneys and wanted to be
19 psychologically evaluated. (Exh. GG at 5.) In addition, the record indicates
20 Petitioner was sufficiently aware of his situation that he attempted to intimidate
21 witnesses to testify on his behalf. At trial, after testifying on Petitioner’s behalf,
22 Margaret Noone was recalled by the prosecution on rebuttal and testified that she
23 lied on direct because she was afraid of, and was threatened by, Petitioner. *People*
24 *v. Noguera*, 4 Cal.4th at 619. Thus, the Court concludes that Petitioner’s state
25 habeas petition offered no facts from which a court could plausibly find a valid
26 claim based on mental incompetence. Claims 17 and 18 are DENIED.

27 //
28

D. Prosecutorial Misconduct Claims

1. *Legal Standard*

A habeas petition alleging prosecutorial misconduct will be granted only when the misconduct “so infect[ed] the trial with unfairness as to make the resulting conviction a denial of due process.” *Greer v. Miller*, 483 U.S. 756, 765 (1987) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)); see also *Darden v. Wainwright*, 477 U.S. 168, 181 (1986). “[T]he touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor.” *Smith v. Phillips*, 455 U.S. 209, 219 (1982). Under *Darden*, the first issue is whether the prosecutor's remarks or conduct were improper; if so, the next question is whether such remarks or conduct infected the trial with unfairness. *Tan v. Runnels*, 413 F.3d 1101, 1112 (9th Cir.2005) (citing *Darden*, 477 U.S. at 181), cert. denied, 546 U.S. 1110 (2006). Eliciting inadmissible evidence may constitute misconduct when the prosecutor's actions were knowing and intentional. See *United States v. Percy*, 250 F.3d 720, 729 (9th Cir.), cert. denied, 534 U.S. 1009 (2001).

2. *Pre-Trial & Guilt Phase*

a. CLAIM 20 (and portion of Claim 47): The Prosecutor's Improper Voir Dire Questions and Argument Misled the Jurors About the Scope of Their Sentencing Discretion

In Claim 20, Petitioner argues that the prosecutor erroneously questioned the jury regarding whether they could sentence petitioner to death once they recognized his humanity. (Dkt. No. 317 at 164-68.) In Claim 47, Petitioner similarly argues that the prosecutor committed misconduct by asking jurors if they could impose the death penalty for a person who looked and acted normally in court. (Dkt. No. 317 at 267-274.) Petitioner raised some of these arguments for the first time in state court as Claim 14 on direct appeal. (Dkt. No. 148, Lodgment 1 at 157-64.) The California Supreme Court rejected the claims on the merits. *People*

1 *v. Noguera*, 4 Cal.4th at 645-47. Petitioner raised additional arguments in Claim 8
2 in his 2003 exhaustion petition. (Dkt. No. 336, Lodgment 9 at 96-99.) The
3 California Supreme Court summarily denied the claims on the merits and,
4 alternatively, found the claims to be untimely, barred for having been previously
5 raised on appeal, barred for not having previously been raised on direct appeal,
6 and successive. (Dkt. No. 336, Lodgment 12.)

7 Respondent argues that Petitioner has failed to meet his burden of showing
8 that the California Supreme Court's resolution of the claims amounted to an
9 unreasonable application of clearly established Federal law, or an unreasonable
10 determination of the facts in light of the evidence presented in the state court
11 proceeding and, as such, Petitioner is barred from relitigating the claims in federal
12 court. 28 U.S.C. §2254(d); *Pinholster*, 563 U.S. at 181-82.

13 Petitioner's objection to the prosecutor's voir dire questions is essentially an
14 objection to death qualification. The prosecutor sought to empanel jurors who
15 would be willing and able to impose the death penalty upon the defendant in the
16 case before them – a defendant with whom they might identify, or for whom they
17 might have sympathy. As such, the district attorney's questions focused on
18 whether the jurors could vote for death. With regard to Juror Celine Reilly, the
19 prosecutor asked, "if you find him guilty of first degree murder, . . . and we get to
20 the penalty phase. And you weigh the aggravation versus the mitigation, and you
21 feel that death is the appropriate penalty, do you have it in you to be a participant
22 in a decision with 11 other people that in all actuality would result in the death of
23 another human being?" (RT 2972-73.) This was proper voir dire, as were similar
24 questions asked of Juror Janice Berens (RT 2258), Juror Ruth Stasiak (RT 3781),
25 and alternate Carol Newton (RT 3680-81). Nothing about the prosecutor's voir
26 dire misled the jurors about the scope of their sentencing discretion. *See e.g.*,
27 *Lockhart v. McCree*, 476 U.S. 162, 178 (1986) (death qualification does not
28 violate a defendant's right to a fair and impartial jury); *Wainwright v. Witt*, 469

1 U.S. 412, 424 (1985); *Adams v. Texas*, 448 U.S. 38, 45 (1980).

2 The California Supreme Court's finding of no constitutional error was not
3 an unreasonable application of clearly established federal law under section
4 2254(d)(1), nor an unreasonable determination of the facts under section
5 2254(d)(2). Claim 20 and the portion of Claim 47 addressing voir dire are
6 DENIED.

7 b. *CLAIM 21: The Prosecutor's Improper Voir Dire*
8 *Questions and Argument Violated the Requirement of an*
9 *Individualized Sentencing Determination*

10 In Claim 21, Petitioner argues that his constitutional rights were violated
11 because the prosecutor posed voir dire questions and made penalty phase closing
12 argument that prevented the jury from making an individualized sentencing
13 determination. (Dkt. No. 317 168-72.) Petitioner raised portions of this claim for
14 the first time in state court as Claim 18 on direct appeal. (Dkt. No. 148, Lodgment
15 1 at 191-96.) He argued that the prosecutor was improperly permitted to ask voir
16 dire questions, and make a closing argument, that diminished the mitigating effect
17 of Petitioner's age and the fact that he had committed a single murder. (Dkt. No.
18 148, Lodgment 1 at 195-96.) The California Supreme Court rejected the claim on
19 the merits, finding that the district attorney's voir dire questions properly elicited
20 information regarding the jurors' abilities to consider imposing a death sentence
21 under the facts of the case. *People v. Noguera*, 4 Cal.4th at 647 (the prosecutor
22 "was merely making the entirely proper argument that the circumstances under
23 which the murder of Jovita Navarro occurred were sufficiently aggravating to
24 warrant the death penalty, despite defendant's youth and the fact that there was
25 only one victim."). Petitioner raised the clam again in his June 2003 exhaustion
26 petition, adding constitutional claims that the prosecutor's actions denied him
27 effective assistance of counsel, a fair trial, an impartial jury, a reliable special
28 circumstance determination, a fair and reliable penalty phase determination, equal

1 protection of the law, and due process of law. (Dkt. 336, Lodgment 9 at 99-100.)
2 The California Supreme Court summarily denied the claim on the merits and,
3 alternatively, denied the claim as untimely, barred for having been previously
4 raised on appeal, barred for not having been previously raised on appeal, and
5 successive. (Dkt. No. 336, Lodgment 12.)

6 Respondent argues that Petitioner has failed to meet his burden of showing
7 that the California Supreme Court's resolution of the claim amounted to an
8 unreasonable application of clearly established Federal law, or an unreasonable
9 determination of the facts in light of the evidence presented in the state court
10 proceeding and, as such, Petitioner is barred from relitigating the claim in federal
11 court. 28 U.S.C. §2254(d); *Pinholster*, 563 U.S. at 181-82. This Court agrees.

12 With regard to voir dire, Petitioner contends that the prosecutor asked
13 questions that required jurors to prejudge the aggravating and mitigating evidence,
14 creating "an unconstitutional presumption in favor of death." (Dkt. No. 317 at
15 170.) Petitioner suggests that the voir dire questions, and particularly the
16 prosecutor's penalty phase closing argument "led the jury to believe that
17 Petitioner's individual characteristics need not be considered because the crime
18 was, in the prosecutor's view, so horrible that nothing could mitigate it." (Dkt. No.
19 317 at 170-71.) With respect to voir dire, Petitioner's claim is conclusory. He fails
20 to point to particular questions he claims required the jury to prejudge the
21 evidence. As such, this Court cannot find that the prosecutor's questions were
22 improper rather than within the district attorney's right to inquire into jury bias. As
23 discussed *infra*, nothing about the prosecutor's voir dire misled the jurors about
24 the scope of their sentencing discretion. *See e.g., Lockhart v. McCree*, 476 U.S. at,
25 178 (death qualification does not violate a defendant's right to a fair and impartial
26 jury); *Wainwright v. Witt*, 469 U.S. at 424; *Adams v. Texas*, 448 U.S. at 45. With
27 respect to the prosecutor's penalty phase closing argument, the excerpts Petitioner
28 cites in support of his claim reveal nothing improper. (Dkt. No. 317 at 170 n.11.)

1 Petitioner was convicted of first-degree special circumstances murder, and the
2 prosecutor argued that the evidence in aggravation warranted a death sentence.
3 This was proper argument.

4 In Mr. Pereyda's closing argument, he was free to dispute the prosecutor's
5 claims, to discuss the evidence presented in mitigation, to argue a different
6 interpretation of the weighing process, to clarify any concerns about the jury's
7 perception of its sentencing discretion, and to draw the jury's attention to the
8 penalty phase instructions. As discussed below, defense counsel properly directed
9 the jury's attention to the penalty phase instructions, quoted CALJIC 8.84.2,
10 explicitly informed the jury that they could return a life verdict even if they found
11 that the aggravating evidence outweighed the mitigating evidence, and detailed the
12 mitigating factors he thought the jury should consider. Moreover, the trial court
13 instructed the jury that "[s]tatements made by the attorneys during trial are not
14 evidence" (CT 1379; RT 8678) and gave the modified version of CALJIC 8.84.1,
15 submitted by the defense (CT 1245-46), advising the jury that "[i]n determining
16 which penalty is to be imposed on the defendant, you shall consider all of the
17 evidence which has been received during any part of the trial of this case. . ."
18 including factor (k). (RT 8696-99; CT 1407-08.) The Court also gave the
19 defense's special instructions, focusing on mitigation (RT at 8696-99; CT at 1409,
20 1247), and sympathy. (RT 8704; CT 1253, 1416.) The jurors were also instructed
21 that they must "determine the facts of the case from the evidence received in the
22 trial and not from any other source." (CT 1593.) The Court must "generally
23 presume that jurors follow their instructions." *Penry v. Johnson*, 532 U.S. 782, 799
24 (2001); see also *Cheney v. Washington*, 614 F.3d at 997. "The Court presumes that
25 jurors, conscious of the gravity of their task, attend closely to the particular
26 language of the trial court's instructions in a criminal case and strive to understand,
27 make sense of, and follow the instructions given them." *Francis v. Franklin*, 471
28 U.S. 307, 324 n. 9 (1985). Further, "it is well established that 'arguments of

1 counsel generally carry less weight with a jury than do instructions from the
 2 court.’ ” *Cheney*, 614 F.3d at 997 (citing *Boyde v. California*, 494 U.S. 370, 384
 3 (1990); *see also Waddington v. Sarausad*, 555 U.S. 179, 194-95 (2009) (finding
 4 that the state court reasonably concluded that the prosecutor's use of an improper
 5 hypothetical during closing argument “did not taint the proper instruction of state
 6 law,” because of the foregoing statement in *Boyde*). “[J]uries generally ‘vie[w]
 7 [closing arguments] as the statements of advocates' rather than ‘as definitive and
 8 binding statements of the law.’ ” *Sarausad*, 555 U.S. at 195 n. 6 (quoting *Boyde*).

9 Petitioner has not adduced any evidence showing that the jury failed to
 10 follow the trial court’s instructions. The California Supreme Court’s finding of no
 11 constitutional error was not an unreasonable application of clearly established
 12 federal law under section 2254(d)(1), nor an unreasonable determination of the
 13 facts under section 2254(d)(2). Claim 21 is DENIED.

14 c. *CLAIM 24: The Prosecution Discriminatorily Used*
 15 *Peremptory Challenges to Remove Jurors Who Were*
 16 *Hispanic and Other People of Color from Petitioner’s*
 17 *Jury, and Petitioner’s Trial Counsel Unreasonably*
 18 *Failed to Object to this Misconduct*

19 In Claim 24, Petitioner claims that his Fifth, Sixth, Eighth and Fourteenth
 20 Amendment rights were violated “because the prosecution discriminatorily used
 21 peremptory challenges to remove jurors who were Hispanic and other people of
 22 color from Petitioner’s jury.” (Dkt. No. 317 at 180-82.) Petitioner raised this
 23 claim for the first time in state court as Claim 14 of his March 1998 exhaustion
 24 petition. (Dkt. No. 336, Lodgment 4 at 163-64.) The California Supreme Court
 25 summarily denied the claim on the merits and, alternatively, found the claim to be
 26 untimely. (Dkt. No. 336, Lodgment 8.)

27 Respondent argues that Petitioner has failed to meet his burden of showing
 28 that the California Supreme Court’s resolution of the claim amounted to an

1 unreasonable application of clearly established Federal law, or an unreasonable
 2 determination of the facts in light of the evidence presented in the state court
 3 proceeding and, as such, Petitioner is barred from relitigating the claim in federal
 4 court. 28 U.S.C. §2254(d); *Pinholster*, 563 U.S. at 181-82. This Court agrees.

5 Petitioner's claim is entirely conclusory. He fails to cite any factual support
 6 for his allegations. The California Supreme Court's finding of no constitutional
 7 error was not an unreasonable application of clearly established federal law under
 8 section 2254(d). Claim 24 is DENIED.

9 **3. *Penalty Phase Summation***

10 Petitioner avers that the prosecutor committed various acts of misconduct
 11 during penalty phase closing argument. Federal habeas corpus review of
 12 prosecutorial misconduct claims is limited to the narrow issue of whether the
 13 alleged misconduct "so infected the trial with unfairness as to make the resulting
 14 conviction a denial of due process." *Darden v. Wainwright*, 477 U.S. at 181
 15 (quoting *Donnelly v. DeChristoforo*, 416 U.S. at 643). The "standard allows a
 16 federal court to grant relief on habeas review when the state court trial was
 17 fundamentally unfair but avoids interfering in state-court proceedings when errors
 18 fall short of constitutional magnitude." *Drayden v. White*, 232 F.3d 704, 713 (9th
 19 Cir. 2000), *cert. denied*, 532 U.S. 984 (2001). "To constitute a due process
 20 violation, the prosecutorial misconduct must be 'of sufficient significance to result
 21 in the denial of the defendant's right to a fair trial.'" *Greer v. Miller*, 483 U.S. at
 22 765. "[P]rosecutorial misconduct[] warrant[s] relief only if [it] 'had substantial
 23 and injurious effect or influence in determining the jury's verdict.'" *Wood v. Ryan*,
 24 693 F.3d at 1113 (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 637-38 (1993)).

25 With respect to summations, a reviewing court should consider challenged
 26 remarks in light of the realistic nature of closing arguments at trial. Counsel are
 27 given latitude "in the presentation of closing arguments, " and courts must allow
 28 prosecutors "to strike hard blows based on the evidence presented and all

1 reasonable inferences therefrom.” *Ceja v. Stewart*, 97 F.3d 1246, 1253-54 (9th
2 Cir. 1996) (quoting *United States v. Baker*, 10 F.3d 1374, 1415 (9th Cir. 1993)),
3 *cert. denied*, 522 U.S. 971 (1997); *United States v. Molina*, 934 F.2d at 1445
4 (noting that a prosecutor must have “reasonable latitude” to fashion closing
5 arguments). “[T]he touchstone of due process analysis in cases of alleged
6 prosecutorial misconduct is the fairness of the trial, not the culpability of the
7 prosecutor.” *Smith v. Phillips*, 455 U.S. 209, 219 (1982). Thus, “[i]mproper
8 argument does not, per se, violate a defendant's constitutional rights.” *Jeffries v.*
9 *Blodgett*, 5 F.3d 1180, 1191 (9th Cir.1993), *cert. denied*, 510 U.S. 1191 (1994).
10 “[I]t is not enough that the prosecutor's remarks were undesirable or even
11 universally condemned.” *Darden*, 477 U.S. at 181 (internal punctuation and
12 citation omitted). Rather, the Court must determine whether remarks rendered a
13 trial fundamentally unfair, looking at the challenged remarks in the context of the
14 entire proceeding to determine whether the argument influenced the jury's
15 decision. *Boyde v. California*, 494 U.S. at 385; *Greer v. Miller*, 483 U.S. at
16 765–66; *Darden*, 477 U.S. at 179-82; *Hall v. Whitley*, 935 F.2d 164, 165 (9th
17 Cir.1991). A prosecutor's comments in summation constitute grounds for reversal
18 only when the remarks caused actual prejudice. *Shaw v. Terhune*, 380 F.3d 473,
19 478 (9th Cir. 2004) (applying harmless error test to claim of prosecutorial
20 misconduct in summation); *Fields v. Woodford*, 309 F.3d 1095, 1109 (9th Cir.), as
21 amended by 315 F.3d 1062 (9th Cir.2002).

22 As an initial matter, on direct appeal the California Supreme Court rejected
23 Petitioner’s arguments raised in claims 43 through 50, and 52, due to a failure to
24 object at trial. *People v. Noguera*, 4 Cal.4th at 638, 644. Consequently, because
25 the Court found these contentions forfeited under California's contemporaneous
26 objection rule, they are procedurally defaulted from federal habeas review.
27 *Coleman v. Thompson*, 501 U.S. 722, 729-30 (1991) (a federal court will not
28 review a claim if the state court's rejection of the claim rests on a state law ground

1 that is independent of the federal question and adequate to support the judgment).
 2 The Ninth Circuit has repeatedly recognized and applied the California
 3 contemporaneous objection rule in affirming denials of federal habeas petitions on
 4 grounds of procedural default where there was a failure to object at trial. *See, e.g.,*
 5 *Inthavong v. Lamarque*, 420 F.3d 1055, 1058 (9th Cir. 2005), *cert. denied*, 547
 6 U.S. 1059 (2006); *Paulino v. Castro*, 371 F.3d 1083, 1092-93 (9th Cir. 2004);
 7 *Melendez v. Plieler*, 288 F.3d 1120, 1125 (9th Cir. 2002).

8 In addition, the California Supreme Court found that trial counsel's failure
 9 to object was not ineffective assistance of counsel, as there was no reasonable
 10 likelihood that any of the challenged comments might have been misconstrued by
 11 the jurors. *People v. Noguera*, 4 Cal. 4th at 638-39. The Court explicitly found
 12 that "[t]he prosecutor neither vouched personally for the death penalty as an
 13 appropriate sentence nor argued on the basis of facts not in evidence." *Id.* at 639.
 14 As such, the Court determined that the prosecutor did not commit prejudicial
 15 misconduct. Even if Petitioner's claims were not procedurally defaulted, he would
 16 not be entitled to relief because, as discussed in further detail below, the California
 17 Supreme Court was not unreasonable in finding that they are without merit.

18 a. *CLAIM 43 – The Prosecutor Committed Misconduct*
 19 *When He Expressed His Personal Opinion About the*
 20 *Gravity of the Crime*

21 In Claim 43, Petitioner suggests that the prosecutor committed prejudicial
 22 misconduct during penalty phase closing argument when he made statements
 23 expressing "a personal opinion that the crime was worse than any other." (Dkt.
 24 No. 317 at 247.) Specifically, Petitioner takes issue with the prosecutor's
 25 statement that, "There are lots and lots of murders which are prosecuted in this
 26 courthouse in which this type of penalty is not sought. There's a reason for that."
 27 (RT 8631.) He also notes that the prosecutor later continued by saying that he
 28 could "think of no other crime involving one victim that is so horrible that the

1 evidence suggests that you shouldn't impose the death penalty." (RT 8658.)

2 Petitioner argues that these statements referenced the prosecutor's personal
3 belief regarding Petitioner's guilt, or the appropriateness of the death penalty,
4 based upon facts not in evidence. Petitioner suggests the statement violated
5 section 3-58(b) of the ABA Standards of Criminal Justice, which provides that
6 "[i]t is unprofessional conduct for the prosecutor to express his or her personal
7 belief or opinion as to the truth and falsity of any testimony or evidence or the
8 guilt of the defendant." (ABA Standards of Criminal Justice 3-58(b), 2d ed.
9 1980). Petitioner also argues that the prosecutor's discussion of a hypothetical set
10 of facts "compounded his intentional and egregious misconduct by measuring
11 Petitioner's culpability against a heat of passion killing" because voluntary
12 manslaughter is not a capital offense and "the culpability of the accused is much
13 less than any special circumstance murder." (Dkt. No. 317 at 249.)

14 Petitioner initially raised this claim on direct appeal as Claim 11. (Dkt. No.
15 148, Lodgment 1 at 136-143.) The California Supreme Court found that Petitioner
16 had waived the claim by failing to object to the prosecutor's argument, and such
17 failure did not amount to ineffective assistance of counsel because "[t]he
18 prosecutor neither vouched personally for the death penalty as an appropriate
19 sentence [citation] nor argued on the basis of facts not in evidence." *People v.*
20 *Noguera*, 4 Cal.4th at 639. Petitioner raised the claim again in his June 9, 2003,
21 exhaustion petition. (Dkt. No. 336, Lodgment 9 at 148-151.) The California
22 Supreme Court summarily denied the claim on the merits and, alternatively, denied
23 the claim as untimely, barred for having previously been raised and rejected on
24 appeal, and successive. (Dkt. No. 336, Lodgment 12.)

25 Respondent argues that Petitioner has failed to meet his burden of showing
26 that the California Supreme Court's denial of Claim 11 on the merits amounted to
27 an unreasonable application of clearly established federal law, or an unreasonable
28 determination of the facts in light of the evidence presented in the state court

1 proceeding. 28 U.S.C. §2254(d); *Pinholster*, 563 U.S. at 181-82.

2 A court must “examine the likely effect of the statements in the context in
3 which they were made,” *Sandoval v. Calderon*, 241 F.3d 765, 778 (9th Cir. 2000),
4 *cert. denied*, 534 U.S. 847 (2001), to determine “whether the prosecutors’
5 comments ‘so infected the trial with unfairness as to make the resulting conviction
6 a denial of due process.’” *Darden*, 477 U.S. at 181 (quoting *Donnelly v.*
7 *DeChristoforo*, 416 U.S. at 643). “Improper comment warrants reversal only if it
8 appears that the comment may possibly have affected the verdict.” *Lincoln v.*
9 *Sunn*, 807 F.2d 805, 809 (9th Cir. 1987) (citation omitted). The jury found
10 Petitioner guilty of special circumstances murder. It listened to Ricky Abram’s
11 testimony regarding the meeting at Bob’s Big Boy, where Petitioner confided in
12 Abram the details of his plan to kill Jovita Navarro, and sought his help. It heard
13 John Arce’s testimony that Petitioner said he wanted to kill Jovita. It rejected
14 Petitioner’s denial of involvement in Jovita’s killing, and his alibi defense. It
15 heard Margaret Noone’s testimony that Petitioner had threatened her into
16 testifying on his behalf. It learned that Petitioner had previously carjacked John
17 Antenucci at gunpoint, and it listened to Petitioner’s case in mitigation. Assuming
18 without deciding that the prosecutor’s remarks were inappropriate, the California
19 Supreme Court was not unreasonable in finding that Petitioner did not suffer
20 prejudice as a result thereof. Claim 43 is DENIED.

21 b. *CLAIM 44 – The Prosecutor Committed Misconduct*
22 *When He Compared Petitioner to an Imaginary, Less*
23 *Culpable Defendant*

24 In Claim 44, Petitioner argues that the prosecutor committed prejudicial
25 misconduct during penalty phase closing argument when he “compared petitioner
26 to an imaginary character of mythic proportions” and thereby violated Petitioner’s
27 Eighth Amendment right to individualized sentencing under *Woodson v. North*
28 *Carolina*, 428 U.S. 280 (1976) (Dkt. No. 317 at 251-57.) Specifically, Petitioner

1 takes issue with the prosecutor's comments regarding Petitioner's mitigating
2 evidence, and the weight it should be accorded. The district attorney argued that
3 Petitioner's evidence in mitigation did not outweigh the prosecution's evidence in
4 aggravation, and referenced examples of mitigating circumstances he opined
5 might be given "high value," but were absent from Petitioner's case.

6 Do you have a person who won the medal of honor? Do you
7 have a person who was valedictorian in their class? Do you have a
8 person who is asking you to spare his life that saved a little three-
9 year-old boy from drowning?

10 Because if you had that, ladies and gentlemen, you may be able
11 to put the value on one of those three things in the same quantity that
12 you can put to any one of those 12 aggravating factors. But you
13 don't.

14 Do you have a defendant who was sexually abused as a child?
15 Because if you did, you would probably want to put a high value on
16 that for pity and sympathy.

17 Do you have a defendant that comes from a broken home? Do
18 you have a defendant whose mother didn't love him, whose father
19 didn't love him, whose sister didn't love him?

20 Do you have a defendant who wasn't provided with clothing or
21 food or shelter, that had to hit the streets when he was 11 or 12, that
22 had to hit the streets and make it on his own? Do you have any of
23 that? No, you don't have any of that.

24 (RT 8650-51.) The prosecutor further argued, "[t]his is not an 18 year old boy who
25 got kicked out of his home, who goes into a market with a mask on because he's
26 hungry and he has a loaded weapon and he goes in there and here's a clerk, and for
27 some reason the clerk takes the mask off and this 18-year-old, because of being
28 hungry, panics, kills that person because perhaps that person is going to be a

1 witness. You don't have that in this case. (RT 8658-59.)

2 Petitioner contends that these arguments, "comparing Petitioner to . . .
3 hypothetical characters," undermined the value of his mitigating evidence and "led
4 the jury to preclude consideration of Petitioner's mitigating evidence," judging
5 him not as an individual, but "in terms of who he was not." (Dkt. No. 317 at 254-
6 55.) Petitioner suggests that the prosecutor's argument violated his constitutional
7 right to "individualized consideration," under *Woodson* and *Penry v. Lynaugh*, 492
8 U.S. 302 (1969),

9 Petitioner initially raised this claim in state court on direct appeal. (Dkt. No.
10 148, Lodgment 1 at 144-48.) The California Supreme Court denied the claim, in
11 combination with the other prosecutorial misconduct in penalty phase closing
12 argument claims, finding Petitioner had waived the claims by failing to object and,
13 in any case, "there 'was not a reasonable likelihood any of the challenged
14 comments might have been misconstrued by the jurors.'" Petitioner raised the
15 claim again as Claim 29 of his June 9, 2003 exhaustion petition. (Dkt. No. 336,
16 Lodgment 9 at 151-53.) The California Supreme Court summarily denied the
17 claim on the merits and, alternatively, found it untimely, *Waltreus* barred to the
18 extent it was raised on appeal, *Dixon* barred as to the parts not previously brought
19 on appeal, and successive to the extent it could have been raised in Petitioner's
20 prior habeas petition. (Dkt. No. 336, Lodgment 12.)

21 Respondent argues that Petitioner has failed to meet his burden of showing
22 that the California Supreme Court's denials of the claim amounted to an
23 unreasonable application of clearly established federal law, or an unreasonable
24 determination of the facts in light of the evidence presented in the state court
25 proceeding. 28 U.S.C. §2254(d); *Pinholster*, 563 U.S. at 181-82.

26 Once again, this Court must determine "whether the prosecutors' comments
27 'so infected the trial with unfairness as to make the resulting conviction a denial of
28 due process.'" *Darden*, 477 U.S. at 181. As the Supreme Court has noted,

1 “arguments of counsel generally carry less weight with a jury than do instructions
2 from the court. The former are usually billed in advance to the jury as matters of
3 argument, not evidence, and are likely viewed as the statements of advocates; the
4 latter. . . are viewed as definitive and binding statements of the law.” *Boyde v.*
5 *California*, 494 U.S. at 384, citing *Carter v. Kentucky*, 450 U.S. 288, 302–304,
6 and n. 20 (1981); *Quercia v. United States*, 289 U.S. 466, 470 (1933); *Starr v.*
7 *United States*, 153 U.S. 614, 626 (1894). Moreover, “arguments of counsel, like
8 the instructions of the court, must be judged in the context in which they are
9 made.” *Boyde*, 494 U.S. at 385, citing *Greer v. Miller*, 483 U.S. at 766; *Darden*,
10 477 U.S. at 179; *United States v. Young*, 470 U.S. 1, 11–12 (1985); *Donnelly v.*
11 *DeChristoforo*, 416 U.S. at 647 (“[A] court should not lightly infer that a
12 prosecutor intends an ambiguous remark to have its most damaging meaning or
13 that a jury, sitting through lengthy exhortation, will draw that meaning from the
14 plethora of less damaging interpretations”).

15 In *Woodson*, on which Petitioner relies, the Supreme Court held, in relevant
16 part, that North Carolina’s mandatory death sentence for first-degree murder
17 violated the Eighth Amendment by prohibiting “consideration of relevant aspects
18 of the character and record of each convicted defendant before the imposition
19 upon him of a sentence of death.” *Woodson*, 428 U.S. at 303. The Court
20 condemned

21 a process that accords no significance to relevant facets of the
22 character and record of the individual offender or the circumstances
23 of the particular offense excludes from consideration in fixing the
24 ultimate punishment of death the possibility of compassionate or
25 mitigating factors stemming from the diverse frailties of humankind.
26 It treats all persons convicted of a designated offense not as uniquely
27 individual human beings, but as members of a faceless,
28 undifferentiated mass to be subjected to blind infliction of the penalty

1 of death.

2 *Id.* at 304. In so doing, the Court held that “in capital cases the fundamental
3 respect for humanity underlying the Eighth Amendment requires consideration of
4 the character and record of the individual offender and the circumstances of the
5 particular offense as a constitutionally indispensable part of the process of
6 inflicting the penalty of death.” *Id.*

7 Petitioner suggests that, as a result of the prosecutor’s argument, “[t]he
8 jurors were not clearly informed of what mitigation actually is” and they were
9 “prevented” from considering Petitioner’s mitigating evidence. (Docket No. 317
10 at 255.) However, a simple reading of the trial record belies Petitioner’s
11 contentions. First, following the prosecutor’s closing statement, Petitioner’s
12 counsel had an opportunity to address the jury. He properly directed the jury’s
13 attention to the fact that, “[t]he Court will give you instructions . . . in the light of
14 how we go through this weighing process in reference to the aggravating and the
15 mitigating circumstances.” (RT at 8661.) In a counterpoint to the prosecutor’s
16 argument, Mr. Pereyda told the jury,

17 . . . I don’t mean to belittle anybody’s argument or anybody’s thought
18 processes, but this is an obligation of not merely like going to a
19 shopping center, like going to a market and assigning values and
20 saying this costs so much and this item is worth more and this item is
21 worth less. I think what you have to consider is you have to consider
22 the totality of the circumstances.

23 (RT at 8662.) Defense counsel then quoted CALJIC 8.84.2 –

24 If in your reason [sic] judgment you conclude that the aggravating
25 circumstances outweigh the mitigating circumstances, and you
26 personally believe death is the appropriate sentence under all the
27 circumstances, then you shall impose death. In the event that you
28 cannot so find, you shall impose life without the possibility of parole.

1 (RT at 8662; CT 1415.) Mr. Pereyda went on to explicitly tell the jurors that they
2 could return a life verdict even if they found that the aggravating evidence
3 outweighed the mitigating evidence, to detail the mitigating factors he thought the
4 jury should consider, and to again direct the jury's attention to the instructions
5 they would be given. (RT at 8663-70.)

6 Following closing statements, the Court instructed the jury that
7 "[s]tatements made by the attorneys during trial are not evidence" (CT 1379; RT
8 8678) and gave the modified version of CALJIC 8.84.1, submitted by the defense
9 (CT 1245-46), advising the jury that "[i]n determining which penalty is to be
10 imposed on the defendant, you shall consider all of the evidence which has been
11 received during any part of the trial of this case. . ." including factor (k),
12 any other circumstance which extenuates the gravity of the crime
13 even though its not a legal excuse for the crime [and any sympathetic
14 or other aspect of the defendant's character or record that the
15 defendant offers] as a basis for sentence less than death, whether or
16 not related to the offense for which he is on trial....

17 (RT 8696-99; CT 1407-08.) The Court also gave Special Instruction Number
18 Two, requested by the defense (CT 1247), focusing on mitigation:

19 As to those factors that you find to be mitigating, they are only
20 examples of the factors that you may consider in determining
21 punishment in this case.

22 You should pay careful attention to them and give them the
23 wight to which you find them to be entitled.

24 You are not required to limit your consideration of mitigating
25 circumstances to these factors.

26 You may also consider other circumstances as reasons for not
27 imposing the death sentence.

28 Any mitigating circumstances, standing alone, may be

1 sufficient to support a decision that life without the possibility of
 2 parole is the appropriate punishment. . .
 3 (RT at 8696-99; CT at 1409.) Judge Robert R. Fitzgerald also gave another
 4 special instruction requested by the defense, advising the jurors, “you may
 5 consider pity and sympathy for the defendant in deciding the penalty to be
 6 imposed on the defendant.” (RT 8704; CT 1253, 1416.)

7 The jury was free to consider and give effect to Petitioner’s mitigating
 8 evidence in imposing sentence. *Penry v. Lynaugh*, 492 U.S. 302 (1989). As in
 9 *Boyde*, “there is not a reasonable likelihood that the jurors in Petitioner’s case
 10 understood the challenged instructions to preclude consideration of relevant
 11 mitigating evidence offered by Petitioner.” *Id.* at 386. Even if the prosecutor’s
 12 discussion of hypothetical mitigating evidence was inappropriate, the California
 13 Supreme Court was not unreasonable in finding that Petitioner did not suffer
 14 prejudice as a result thereof. Claim 44 is DENIED.

15 c. CLAIMS 45 & 46 – The Prosecutor Committed
 16 Misconduct When He Relied on Less Serious, Noncapital
 17 Homicides to Argue that Petitioner’s Crime Could Not
 18 Be Mitigated and Misled the Jury About the Nature and
 19 Scope of Its Sentencing Discretion

20 In Claims 45 and 46, Petitioner relies on identical allegations, contending
 21 that the prosecutor committed prejudicial misconduct by using “straw man”
 22 arguments “to alter the jury’s perception of the magnitude of Petitioner’s offense.”
 23 (Dkt. No. 317 at 257-64, 265-66.) Petitioner takes issue with the prosecution’s
 24 discussion of hypothetical, non-capital homicides, that Petitioner claims were
 25 “completely irrelevant to the jury’s decision.” (Dkt. No. 317 at 260.) By
 26 referencing these other crimes, Petitioner argues, the prosecutor urged the jury to
 27 vote for death based upon an invalid comparison, and essentially “created a
 28 presumption in favor of death.” (Dkt. No. 317 at. 260.) In other words, “[t]he

1 weight given to the crime was improperly inflated by comparing it to less serious
2 crimes.” (Dkt. No. 317 at 261.)

3 Petitioner initially raised Claim 45 in state court on direct appeal. (Dkt. No.
4 148 at 149-56.) As it did with all of the prosecutorial misconduct in closing
5 argument claims, the California Supreme Court denied the claim, finding
6 Petitioner had waived the claims by failing to object and, in any case, “there ‘was
7 not a reasonable likelihood any of the challenged comments might have been
8 misconstrued by the jurors.” *People v. Noguera*, 4 Cal.4th at 638-39. Petitioner
9 raised the claim again as Claim 30 of his June 9, 2003 exhaustion petition, and
10 raised Claim 46 as claim 31 of that same petition. (Dkt. No. 336, Lodgment 9 at
11 153-55, 155-56.) The California Supreme Court summarily denied the claims on
12 the merits and, alternatively, found them untimely, *Waltreus* barred to the extent
13 they were raised on appeal, *Dixon* barred as to the parts not previously brought on
14 appeal, and successive to the extent they could have been raised in Petitioner’s
15 prior habeas petition. (Dkt. No. 336, Lodgment 12.)

16 Respondent argues that Petitioner has failed to meet his burden of showing
17 that the California Supreme Court’s denials of the claims amounted to an
18 unreasonable application of clearly established federal law, or an unreasonable
19 determination of the facts in light of the evidence presented in the state court
20 proceeding. 28 U.S.C. §2254(d); *Pinholster*, 563 U.S. at 181-82.

21 Petitioner’s argument is based upon clearly established federal law holding
22 that *states’ capital sentencing procedures* must “genuinely narrow the class of
23 persons eligible for the death penalty and must reasonably justify the imposition of
24 a more severe sentence on the defendant compared to others found guilty of
25 murder.” *Zant v. Stephens*, 462 U.S. 862, 877 (1983); *Godfrey v. Georgia*, 446
26 U.S. 420, 428-29 (1980) (striking down statutory aggravating circumstance that
27 failed to narrow the class of persons eligible for the death penalty.) This precedent
28 does not support Petitioner’s contention that a prosecutor’s closing argument

1 could similarly offend the Constitution by failing to circumscribe the class of
2 persons eligible for the death penalty. This is the role of the statute and, as
3 discussed *infra* with respect to Claims 62-66, California's death penalty statute has
4 long been held to be in constitutional.

5 The prosecutor did not, as Petitioner suggests, argue that Petitioner's crime
6 "could not be mitigated" nor did he mislead the jury about the nature and scope of
7 its sentencing discretion. Rather, it is well within the prosecutor's purview to
8 make the kinds of argument Petitioner takes issue with here. For example, when
9 the district attorney discussed the "circumstances of the crime" aggravating factor,
10 he argued that "strangulation" was a "very personal thing," as compared to other
11 types of killings. The prosecutor referenced hypothetical crimes to emphasize the
12 *personal* nature of Petitioner's offense, and to demonstrate the time and effort it
13 would have taken to extinguish Jovita Navarro's life. (RT 8647-48.) He used the
14 comparison to argue in favor of the weight he thought the aggravator should be
15 given. These arguments did not "mislead the jury about the weighing process,"
16 "create a presumption in favor of death," or "encourage the jury to make an
17 arbitrary and capricious sentencing decision." Petitioner was convicted of first-
18 degree special circumstances murder, and the prosecutor argued that the evidence
19 in aggravation warranted a death sentence.

20 The defense was free to dispute the prosecutor's claims, to present evidence
21 in mitigation, to argue a different interpretation of the weighing process, to clarify
22 any concerns about the jury's perception of its sentencing discretion, and to draw
23 the jury's attention to the penalty phase instructions. As discussed above,
24 Petitioner's counsel properly directed the jury's attention to the penalty phase
25 instructions, quoted CALJIC 8.84.2, explicitly informed the jury that they could
26 return a life verdict even if they found that the aggravating evidence outweighed
27 the mitigating evidence, and detailed the mitigating factors he thought the jury
28 should consider.

Moreover, the trial court instructed the jury that “[s]tatements made by the attorneys during trial are not evidence” (CT 1379; RT 8678) and gave the modified version of CALJIC 8.84.1, submitted by the defense (CT 1245-46), advising the jury that “[i]n determining which penalty is to be imposed on the defendant, you shall consider all of the evidence which has been received during any part of the trial of this case. . .” including factor (k). (RT 8696-99; CT 1407-08.) The Court also gave the defense’s special instructions, focusing on mitigation (RT at 8696-99; CT at 1409, 1247), and sympathy. (RT 8704; CT 1253, 1416.) The jurors were also instructed that they must “determine the facts of the case from the evidence received in the trial and not from any other source.” (CT 1593.) The Court must “generally presume that jurors follow their instructions.” *Penry v. Johnson*, 532 U.S. at 799; see also *Cheney v. Washington*, 614 F.3d at 997. “The Court presumes that jurors, conscious of the gravity of their task, attend closely to the particular language of the trial court’s instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them.” *Francis v. Franklin*, 471 U.S. at 324 n. 9. Further, “it is well established that ‘arguments of counsel generally carry less weight with a jury than do instructions from the court.’ ” *Cheney*, 614 F.3d at 997 (citing *Boyde v. California*, 494 U.S. at 384; see also *Waddington v. Sarausad*, 555 U.S. at 194-95 (finding that the state court reasonably concluded that the prosecutor’s use of an improper hypothetical during closing argument “did not taint the proper instruction of state law,” because of the foregoing statement in *Boyde*). “[J]uries generally ‘vie[w] [closing arguments] as the statements of advocates’ rather than ‘as definitive and binding statements of the law.’ ” *Sarausad*, 555 U.S. at 195 n. 6 (quoting *Boyde*).

In *Darden*, the Supreme Court concluded that the petitioner was not deprived of a fair trial based on numerous “undoubtedly” improper comments made by the prosecutor during closing argument, because, inter alia, “[t]he trial court instructed the jurors several times that their decision was to be made on the

1 basis of the evidence alone, and that the arguments of counsel were not evidence.”
 2 477 U.S. at 181–82. Petitioner has not adduced any evidence showing that the
 3 jury failed to follow the trial court’s instructions. There is no basis for concluding
 4 that the jurors perceived the prosecutor’s comments about hypothetical crimes to
 5 override their duty to base their decision on the facts and the law or that the jury
 6 was misled regarding its sentencing discretion. The jury was free to consider and
 7 give effect to Petitioner’s mitigating evidence in imposing sentence. *Penry v.*
 8 *Lynaugh*, 492 U.S. 302. The California Supreme Court’s decisions denying relief
 9 was neither an unreasonable application of clearly established federal law, nor an
 10 unreasonable determination of the facts under §2254(d). Claims 45 and 46 are
 11 DENIED.

12 d. *CLAIM 47 – The Prosecutor Committed Misconduct*
 13 *When He Removed Sympathy from the Jury’s*
 14 *Consideration During Voir Dire¹⁶ and Closing Argument*

15 In Claim 47, Petitioner argues that the prosecutor committed misconduct
 16 during penalty phase closing argument when he “argued that, although the jury
 17 [would be] instructed that it could consider sympathy [in the factor (k)
 18 instruction], Petitioner was not entitled to it.” (Dkt. No. 317 at 271, citing RT
 19 8642-45.) Petitioner suggests that the prosecutor led jurors “to believe that their
 20 basic moral values and their perceptions of Petitioner were distinct from the
 21 penalty process.” (Dkt. No. 317 at 272.) In his penalty phase closing argument,
 22 after discussing Petitioner’s family members’ testimony, the prosecutor argued:

23 . . . [T]he question you have to ask yourself is does the
 24 defendant deserve that sympathy for his family members?

25 Because ladies and gentlemen, no matter what your verdict is,

26 ¹⁶ The portion of Claim 47 arguing the prosecutor committed misconduct during voir dire when he
 27 “repeatedly asked prospective jurors if they could vote for death once they recognized Petitioner’s
 28 humanity” (Dkt. No. 317 at 268) is substantially similar to the argument raised in Claim 20 The
 Prosecutor’s Improper Voir Dire Questions and Argument Misled the Jurors About the Scope of
 Their Sentencing Discretion and is addressed *supra* in connection therewith.

1 because whether you say he's going [to] die or you say he's going to
2 live the rest of his life in San Quentin, they are here because of what
3 he did. And there is nothing that you can do that's going to change
4 that.

5 And do you think it's fair? Do you think it's right? Does it
6 come to your sense of dignity that because they are suffering, he
7 should get that benefit? Of course not.

8 And I ask you to consider that because it gets back to what I
9 said before, to try to distinguish the emotion that you're going to have
10 – and you should have that – from genuine pity on the behalf of the
11 defendant.

12 And there's another thing about sympathy on behalf of the
13 defendant; does he really deserve it? What did he do in the guilt
14 phase?

15 He got up and he testified that he didn't have anything to do
16 with the crime. . . . [O]ne of things I suggested to you to consider
17 when you consider pity and sympathy is remorse.

18 Don't you think that a person, before you give him pity and
19 before you give him sympathy, should be remorseful for what he did?
20 No, not this man who is sitting over there.

21 . . . He gets upon the stand and one, he commits perjury. And
22 number two, he by the threat of force, the threat of force, he coerces
23 and threatens Marjorie Noone to come in here and to commit perjury.

24 And I ask you, and once again, these are difficult questions, but
25 when you go back there, you ask yourself, is that the kind of man that
26 we're going to give sympathy and pity to?

27 . . . I ask you to reject paragraph K because I don't think it
28 applies because of what I just said. . . .

1 (RT 8644-45.)

2 Petitioner argues that the prosecutor's statements narrowed the scope of
3 factor (k), focusing exclusively on "the allusion to sympathy" and then suggested
4 to the jury that factor (k) did not apply because Petitioner did not deserve
5 sympathy. (Dkt. No. 317 at 270-71.) As such, Petitioner contends that the
6 prosecutor "*prevented*" the jury from feeling sympathy, from considering all
7 relevant mitigating evidence, and from properly weighing aggravation and
8 mitigation pursuant to California law so as to make Petitioner's sentence a denial
9 of due process.

10 Petitioner initially raised this claim on direct appeal. (Dkt. No. 148,
11 Lodgment 1 at 157-64.) The California Supreme Court found that Petitioner had
12 waived the claim by failing to object to the prosecutor's argument, and such
13 failure did not amount to ineffective assistance of counsel because "[t]he
14 prosecutor neither vouched personally for the death penalty as an appropriate
15 sentence [citation] nor argued on the basis of facts not in evidence." *People v.*
16 *Noguera*, 4 Cal.4th at 639. Petitioner raised the claim again in his June 9, 2003,
17 exhaustion petition. (Dkt. No. 336, Lodgment 9 at 159-61.) The California
18 Supreme Court summarily denied the claim on the merits and, alternatively, denied
19 the claim as untimely, barred for having previously been raised and rejected on
20 appeal, and successive. (Dkt. No. 336, Lodgment 12.)

21 Respondent argues that Petitioner has failed to meet his burden of showing
22 that the California Supreme Court's denial on the merits amounted to an
23 unreasonable application of clearly established federal law, or an unreasonable
24 determination of the facts in light of the evidence presented in the state court
25 proceeding. 28 U.S.C. §2254(d); *Pinholster*, 563 U.S. at 181-82.

26 As discussed above, the Supreme Court has noted that "arguments of
27 counsel generally carry less weight with a jury than do instructions from the court.
28 The former are usually billed in advance to the jury as matters of argument, not

1 evidence, and are likely viewed as the statements of advocates; the latter. . . are
2 viewed as definitive and binding statements of the law.” *Boyde v. California*, 494
3 U.S. at 384, *citing Carter*, 450 U.S. at 302–304, and n. 20; *Quercia*, 289 U.S. at
4 470; *Starr*, 153 U.S. at 626. Moreover, “arguments of counsel, like the
5 instructions of the court, must be judged in the context in which they are made.”
6 *Boyde*, 494 U.S. at 385, *citing Greer v. Miller*, 483 U.S. at 766; *Darden v.*
7 *Wainwright*, 477 U.S. at 179; *Young*, 470 U.S. at 11–12; *Donnelly v.*
8 *DeChristoforo*, 416 U.S. at 647 (“[A] court should not lightly infer that a
9 prosecutor intends an ambiguous remark to have its most damaging meaning or
10 that a jury, sitting through lengthy exhortation, will draw that meaning from the
11 plethora of less damaging interpretations”).

12 Petitioner maintains that the prosecutor prevented the jury from feeling
13 sympathy, and narrowed the application of factor (k), when he argued that factor
14 (k) did not apply. This Court finds no objectionable prosecutorial argument in the
15 prosecutor’s factor (k) argument. Reading the prosecutor’s comments in context,
16 it is clear that he asked the jury to “reject paragraph k,” but never suggested or
17 instructed the jury that it could not consider the penalty phase evidence Petitioner
18 presented. The prosecutor stated, “I ask you to reject paragraph k *because I don’t*
19 *think it applies. . .*” (RT 8645.) The prosecutor’s approach was not to contend
20 that background and character evidence was irrelevant, but rather, to argue that, *in*
21 *his opinion*, Petitioner *did not deserve sympathy* and that the aggravating
22 circumstances outweighed the mitigating circumstances. The jury was free to
23 consider and give effect to Petitioner’s mitigating evidence in imposing sentence.
24 *Penry v. Lynaugh*, 492 U.S. 302. “Indeed, the prosecutor explicitly assumed that
25 petitioner's mitigation evidence was a proper factor in the weighing process, but
26 argued that it was minimal in relation to the aggravating circumstances.” *Boyde*,
27 494 U.S. at 385. The district attorney encouraged the jurors to consider the
28 evidence presented by the defense, that “in 1976 [Petitioner] joined the Blue

1 Jackets of California”, “that his mother and father were divorced in 1979”, and
2 “that he went to school.” (RT at 8646.) He simply *argued* that aggravating
3 evidence outweighed the mitigating evidence. (RT at 8648-49.)

4 Moreover, Petitioner’s trial attorney countered the prosecutor’s sympathy
5 argument during his penalty phase closing statement, arguing:

6 . . . I would submit to you that I think every mother should have some
7 sympathy. Everybody that brings somebody into this world to live I
8 think has earned sympathy. And the fact that she has seen her son go
9 through this ordeal, the fact that she has seen him convicted, and the
10 fact that she will no longer see him at home, I think that bears some
11 sympathy.

12 (RT 8667.) Mr. Pereyda also argued,

13 You will receive a jury instruction to the effect that you can consider
14 pity and sympathy for the defendant and that is the defendant alone.
15 Not just his family. You can consider that as a mitigating factor as
16 well as considering any sympathy you may have for his family and for
17 his friends.

18 (RT 8670-71.)

19 Subsequently, the trial court gave the factor (k) instruction, advising the
20 jury, in relevant part, to consider

21 (k) any other circumstance which extenuates the gravity of the crime
22 even though its not a legal excuse for the crime and any sympathetic
23 or other aspect of the defendant’s character or record that the
24 defendant offers as a basis for [a] sentence less than death, whether or
25 not related to the offense for which he is on trial. You must disregard
26 any jury instruction given to you in the guilt or innocence phase of
27 this trial which conflicts with this principle.

28 As to those factors that you find to be mitigating, they are only

1 examples of some of the factors that you may consider in determining
2 punishment in this case.

3 You should pay careful attention to them and give them the
4 weight to which you find them to be entitled.

5 You are not required to limit your consideration of mitigating
6 circumstance [sic] to these factors.

7 You have also consider [sic] other circumstances as reasons for
8 not imposing the death sentence.

9 Any mitigating circumstances, standing alone, may be
10 sufficient to support a decision that life without the possibility of
11 parole is the appropriate punishment.

12 (RT at 8698-99.) Moreover, the trial court gave a special instruction requested by
13 the defense, advising the jurors, “you may consider pity and sympathy for the
14 defendant in deciding the penalty to be imposed on the defendant.” (RT 8704; CT
15 1253, 1416.) As in *Boyde*, “there is not a reasonable likelihood that the jurors in
16 Petitioner's case understood the challenged instructions to preclude consideration
17 of relevant mitigating evidence offered by Petitioner.” *Id.* at 386. The California
18 Supreme Court’s rejection of Petitioner’s claim was not an unreasonable
19 application of clearly established federal law nor an unreasonable determination of
20 the facts under §2254(d). Claim 47 is DENIED.

21 e. CLAIM 48 – The Prosecutor Committed Misconduct
22 When He Argued that the Jury Could Not Consider
23 Sympathy in the Penalty Phase Unless Petitioner
24 Expressed Remorse, Commented on Petitioner’s Failure
25 to Admit Participation, and Urged that Mitigating
26 Evidence Not Be Considered

27 In Claim 48, Petitioner additionally suggests that the prosecutor erroneously
28 argued that Petitioner was not entitled to the jury’s sympathy because he had not

1 expressed remorse for the crime and failed to admit participation in the crime.
2 (Dkt. No. 317 at 275-81.) On the heels of his argument that the jury should
3 distinguish their sympathy for Petitioner's family from sympathy on Petitioner's
4 behalf, the Prosecutor argued:

5 And there's another thing about sympathy on behalf of the
6 defendant; does he really deserve it? What did he do in the guilt
7 phase?

8 He got up and he testified that he didn't have anything to do
9 with the crime. One of the things I asked you to suggest, or one of
10 the things I suggested to you to consider when you consider pity and
11 sympathy is remorse.

12 Don't you think that a person, before you give him pity and
13 before you give him sympathy, should be remorseful for what he did?
14 No, not this man who is sitting over there.

15 What this man came – and he makes I think your decision
16 much easier for you – he gets up on the stand and one, he commits
17 perjury. And number two, he by the use of force, the threat of force,
18 he coerces and threatens Marjorie Noone to come in here and to
19 commit perjury.

20 And I ask you , and once again, these are difficult questions,
21 but when you go back there, you ask yourself, is that the kind of man
22 that we're going to give sympathy and pity to?

23 (RT 8644-45.)

24 Petitioner claims that the prosecutor committed misconduct during this
25 closing statement because he “placed Petitioner between a rock and hard place.”
26 (Dkt. No. 317 at 277.) Petitioner suggests that in order to have expressed remorse
27 at the penalty phase, he would have had to abandon his penalty phase defense of
28 lingering doubt and the prosecutor's argument “makes it impossible for a

1 defendant who claims he or she is innocent to ever benefit from sympathy as a
2 mitigating factor.” (Dkt. No. 317 at 277.) Further, Petitioner contends that the
3 prosecutor’s remorse argument violated Petitioner’s constitutional rights because
4 it was a statement that Petitioner “should be penalized for failing to confess” and
5 “a defendant cannot express remorse without admitting guilt.” (Dkt. No. 317 at
6 277-78.)

7 Petitioner initially raised this claim as Claim 33 in his June 9, 2003
8 exhaustion petition. (Dkt. No. 336, Lodgment 9 at 161-163.) The California
9 Supreme Court summarily denied the claim on the merits and, alternatively, denied
10 the claim as untimely, barred for having been previously been raised and rejected
11 on direct appeal, barred for having not been raised on direct appeal, and
12 successive. (Dkt. No. 336, Lodgment 12.)

13 Respondent argues that Petitioner has failed to meet his burden of showing
14 that the California Supreme Court’s denial on the merits amounted to an
15 unreasonable application of clearly established federal law, or an unreasonable
16 determination of the facts in light of the evidence presented in the state court
17 proceeding. 28 U.S.C. §2254(d); *Pinholster*, 563 U.S. at 181-82.

18 The Supreme Court has never “clearly established” that a sentencing court
19 may not make an adverse inference from a defendant’s lack of remorse at
20 sentencing. In *Mitchell v. United States*, 526 U.S. 314 (1999), the Supreme Court
21 held that the Fifth Amendment right to remain silent survives a guilty plea and
22 applies at sentencing. *Id.* at 317 (A sentencing court may not draw an adverse
23 inference from a defendant’s silence.). However, the Court “express[ed] no view”
24 on “[w]hether silence bears upon the determination of a lack of remorse, or upon
25 acceptance of responsibility. . .” *Id.* at 330.

26 Petitioner testified during the guilt phase, offering an alibi defense, and
27 maintaining he had no involvement in the commission of the crimes for which he
28 was on trial. (RT 7663-66.) Although the jury rejected this defense, convicting

1 him of first degree special circumstances murder, he put on a “lingering doubt”
 2 defense at the penalty phase. Petitioner now contends that, by arguing that he was
 3 not entitled to sympathy because he failed to express remorse for the crimes, the
 4 prosecution placed him “between a rock and hard place.” Essentially, Petitioner
 5 suggests that he could not express remorse without abandoning his “lingering
 6 doubt” penalty phase defense, that the prosecutor’s comment on his lack of
 7 remorse constituted a statement on his exercise of his right against self-
 8 incrimination, and that any defendant who claims innocence could never benefit
 9 from sympathy as a mitigating factor.

10 The prosecutor in Petitioner’s case was perfectly within his lane when he
 11 argued that Petitioner did not deserve sympathy given his lack of remorse. The
 12 jury had already rejected Petitioner’s claim of innocence during the guilt phase;
 13 nevertheless, he chose to pursue the lingering doubt defense at the penalty phase.
 14 The prosecutor’s comment was not a statement on Petitioner’s exercise of his Fifth
 15 Amendment right against self-incrimination. Petitioner testified. He maintained
 16 his innocence.¹⁷ The prosecutor’s comment was a statement regarding
 17 Petitioner’s failure to express remorse for a crime for which the jury had already
 18 found him guilty. It was an attack on his penalty phase defense and a suggestion
 19 that Petitioner did not deserve sympathy. *See United States v. Segal*, 549 F.2d
 20 1293, 1299 n.3 (9th Cir.) (“a sentencing court [may] impose a harsh sentence as a
 21 penalty for the defendant’s refusal to admit guilt, since an admission would
 22 evidence the first step in rehabilitation”), *cert. denied*, 431 U.S. 919 (1977); *see*
 23 *also United States v. Long*, 706 F.2d 1044, 1055 (9th Cir. 1983); *Gollaher v.*
 24 *United States*, 419 F.2d 520, 529-31 (9th Cir.), *cert. denied*, 396 U.S. 960 (1969).

25 With respect to Petitioner’s contention that the prosecutor’s argument

26 ¹⁷ The idea that the expression of remorse warrants sympathy or mitigating effect, is
 27 not supposed to induce involuntary incriminating statements; rather, the expression
 28 of genuine remorse implicates societal interests and indicates the defendant might
 deserve some leniency. *Cf. United States v. Belgard*, 694 F.Supp. 1488, 1497-98
 (D.Ore. 1988).

1 concerning Petitioner's lack of remorse constituted a violation of his right against
 2 self-incrimination, the Ninth Circuit has long observed that the "presence or
 3 absence of remorse is a factor relevant to the jury's penalty decision" in a
 4 California state capital case. *Harris v. Pulley*, 885 F.2d 1354, 1384 (9th Cir. 1988)
 5 (internal quotation marks omitted), *cert. denied*, 493 U.S. 1051 (1990); *Sims v.*
 6 *Brown*, 430 F.3d 1220 (9th Cir. 2005) (citing *Griffin v. California*, 380 U.S. 609
 7 (1965) and finding prosecutor's statements regarding petitioner's lack of remorse
 8 during penalty phase did not constitute impermissible commentary about
 9 petitioner's exercise of his Fifth Amendment right not to testify), *cert. denied*, 549
 10 U.S. 833 (2006); *see also Isaacs v. Head*, 300 F.3d 1232, 1271 (11th Cir. 2002)
 11 (noting that "several other courts have found that, under many circumstances,
 12 arguments or comments related to a lack of remorse do not implicate the
 13 defendant's decision not to testify because they may related to other evidence
 14 properly before the jury or to the defendant's demeanor at trial"), *cert. denied*, 538
 15 U.S. 988 (2003). The California Supreme Court's rejection of Petitioner's claim
 16 was not an unreasonable application of clearly established federal law nor an
 17 unreasonable determination of the facts under §22554(d). Claim 48 is DENIED.

18 f. *CLAIMS 49 & 50 – The Prosecutor Committed*
 19 *Misconduct When He Used Nonstatutory Aggravating*
 20 *Factors During Penalty Phase Argument Without Prior*
 21 *Notice*

22 In Claims 49 and 50, Petitioner argues that the prosecutor committed
 23 prejudicial misconduct when he argued nonstatutory aggravating factors at penalty
 24 phase closing argument. (Dkt. No. 317 at 281-91.) The particular arguments
 25 Petitioner cites were actually made when the prosecutor was addressing mitigating
 26 evidence. (RT 8642-45.) After reading the language of factor (k), the prosecutor
 27 argued:

28 Yesterday you heard some very emotional testimony, and I

1 more than anyone else in this courtroom was moved when the sister
2 got on the stand, when the grandmother got on the stand, when the
3 father got on the stand.

4 The mother, I think the evidence suggests you should have no
5 sympathy for her. That is her child, she's come in here, and she
6 committed perjury during the penalty phase.

7 (RT 8642-43.) In discussing the sympathy the jurors might have for Petitioner's
8 sister, father and grandmother, the prosecutor argued that he did not feel that Mr.
9 Noguera deserved to benefit from the juror's sympathy for his family members.
10 (RT 8644.) As discussed, *supra*, the district attorney argued that Petitioner did not
11 deserve sympathy because he failed to show remorse, he failed to take
12 responsibility, and he committed perjury in "testif[ying] he didn't have anything to
13 do with the crime." (RT 8644-45.) Moreover, the prosecutor drew the jury's
14 attention to the fact that Petitioner "coerc[d] and threaten[ed] Marjorie Noone to . .
15 . commit perjury," and summed up his argument by suggesting that the jurors ask
16 themselves, "is that the kind of man that we're going to give sympathy and pity
17 to?" (RT 8645.)

18 Petitioner initially raised these facts and argument as Claim 17 in his direct
19 appeal. (Dkt. No. 148, Lodgment 1 at 181-90.) The California Supreme Court
20 found that Petitioner had waived the claim by failing to object to the prosecutor's
21 argument, and such failure did not amount to ineffective assistance of counsel
22 because "[t]he prosecutor neither vouched personally for the death penalty as an
23 appropriate sentence [citation] nor argued on the basis of facts not in evidence."
24 *People v. Noguera*, 4 Cal.4th at 639. Petitioner raised the claim(s) again in his
25 June 9, 2003, exhaustion petition as Claims 34 and 35. (Dkt. No. 336, Lodgment 9
26 at 163-65.) The California Supreme Court summarily denied the claims on the
27 merits and, alternatively, denied the claims as untimely, barred for having been
28 previously been raised and rejected on direct appeal, barred for having not been

1 raised on direct appeal, and successive. (Dkt. No. 336, Lodgment 12.)

2 Respondent argues that Petitioner has failed to meet his burden of showing
3 that the California Supreme Court's denials on the merits amounted to an
4 unreasonable application of clearly established federal law, or an unreasonable
5 determination of the facts in light of the evidence presented in the state court
6 proceeding. 28 U.S.C. §2254(d); *Pinholster*, 563 U.S. at 181-82. This Court
7 agrees. More pointedly, Petitioner misconstrues the record.

8 Without citing any clearly established federal law, Petitioner argues that the
9 California Supreme Court's decisions denying his claims were contrary thereto.
10 Even a cursory examination of the record on appeal reveals the flaws in
11 Petitioner's contention. Nowhere in the prosecutor's argument did he suggest that
12 the subject guilt phase testimony should be considered as aggravating evidence.
13 Nor did he argue that the absence of mitigation should be considered in
14 aggravation. *Cf McDowell v. Calderon*, 107 F.3d 1351, 1365 n. 7 (9th Cir. 1997)
15 ("We assume only for the purpose of this analysis that it could be an error of
16 federal constitutional dimension for the prosecutor to argue that the absence of a
17 mitigating factor can be considered by the jury as an aggravating factor in a capital
18 case.") The prosecutor simply argued that the evidence proffered in mitigation did
19 not deserve much weight. There is absolutely no support in the record for
20 Petitioner's contention that the prosecution argued, or that the jury considered,
21 "nonstatutory aggravating factors." The California Supreme Court's rejection of
22 Petitioner's claim was not an unreasonable application of clearly established
23 federal law nor an unreasonable determination of the facts under §2254(d).
24 Claims 49 and 50 are DENIED.

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28 //

g. CLAIM 51 – The Prosecutor Committed Misconduct
When He Improperly and Fraudulently Contended
During the Guilt Phase that the Alleged Co Conspirator,
Dominique Navarro, Had Refused to Testify at
Petitioner’s Behest

In Claim 51, Petitioner argues that the prosecutor committed prejudicial misconduct during guilt phase closing argument when he suggested that Dominique Navarro had refused to testify “at Petitioner’s behest.” (Dkt. No. 317 at 291-96.)

Petitioner initially brought this claim as Claim 16 in his initial exhaustion petition. (Dkt. No. 336, Lodgment 4 at 165-71.) The California Supreme Court summarily denied the claim on the merits and, alternatively, found the claim to be untimely and barred for having not been raised on direct appeal. (Dkt. No. 336, Lodgment 8.)

Respondent argues that Petitioner has failed to meet his burden of showing that the California Supreme Court’s denials on the merits amounted to an unreasonable application of clearly established federal law, or an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. §2254(d); *Pinholster*, 563 U.S. at 181-82.

As discussed above, Dominique Navarro was Jovita Navarro’s daughter, and Petitioner’s girlfriend. On the evening before the murder, Petitioner and Dominique went to a party together, went out for a hamburger and “went parking before Petitioner took [Dominique] home about 1:30 am.” (Dkt. No. 317 at 23, citing CT Supp. I at 54-56.) By all accounts, Dominique was home at 4:30 a.m., when Jovita was attacked, and she ran to a neighbor’s house for help. (RT at 5175, 5183, 5438, 5583; CT Supp. I at 63.) Contrary to Petitioner’s suggestion that “Dominique’s testimony appeared to be neither material nor pertinent,”¹⁸ there

¹⁸ Dkt. No. 317 at 292-93.

1 was substantial reason for the prosecution to call her as a witness at trial as the
2 state's theory at trial was that Dominique and Petitioner conspired in the murder of
3 her mother.

4 On February 4, 1987, during a pre-trial hearing regarding motions
5 scheduling, the district attorney advised the trial court that he intended to file a
6 motion regarding the use of Dominique Navarro's statements to police and
7 prosecutors, and her application for life insurance benefits following the murder of
8 her mother. (RT 4276.) The prosecutor sought to introduce this evidence in
9 support of his theory that "there were three objectives [of the conspiracy]: to kill
10 the victim, to cover it up, and to collect the money from the insurance." (RT
11 4340.) At the time of the hearing, Ms. Navarro's juvenile first-degree murder
12 conviction was final, and she had already spoken to an investigator from the
13 district attorney's office. (RT 4277.) The district attorney stated that he planned
14 to call her to testify at an *in limine* motion hearing, but she advised the investigator
15 that she was going to refuse to testify. (RT 4277.) The prosecutor advised the
16 judge that it was his "desire to call her in our case in chief" and "specifically to
17 impeach her [with her prior statements] if she does not. . . let me back it up." (RT
18 4277.)

19 On February 9, 1987, Dominique took the stand a pretrial hearing in
20 Petitioner's case, while represented by counsel. (RT 4295-96.) Her attorney
21 advised the court that "[s]he did not want to be involved. She did not want to be
22 sworn, did not want to have anything to do with the case. . . ." (RT 4296.) She also
23 said that she understood "the consequences of taking the posture," but "did not
24 wish to participate as a witness." (RT 4296.) After Dominique refused to respond
25 to the administration of the oath, the trial court held her in contempt and ordered
26 her held in the Orange County Jail until either the conclusion of the trial or she
27
28

1 notified authorities of her intention to testify.¹⁹ (RT 4299-300.) In her absence,
 2 the trial court denied the People's motion to introduce at trial her December 20,
 3 1983, statement to police, determining that the statement was involuntary. (RT at
 4 4338.) The court did, however, grant the People's motion to introduce
 5 Dominique's statement to Mindy Jackson, her statements to police on April 24,
 6 1983, and her applications for insurance benefits in June and September of 1983.
 7 The court found that "the statements offered or proffered ultimately were made in
 8 preparation of the objective of conspiracy; therefore, the statements [were]
 9 admissible as an exception to the hearsay rule." (RT 4341.)

10 During the defense case, Petitioner took the stand and testified that he had
 11 no involvement in Jovita Navarro's murder. (RT 7618-90.) Immediately upon
 12 conclusion of his testimony, out of the presence of the jury, the prosecution noted
 13 its intention to ask Petitioner on cross-examination if he had made certain
 14 statements before and after Dominique's February 9, 1983, refusal to testify.²⁰ (RT
 15 7690-91.) If he denied making the statements, the prosecutor intended to
 16 subpoena two deputy marshals to testify regarding the statements, which were
 17 relevant to the prosecution's contention that Petitioner dissuaded Dominique from
 18 testifying. (RT 7691-96.) The trial court overruled the defense objection to the
 19 introduction of the evidence. (RT 7696.)

20 On cross-examination, the district attorney asked Petitioner about
 21 Dominique's appearance in court on the morning of February 9, 1987. (RT 7698-

22 ¹⁹ On February 11, 1987, Dominique was charged by complaint with a violation of
 23 California Penal Code section 32, "accessory after the fact," "as a result of her
 24 failure to take the oath when commanded to by the court." (RT 8795-800, 8828-
 25 29.) Under section 32, "[e]very person who, after a felony has been committed,
 26 harbors, conceals or aids a principal in such felony, with the intent that said
 principal may avoid or escape from arrest, trial, conviction or punishment, having
 knowledge that said principal has committed such felony or has been charged with
 such felony or convicted thereof, is an accessory to such felony." Cal. Pen. C. §32.

27 ²⁰ At trial, the court took judicial notice of the facts that, (1) on February 9, 1983,
 28 Dominique took the stand, and refused to take the oath and testify; and (2) as of the
 time she was called to the stand, she had no privilege to prevent her from testifying.
 (RT 7843-44, 7846-47.)

1 99.) Petitioner testified that before the hearing he was housed downstairs. (RT
2 7700.) He recalled that he asked the marshal if it was okay if he saw Dominique,
3 and was told that “if [he] wanted a visit, [he would] have to have a custody visit.”
4 (RT 7700-01.) Petitioner denied referring to Dominique as his “wife.” (RT 7701.)
5 Petitioner testified that Dominique was escorted into court, took the witness stand,
6 and did nothing; she stood mute. (RT 7699.) She was held in contempt, and
7 taken out of the courtroom. (RT 7702.) Petitioner denied asking anyone to “tell
8 Dominique she did a real good job in testifying.” (RT 7703.)

9 In rebuttal, the prosecution called Deputy Cindy Lucille Cossairt who
10 testified that she was assigned to be Mr. Noguera’s runner on February 9, 1983, to
11 take him up to the courtroom. (RT 7839.) Sometime between 8:30 and 9:00 a.m.,
12 before Dominique testified, Petitioner asked Deputy Cossairt who was in charge of
13 the basement holding facility because he wanted to be able to talk to “his wife”
14 who “had just come down to testify in his case.” (RT 7838-39.) Deputy Cossairt
15 testified that Dominique Navarro was the only female in the holding area who was
16 scheduled to testify; she was present when Dominique was given the oath. (RT
17 7840, 7844.)

18 Subsequently, Deputy William A. Elliott testified that he was working in the
19 holding area at approximately noon on February 9, 1983, when he heard Petitioner
20 talking to another inmate, “Mr. Clark.” (RT 7848-49.) “[Mr. Noguera] relayed to
21 Mr. Clark . . . to tell Dominique that, ‘she did a good job and tell her that I love
22 her.’” (RT 7849.) That day, Deputy Elliott contacted Jeff Arnold from the Orange
23 County District Attorney’s Office. (RT 7850-51.)

24 Given the fact that Dominique did not have a privilege at the time she
25 refused to testify, in combination with the deputy marshals’ testimony, it was not
26 unreasonable for the prosecutor to infer that Petitioner had influenced her
27 decision. There is no evidence to support Petitioner’s contentions that “*the*
28 *prosecutor knew*” (1) “that Dominique Navarro’s refusal to testify was due to her

1 concern that it would negatively affect her safety in the Women’s Jail at the time”;
2 or (2) “that, had Dominique Navarro been transferred to another facility, she
3 would have been willing to testify.” (Dkt. No. 317 at 295.) The prosecutor’s
4 argument did not constitute misconduct.

5 Moreover, unless the prosecutor’s alleged misconduct had a substantial and
6 injurious effect or influence in determining the jury’s verdict, a grant of relief is
7 unwarranted. *Brecht*, 507 U.S. at 637-38; *Darden*, 477 U.S. at 181; *see also Smith*
8 *v. Phillips*, 455 U.S. at 219 (“Past decisions of this Court demonstrate that the
9 touchstone of due process analysis cases of alleged prosecutorial misconduct is the
10 fairness of the trial, not the culpability of the prosecutor.”) The touchstone of the
11 *Darden/Donnelly* standard is the fairness of the trial. *See Darden*, 477 U.S. 181-
12 82 & n. 13 (noting that prosecutorial comments, although deserving of
13 condemnation, did not violate due process because they did not affect the fairness
14 of the trial). The *Darden* factors—i.e., the weight of the evidence, the prominence
15 of the comment in the context of the entire trial, whether the prosecution misstated
16 the evidence, whether the judge instructed the jury to disregard the comment,
17 whether the comment was invited by defense counsel in its summation and
18 whether defense counsel had an adequate opportunity to rebut the
19 comment—require courts to place improper argument in the context of the entire
20 trial to evaluate whether its damaging effect was mitigated or aggravated. What
21 *Darden* requires reviewing courts to consider appears to be equivalent to
22 evaluating whether there was a “reasonable probability” of a different result. As
23 such, a key factor in the prejudice analysis is the strength of the evidence against
24 the accused.

25 Assuming without finding that the prosecutor’s inference here was
26 somehow erroneous, Petitioner cannot demonstrate that he suffered any prejudice
27 therefrom. During his guilt phase closing argument, the prosecutor admitted to the
28 jury that his case relied upon circumstantial evidence. (RT 8237.) He discussed

1 each of the pieces of the puzzle that was his case – (1) the bogus rape; (2) the
 2 bogus burglary; (3) the lack of forced entry; (4) Petitioner’s knowledge of martial
 3 arts; (5) the testimony of the two deputy marshals, suggesting that Petitioner had
 4 influenced Dominique’s February 9, 1983, refusal to testify; (6) forensic evidence;
 5 (7) Margaret Noone’s perjury; (8) Dominique’s unusual behavior on the night of
 6 the murder; (9) the meeting at Bob’s Big Boy with Ricky Abram; (10) the motive;
 7 and (11) Dominique’s statements to La Habra Police. (RT 8237-40.) The
 8 prosecutor repeatedly advised the jurors that they could accept or reject any of the
 9 pieces – “if we don’t prove it to you. . . you can just throw it away and you
 10 consider the rest of the evidence and see if we proven [sic] to you beyond a
 11 reasonable doubt....” (RT 8238, 8239.)

12 In light of the evidence presented at the guilt phase, Petitioner cannot
 13 demonstrate that the California Supreme Court’s decision, denying his claim that
 14 prosecutor’s argument affected the fairness of his trial, was unreasonable under
 15 §2254(d). *See Darden*, 477 U.S. at 181 n. 13. Claim 51 is DENIED.

16 h. CLAIM 52 – The Prosecutor Committed Misconduct
 17 When He Improperly Led the Jury to Place a Price Tag
 18 on Each Aggravating or Mitigating Factor

19 In Claim 52, Petitioner argued that the prosecutor suggested the jury place a
 20 “price tag”²¹ on each of the aggravating and mitigating factors and thereby misled
 21 the jury “about the nature of its responsibility for determining the appropriateness
 22 of the death penalty in Petitioner’s case.” (Dkt. No. 317 at 298-99.)

23 Petitioner initially brought this claim as Claim 36 in his June 9, 2003
 24 exhaustion petition. (Dkt. No. 336, Lodgment 9 at 166-69.) The California

25
 26 ²¹ While the prosecutor did use the term “price tag” on one occasion, he explained
 27 to the jurors that it was their duty to “assign a value” or “assign a weight” to each of
 28 the mitigating and aggravating factors. (RT 8646) The district attorney emphasized
 the weighing analogy and argued that the jury’s sentencing decision would result
 from not simply counting the numbers on each side, but weighing the factors on
 each side against each other. (RT 8646-47.)

1 Supreme Court summarily denied the claim on the merits and, alternatively, found
 2 the claim to be untimely, barred for having been raised on direct appeal, barred to
 3 the extent it was not raised on direct appeal, and barred as successive. (Dkt. No.
 4 336, Lodgment 12.)

5 Respondent argues that Petitioner has failed to meet his burden of showing
 6 that the California Supreme Court's denials on the merits amounted to an
 7 unreasonable application of clearly established federal law, or an unreasonable
 8 determination of the facts in light of the evidence presented in the state court
 9 proceeding. 28 U.S.C. §2254(d); *Pinholster*, 563 U.S. at 181-82. This Court
 10 agrees.

11 For the reasons set forth *supra* with respect to Claims 44, 45 and 46, Claim
 12 52 is DENIED.

13 i. *CLAIM 54 – The Cumulative Effect of the Prosecutor's*
 14 *Misconduct Requires that Petitioner's Convictions and*
 15 *Death Sentence Be Reversed*

16 In Claim 54, Petitioner argues that the errors alleged in Claims 43-52,
 17 individually or in combination, had a substantial and injurious influence on
 18 Petitioner's convictions and sentences, rendering them fundamentally unfair and a
 19 miscarriage of justice. (Dkt. No. 317 at 304.)

20 Petitioner raised this claim for the first time as Claim 37 in his June 9, 2003
 21 exhaustion petition. (Dkt. No. 336, Lodgment 9 at 169.) The California Supreme
 22 Court summarily denied the claim on the merits and, alternatively, found the claim
 23 to be untimely, barred for having been raised on direct appeal, barred to the extent
 24 it was not raised on direct appeal, and barred as successive. (Dkt. No. 336,
 25 Lodgment 12.)

26 Respondent argues that Petitioner has failed to meet his burden of showing
 27 that the California Supreme Court's denials on the merits amounted to an
 28 unreasonable application of clearly established federal law, or an unreasonable

1 determination of the facts in light of the evidence presented in the state court
2 proceeding. 28 U.S.C. §2254(d); *Pinholster*, 563 U.S. at 181-82.

3 In considering the cumulative effect of the prosecutorial misconduct
4 Petitioner alleges, the Court must “analyze the prosecutorial misconduct
5 challenges [addressing arguments to the jury] to assess whether they alone so
6 infected the trial with unfairness as to make the resulting conviction a denial of
7 due process. If the prosecution’s comments alone do not meet this standard, [the
8 Court] analyze[s] them together” with any additional allegations of prosecutorial
9 misconduct, “to determine whether there is a reasonable probability that without
10 those violations the result of the proceeding would have been different.” *Hein v.*
11 *Sullivan*, 601 F.3d 897, 915 (9th Cir. 2010), *cert. denied*, 563 U.S. 935 (2011). In
12 some cases, although no single trial error is sufficiently prejudicial to warrant
13 habeas relief, the cumulative effect of several errors may still prejudice a
14 Petitioner so much that his conviction or sentence must be overturned. *See Alcalá*
15 *v. Woodford*, 334 F.3d 862, 893-95 (9th Cir. 2003). However, where no single
16 constitutional error exists, nothing can accumulate to the level of a constitutional
17 violation. *Hayes v. Ayers*, 632 F.3d 500, 524 (9th Cir. 2011); *cf. United States v.*
18 *Martinez Martinez*, 369 F.3d 1076, 1090 (9th Cir.) (“[T]he ‘cumulative error’
19 analysis is inapposite [where] [the] Defendant has failed to demonstrate any
20 [constitutional error].”), *cert. denied*, 543 U.S. 1013 (2004).

21 As discussed *supra*, this Court has found that the California Supreme Court
22 may have reasonably determined that any prosecutorial misconduct here does not
23 amount to a denial of due process nor suggest a reasonable probability of a
24 different result absent the alleged misconduct. The court was not objectively
25 unreasonable in concluding that any prosecutorial misconduct was harmless.
26 Thus, this Court concludes that there can be no cumulative error. Claim 54 is
27 DENIED.
28

1 **E. Trial Court Error**

2 A habeas corpus petitioner is not entitled to relief based on trial error, unless
 3 the error resulted in “actual prejudice.” *Davis v. Ayala*, __ U.S. __, 135 S.Ct.
 4 2187, 2197 (2015) (citing *Brecht*, 507 U.S. at 637); *Darden v. Wainwright*, 477
 5 U.S. at 181; *Chapman v. California*, 386 U.S. 18, 24 (1967). Under this standard,
 6 “relief is proper only if the federal court has ‘grave doubt about whether a trial
 7 error of federal law had substantial and injurious effect or influence in determining
 8 the jury's verdict.’ ” *Davis v. Ayala*, 135 S.Ct. at 2197-98 (*quoting O’Neal v.*
 9 *McAninch*, 513 U.S. 432, 436 (1995)); see also *O’Neal*, 513 U.S. at 437 (defining
 10 “grave doubt” as being in “virtual equipoise as to the harmlessness of the error”).
 11 “There must be more than a ‘reasonable possibility’ that the error was harmful. . .
 12 . [T]he court must find that the defendant was actually prejudiced by the error.”
 13 *Davis v. Ayala*, 135 S. Ct. at 2197–98 (internal quotes and citations omitted).

14 **1. CLAIM 19: The Trial Court Erred in Allowing Excessive**
 15 **Courtroom Security**

16 In Claim 19, Petitioner argues that the trial court ordered excessive
 17 courtroom security at Petitioner’s trial in violation of his constitutional rights to a
 18 fair trial, an impartial jury, a reliable special circumstance determination, a fair and
 19 reliable penalty phase determination, equal protection, and due process. (Dkt. No.
 20 317 at 160-64.) Petitioner bases this claim on facts alleged in the May 18, 1996
 21 declaration of Petitioner’s wife, Francesca Mozqueda. (Dkt. No. 318, Ex. GG.)

22 Petitioner raised this claim for the first time in state court as Claim 12 of his
 23 March 1998 exhaustion petition. (Dkt. No. 336, Lodgment 4 at 157-60.) The
 24 California Supreme Court summarily rejected the claim on the merits and,
 25 alternatively, denied the claim as untimely, and *Dixon* barred. (Dkt No. 336,
 26 Lodgment 8.)

27 Respondent argues that Petitioner has failed to meet his burden of showing
 28 that the California Supreme Court’s denial of Claim 11 on the merits amounted to

1 an unreasonable application of clearly established federal law, or an unreasonable
2 determination of the facts in light of the evidence presented in the state court
3 proceeding. 28 U.S.C. §2254(d); *Pinholster*, 563 U.S. at 181-82.

4 In *Holbrook v. Flynn*, 475 U.S. 560 (1986), the Supreme Court established
5 a framework for analyzing whether courtroom security measures violate a
6 defendant's right to a fair trial. *Hayes v. Ayers*, 632 F.3d at 521. Reviewing courts
7 must first “look at the scene presented to jurors and determine whether what they
8 saw was so inherently prejudicial as to pose an unacceptable threat to defendant's
9 right to a fair trial.” *Id.* (quoting *Holbrook*, 475 U.S. at 572). In assessing inherent
10 prejudice, the question is “whether an unacceptable risk is presented of
11 impermissible factors coming into play” in the jury's evaluation of the defendant.
12 *Hayes*, 632 F.3d at 521 (citing *Holbrook*, 475 U.S. at 570 (internal quotation
13 marks omitted)). If security measures are not found to be inherently prejudicial, a
14 court then considers whether the measures actually prejudiced members of the
15 jury. *Hayes*, 632 F.3d at 521 (citing *Holbrook*, 475 U.S. at 572). “[I]f the
16 challenged practice is not found inherently prejudicial and if the defendant fails to
17 show actual prejudice, the inquiry is over.” *Hayes*, 632 F.3d at 522 (quoting
18 *Holbrook*, 475 U.S. at 572).

19 Petitioner complains of “a number of security measures” taken at his trial.
20 (Dkt. 317 at 162.) According to Ms. Mozqueda’s declaration: “[t]here were two
21 bailiffs inside the courtroom and two outside the door”; “anyone entering the court
22 room had to go through a metal detector and sign in”; Petitioner “was shackled
23 during the entire trial and there were bailiffs at his side at all times”; and “[t]here
24 was a helicopter circling the court building.” (Dkt. No. 318-4 at 922.) The Court
25 will address each of Petitioner’s allegations in turn.

26 The “conspicuous” or “noticeable” deployment of security personnel in a
27 courtroom during trial is not an “inherently prejudicial practice,” like shackling or
28 requiring the defendant to appear in court in prison garb, for example, which are

1 practices that need to be justified by “an essential state interest specific to each
2 trial.” *See Holbrook*, 475 U.S. at 568–69. “[T]he presence of guards at a
3 defendant's trial need not be interpreted as a sign that he is particularly dangerous
4 or culpable. Jurors may just as easily believe that the officers are there to guard
5 against disruptions emanating from outside the courtroom or to ensure that tense
6 courtroom exchanges do not erupt into violence. Indeed, it is entirely possible that
7 jurors will not infer anything at all from the presence of the guards.” *Holbrook*,
8 475 U.S. at 569.

9 As the Ninth Circuit recognized in *Hayes*, the logic of *Holbrook* also
10 permits entry-screening procedures such as those employed at Petitioner’s trial.

11 If uniformed guards sitting directly behind a defendant “need not be
12 interpreted as a sign that he is particularly dangerous or culpable,”
13 then the mere screening of all who enter the courtroom certainly
14 should not be. Indiscriminate screening at the courtroom door permits
15 an even “wider range of inferences” than strategically placed guards,
16 and it suggests even more strongly that the security is designed “to
17 guard against disruptions emanating from outside the courtroom.”

18 *Hayes*, 632 F.3d at 522 (quoting *Holbrook*, 475 U.S. at 569).

19 With respect to the shackling and circling helicopter, there is nothing
20 beyond Ms. Mozqueda’s declaration to support the allegations. There is no
21 indication in the trial record that Petitioner was shackled at trial. In fact, in
22 acknowledging the ongoing defense objection to the metal detector, the trial judge
23 stated on the record that there was no additional “security than any other court has
24 had in the court on capital cases.” (RT 8334.) There is no objection on the record
25 to shackling or other security measures aside from the metal detector. Moreover,
26 as Respondent correctly notes, it is highly unlikely that any helicopter flying
27 above or circling the Orange County courthouse had anything to do with
28 Petitioner’s trial. Beyond the declaration, Petitioner has provided no evidence to

1 support the existence of this helicopter, or its purpose. Petitioner's claims are
2 conclusory.

3 In light of the foregoing authorities, the Court finds habeas relief is not
4 warranted. Petitioner fails to demonstrate how he was "actually prejudiced" by any
5 of the alleged security measures. *See Hayes*, 632 F.3d at 522–23 (where petitioner
6 cannot show "actual prejudice" from courtroom security procedures, habeas relief
7 not warranted). As Respondent notes, at the outset of the trial, the court instructed
8 the jurors that they were not to consider the use of courtroom security measures, in
9 particular the metal detector (RT 4376), and it is presumed that jurors follow the
10 instructions they are given. *Penry v. Johnson*, 532 U.S. at 799; *Richardson v.*
11 *Marsh*, 481 U.S. 200, 206-07 (1987). While Petitioner cites the post-trial question
12 of a single juror asking the trial court if it could "answer anything about the
13 unusual security of the case?", this question is open to many interpretations and
14 certainly does not demonstrate that Petitioner suffered actual prejudice. Assuming
15 without finding that the juror was asking about the security measures employed at
16 trial, the question alone reveals that the juror had not drawn negative inferences,
17 but remained curious. Accordingly, the Court finds Petitioner has not carried his
18 burden to show that the California Supreme Court's finding of no constitutional
19 error was an unreasonable application of clearly established federal law under
20 section 2254(d). Claim 19 is DENIED.

21 **2. CLAIM 22: The Trial Court Erred When It Permitted the**
22 **Prosecutor to Ask Questions During Voir Dire that Required**
23 **Jurors to Prejudge the Evidence**

24 In Claim 22, Petitioner argues that the trial court erred in permitting the
25 prosecutor to ask the voir dire questions to which he raises objection in Claim 21.
26 In light of this Court's finding, *infra*, that the questions were not improper, the
27 California Supreme Court's finding of no constitutional error was not an
28 unreasonable application of clearly established federal law under section

1 2254(d)(1), nor an unreasonable determination of the facts under section
 2 2254(d)(2). Claim 22 is DENIED.

3 **3. CLAIM 23: The Trial Court's Biased and Inappropriate**
 4 **Questions and Comments During Voir Dire Violated**
 5 **Petitioner's Rights**

6 In Claim 23, Petitioner argues that his constitutional rights were violated
 7 when, "[t]hroughout voir dire, the trial judge made flippant remarks that
 8 undermined the seriousness of the proceedings against Petitioner and indicated the
 9 court's lack of respect for the judicial system and the rules of law the court was
 10 bound to enforce." Petitioner also suggests that the court's comments "created an
 11 impermissible risk that the jurors, recognizing the trial court's bias against
 12 Petitioner, were also prejudiced against Petitioner and in favor of imposing the
 13 death penalty." (Dkt. No. 317 at 178.)

14 Petitioner raised this claim as Claim 13 in his March 1998 exhaustion
 15 petition. (Dkt. No. 336, Lodgment 4 at 160-63.) The California Supreme Court
 16 summarily denied the claim on the merits and, alternatively, found the claim to be
 17 untimely and *Dixon* barred. (Dkt. No. 336, Lodgment 8.)

18 Respondent argues that Petitioner has failed to meet his burden of showing
 19 that the California Supreme Court's resolution of the claim amounted to an
 20 unreasonable application of clearly established Federal law, or an unreasonable
 21 determination of the facts in light of the evidence presented in the state court
 22 proceeding and, as such, Petitioner is barred from relitigating the claim in federal
 23 court. 28 U.S.C. §2254(d); *Pinholster*, 563 U.S. at 181-82. This Court agrees.

24 Petitioner takes issue with the following comment the trial court made while
 25 explaining sequestered voir dire:

26 The Court will ask various questions concerning your feelings on
 27 capital punishment, your sexual prerogatives – never mind. [¶] As we
 28 get into this case, those of you that stay with us, you'll see that I have

1 a peculiar sense of humor – doesn’t always work, as this last little
2 joke didn’t.

3 (Dkt. No. 317 at 178, quoting RT 1460.) Clearly an attempt at humor, nothing
4 about the comment suggests bias that would entitle Petitioner to habeas corpus
5 relief. Similarly, the judge’s comment made before beginning hardship voir dire,
6 referencing “malingerers and whiners,” did not reveal bias or undermine the
7 seriousness of the proceedings. (Dkt. No. 317 at 178, quoting RT at 1465.) Rather,
8 the court was making light of the process by which jurors seek to be removed from
9 proceedings for hardship.

10 Petitioner also quotes a statement the trial judge made when preparing the
11 jury for sequestered voir dire – “I didn’t set up this kind of a coo-coo system,
12 ladies and gentlemen. It’s required under the State of California law and under the
13 law of the United States.” (Dkt. No. 317 at 178, quoting RT at 1461.) As
14 Respondent notes in its answer to the petition, Petitioner neglects to place the
15 judge’s quote in context. Beyond the cited language, he continued, explaining that
16 the reason for the sequestered voir dire was a good one, “though it is time
17 consuming.” The court told the jury,

18 It may be that an individual is so anti capital punishment or so pro
19 capital punishment, that they voice that with such a degree that it
20 infects or impacts the other jurors and perhaps contaminates –
21 perhaps not a good word – affects the jurors’ minds to the degree that
22 you don’t have a full cross section of the community that is voting
23 their own opinion in the case.

24 (Dkt. No. 330 at 73, quoting RT 1461.) Examined in context, the judge’s
25 comments did not demonstrate bias or disrespect for the judicial process.

26 Petitioner similarly extracts out of context, remarks the trial court made
27 while examining the venire en masse for hardship. During the voir dire,
28 prospective juror Norman B stated “I’m against the death penalty.” (RT 1470.)

1 Because the court was only considering hardship at the time, the judge replied, “I
2 don’t want to hear that now. After I talk to you, you may be for the death penalty. .
3 . . [T]hose are the kinds of things that I want to talk to everybody privately about.”
4 (RT 1470.) In citing only the second sentence of the judge’s reply, Petitioner
5 removes the rationale behind the court’s comment. The judge later elaborated
6 upon his point when addressing the entire jury panel:

7 For those of you that are for the death penalty, after I talk to you, you
8 may switch over to being against the death penalty. My point is that
9 no one is sure until you’ve thought about it in depth; and then there is
10 a difference between how you think you feel and how you really feel
11 when it becomes your responsibility to do something. We’ll keep you
12 for awhile.

13 (RT 1470.) Again, the judge’s remarks do not demonstrate bias or disrespect for
14 the judicial process.

15 Finally, Petitioner takes issue with three comments the trial judge made
16 during sequestered voir dire of three prospective jurors who did not end up sitting
17 on Petitioner’s jury, and one remark he made after a prospective juror left the room
18 and outside the presence of any other jurors. This Court finds nothing in any of
19 the comments that rendered the proceedings unfair.

20 The California Supreme Court’s finding of no constitutional error was not
21 an unreasonable application of clearly established federal law under section
22 2254(d). Claim 23 is DENIED.

23 **4. CLAIM 27: The Trial Court Erred by Admitting Hearsay**
24 **Statements Regarding the Victim’s State of Mind**

25 In Claim 27, Petitioner argues that the trial court violated his Fifth, Sixth,
26 Eighth and Fourteenth Amendment rights when it allowed the prosecution to
27 introduce Jovita Navarro’s hearsay statements through the testimony of Margaret
28 Navarro and Mindy Jackson. (Dkt. No. 317 at 186-93.) Petitioner raised this claim

1 for the first time in state court as claim 1 of his direct appeal. (Dkt. No. 148,
2 Lodgment 1 at 31-60.) The California Supreme Court rejected the claim on the
3 merits, finding that although admission of the hearsay statements was improper, it
4 was harmless error because “admission of the hearsay statements added little to a
5 substantial case pointing to defendant’s guilt.” *People v. Noguera*, 4 Cal.4th at
6 622-23. Petitioner raised the claim again as claim 12 of his June 2003 exhaustion
7 petition, adding additional arguments that he was denied the effective assistance of
8 counsel, an impartial jury, and equal protection. (Dkt. No. 336, Lodgment 9 at
9 103-12.) The California Supreme Court denied the claim on the merits and,
10 alternatively, found it untimely, *Dixon* barred as to those arguments not previously
11 raised on appeal, and successive. (Dkt. No. 336, Lodgment 12.)

12 Respondent argues that Petitioner has failed to meet his burden of showing
13 that the California Supreme Court’s denial of Claim 27 on the merits amounted to
14 an unreasonable application of clearly established federal law, or an unreasonable
15 determination of the facts in light of the evidence presented in the state court
16 proceeding. 28 U.S.C. §2254(d); *Pinholster*, 563 U.S. at 181-82.

17 Petitioner argues that the California Supreme Court’s harmless error finding
18 was unreasonable because the statements “showed more than [Jovita’s] fear” but
19 also included evidence of “direct threats against the deceased” and Jovita’s hatred
20 for Petitioner. (Dkt. No. 317 at 191.) He also argues that the state court erred in
21 finding that the information contained in the hearsay statements was introduced to
22 the jury through other sources and failed to address the prosecution’s use of the
23 hearsay evidence during closing argument. (Dkt. No. 317 at 192.) While Petitioner
24 may be correct about the individual details introduced via the improper testimony,
25 this Court finds the California Supreme Court’s harmless error finding to be
26 reasonable given the weight of evidence of Petitioner’s guilt. As the state court
27 held, “the prosecution presented a strong case supporting the conclusion that
28 Jovita Navarro was murdered by defendant.” *People v. Noguera*, 4 Cal.4th at 622.

1 Although the specific details included in the hearsay statements could have been
 2 excluded, “both defendant and Dominique admitted that his relations with Jovita
 3 were not always good, that she wanted Dominique to date others and was
 4 concerned about the decline in Dominique's schoolwork.” *People v. Noguera*, 4
 5 Cal.4th at 622-23. With respect to the prosecutor’s closing argument, as discussed
 6 in detail *infra*, the Court must “examine the likely effect of the statements in the
 7 context in which they were made,” *Sandoval v. Calderon*, 241 F.3d at 778, to
 8 determine “whether the prosecutors’ comments ‘so infected the trial with
 9 unfairness as to make the resulting conviction a denial of due process.’” *Darden*,
 10 477 U.S. at 181 (quoting *Donnelly v. DeChristoforo*, 416 U.S. at 643). “Improper
 11 comment warrants reversal only if it appears that the comment may possibly have
 12 affected the verdict.” *Lincoln v. Sunn*, 807 F.2d at 809 (citation omitted). The jury
 13 listened to Ricky Abram’s testimony regarding the meeting at Bob’s Big Boy,
 14 where Petitioner confided in Abram the details of his plan to kill Jovita Navarro,
 15 and sought his help. It heard John Arce’s testimony that Petitioner said he wanted
 16 to kill Jovita. It heard Margaret Noone’s testimony that Petitioner had threatened
 17 her into testifying on his behalf. No reasonable jurist could find that the
 18 prosecutor’s remarks “had [a] substantial and injurious effect or influence in
 19 determining the jury’s verdict.” *Sandoval v. Calderon*, 241 F.3d at 778 (citation
 20 omitted) (alteration in original), *cert. denied*, 534 U.S. 847, and *cert denied*, 534
 21 U.S. 943 (2001). Accordingly, the Court finds Petitioner has not carried his
 22 burden to show that the California Supreme Court’s finding of no constitutional
 23 error was an unreasonable application of clearly established federal law under
 24 section 2254(d). Claim 27 is DENIED.

25 **5. CLAIM 28: The Trial Court Erred in Admitting Evidence of**
 26 **Petitioner’s Prior Bad Acts**

27 In Claim 28, Petitioner argues that the trial court erroneously allowed the
 28 prosecution to introduce evidence, through the testimony of Steve Arce, of two

1 incidents in which Petitioner used martial arts to fight. Petitioner argues that the
2 fights were introduced as prior bad acts to defame his character in violation of his
3 constitutional rights. (Dkt. No. 317 at 195-97.) Petitioner raised this claim for the
4 first time in state court as claim 2 of his direct appeal. (Dkt. No. 148, Lodgment 1
5 at 61-70.) The California Supreme Court rejected the claim on the merits, finding
6 that the evidence was properly admitted. *People v. Noguera*, 4 Cal.4th at 623-24.
7 Petitioner raised the claim again as Claim 13 of his June 2003 exhaustion petition,
8 adding arguments regarding ineffective assistance of counsel, denial of an
9 impartial jury, and denial of equal protection. (Dkt. No. 336, Lodgment 9 at 112-
10 16.) The California Supreme Court summarily rejected the claim on the merits and,
11 alternatively, found the claim to be untimely, *Dixon* barred as to those portions of
12 the claim not raised on direct appeal, and successive. (Dkt. No. 336, Lodgment
13 12.)

14 Respondent argues that Petitioner has failed to meet his burden of showing
15 that the California Supreme Court's denial of Claim 28 on the merits amounted to
16 an unreasonable application of clearly established federal law, or an unreasonable
17 determination of the facts in light of the evidence presented in the state court
18 proceeding. 28 U.S.C. §2254(d); *Pinholster*, 563 U.S. at 181-82.

19 This Court finds no error in the California Supreme Court's finding that
20 introduction of the evidence was proper. Whereas other evidence of Petitioner's
21 familiarity with martial arts was remote in time, Mr. Arce's testimony placed
22 Petitioner's use of martial arts in closer proximity to the killing. Nevertheless,
23 assuming without finding that the court improperly admitted the evidence,
24 Petitioner has failed to demonstrate that he suffered prejudice therefrom. As
25 discussed *supra*, the evidence of Petitioner's guilt was substantial. Accordingly,
26 the Court finds Petitioner has not carried his burden to show that the California
27 Supreme Court's finding of no constitutional error was an unreasonable
28 application of clearly established federal law under section 2254(d). Claim 28 is

1 DENIED.

2 **6. CLAIM 29: The Trial Court Erred in Admitting Hearsay**
 3 **Statements Regarding Dominique Navarro's Makeup**

4 In Claim 29, Petitioner argues that the trial court erroneously admitted
 5 hearsay statements of Dominique Navarro and Mindy Jackson regarding
 6 Dominique's makeup. (Dkt.No. 317 at 197-203.) Petitioner raised this claim for
 7 the first time in state court as Claim 4 on direct appeal. (Dkt.No. 148, Lodgment 1
 8 at 92-95.) The California Supreme Court rejected the claim on the merits, finding
 9 that evidence that Dominique lied about the circumstances of the killing was
 10 relevant to proving the existence of the conspiracy. *People v. Noguera*, 4 Cal.4th
 11 at 626-28. While the state court found that Dominique's prior statement about
 12 removing her makeup was inadmissible, it duplicated other properly admitted
 13 evidence, and Petitioner was not prejudiced as a result of its admission. *Id.*
 14 Petitioner raised the claim again as Claim 14 of his June 2003 exhaustion petition,
 15 adding additional arguments that admission of the evidence denied him effective
 16 assistance of counsel, an impartial jury, and equal protection.. (Dkt. No. 336,
 17 Lodgment 9 at 116-22.) The California Supreme Court summarily denied the
 18 claim on the merits and, alternatively, found it to be untimely, *Dixon* barred as to
 19 those parts of the claim not previously brought on direct appeal, and successive.
 20 (Dkt. No. 336, Lodgment 12.)

21 Respondent argues that Petitioner has failed to meet his burden of showing
 22 that the California Supreme Court's denial of Claim 28 on the merits amounted to
 23 an unreasonable application of clearly established federal law, or an unreasonable
 24 determination of the facts in light of the evidence presented in the state court
 25 proceeding. 28 U.S.C. §2254(d); *Pinholster*, 563 U.S. at 181-82.

26 Petitioner argues that he suffered prejudice as a result of the erroneously
 27 admitted hearsay testimony about Dominique's habit of removing her makeup. He
 28 suggests that "[w]ithout the hearsay evidence. . . the prosecutor would have been

1 unable to suggest that [Dominique] had not retired for the night. . . . or to argue
 2 that her account of having retired tended to show evidence of a well-planned
 3 scheme to kill her mother.” (Dkt. No. 317 at 202.) Petitioner is mistaken. As the
 4 California Supreme Court noted in denying the claim, “[g]iven the early hour, and
 5 Dominique’s testimony that she had been awakened from sleep by the sounds of a
 6 struggle, it is likely that a reasonable juror would be more impressed with the fact
 7 that Dominique was wearing makeup at all, rather than by the contested ‘habit
 8 evidence that she always removed her cosmetics before going to bed.’” *People v.*
 9 *Noguera*, 4 Cal.4th at 628. Moreover, the jury heard Ricky Abram’s testimony
 10 regarding the “well-planned scheme” to murder Jovita, including Dominique’s
 11 involvement and role to run hysterically next door to report the break-in. (RT
 12 4943-44.) In any event, Petitioner has failed to demonstrate that he suffered
 13 prejudice because the jury heard testimony about Dominique’s habit of removing
 14 her make-up. As discussed *supra*, the evidence of Petitioner’s guilt was
 15 substantial.

16 The Court finds Petitioner has not carried his burden to show that the
 17 California Supreme Court’s finding of no constitutional error was an unreasonable
 18 application of clearly established federal law under section 2254(d). Claim 29 is
 19 DENIED.

20 **7. CLAIM 30: The Trial Court Erred in Admitting Ricky**
 21 ***Abram’s Prior Consistent Statements***

22 In Claim 30, Petitioner argues that the trial court violated his Fifth, Sixth,
 23 Eighth, and Fourteenth Amendment rights, including his rights to the effective
 24 assistance of counsel, a fair trial, an impartial jury, a reliable special circumstance
 25 finding, equal protection and due process, when it allowed the prosecution to
 26 introduce Ricky Abram’s prior consistent statement. (Dkt. No. 317 at 203-206.)
 27 Petitioner raised this claim for the first time in state court as claim 5 of his direct
 28 appeal. (Dkt. No. 148, Lodgment 1 at 96-101.) The California Supreme Court

1 denied the claim on the merits, finding introduction of the prior statements to be
2 proper, under state law, where they had been made before the alleged motive for
3 Abram to lie arose. *People v. Noguera*, 4 Cal.4th at 628-30. Petitioner raised the
4 arguments again in Claim 15 of his June 2003 exhaustion petition, adding
5 arguments that admission of the evidence denied him effective assistance of
6 counsel, an impartial jury, and equal protection. (Dkt. No. 336, Lodgment 9 at
7 123-24.) The California Supreme Court summarily denied the claim on the merits
8 and, alternatively, found the claim to be untimely, *Dixon* barred as to the newly
9 raised arguments, and successive. (Dkt. No. 336, Lodgment 12.)

10 Respondent argues that Petitioner has failed to meet his burden of showing
11 that the California Supreme Court's denial of Claim 30 on the merits amounted to
12 an unreasonable application of clearly established federal law, or an unreasonable
13 determination of the facts in light of the evidence presented in the state court
14 proceeding. 28 U.S.C. §2254(d); *Pinholster*, 563 U.S. at 181-82.

15 Petitioner acknowledges that his trial attorney's cross-examination of Mr.
16 Abram was, in large part, an effort to undermine his credibility. (Dkt. No. 317 at
17 205.) A review of the record reveals that Mr. Pereyda did not suggest that Abram
18 "was under the threat of prosecution" in connection with the murder, as Petitioner
19 implies,²² but rather, had a motive to fabricate testimony in expectation of benefits
20 connected to subsequent arrests. (RT 5026-58, 5113-19.) As such, it was
21 reasonable for the California Supreme Court to find proper, under state law, the
22 prosecution's introduction, on redirect, of Mr. Abram's prior consistent statement.
23 "Although [Petitioner] argues that Abram had a motive to minimize his potential
24 penal liability as soon as Keltner told him that he was liable criminally as a
25 coconspirator, . . . the focus under Evidence Code Section 791 is the specific
26 agreement or other inducement suggested by cross-examination as supporting the
27 witness's improper motive." *People v. Noguera*, 4 Cal.4th at 630. "[A] prior

28 ²² Dkt. No. 317 at 205.

1 consistent statement is admissible as long as the statement [was] made before the
 2 existence of any one of the motives that the opposing party expressly or impliedly
 3 suggests may have influenced the witness's testimony.” *Id.* at 629. “Here, the
 4 thrust of defense counsel’s cross-examination of Ricky Abram sought to explore,
 5 in light of his cooperation in testifying against defendant, the existence and nature
 6 of any agreements with law enforcement authorities to obtain early parole or
 7 assistance in the favorable disposition of multiple criminal charges brought against
 8 him *after* the December 1983 interview with Keltner.” *Id.* at 629-30. The
 9 admission of evidence is an issue of state law and errors of state law do not
 10 warrant federal habeas corpus relief. *See Estelle v. McGuire*, 502 U.S. 62, 67-68
 11 (1991).

12 Petitioner cites no authority to carry his burden to show that the California
 13 Supreme Court’s finding was an unreasonable application of clearly established
 14 federal law or an unreasonable determination of the facts under section 2254(d).
 15 Claim 30 is DENIED.

16 **8. CLAIM 53 – *The Trial Court Erred When It Permitted the***
 17 ***Improper Prosecutorial Argument Regarding the Weighing***
 18 ***of Aggravating and Mitigating Factors and Failed to Give***
 19 ***Corrective Instructions to the Jury***

20 In Claim 53, Petitioner argues that the trial court erred in allowing alleged
 21 improper prosecutorial arguments regarding the weighing of aggravating and
 22 mitigating evidence and in failing to give corrective instructions to the jury. (Dkt.
 23 No. 317 at 300-01.)

24 Petitioner raised this claim for the first time as Claim 17 in his March 2,
 25 1998, exhaustion petition. (Dkt. No. 336, Lodgment 4 at 172–73.) The California
 26 Supreme Court summarily denied the claim on the merits and, alternatively, found
 27 the claim to be untimely and barred for having been raised on direct appeal. (Dkt.
 28 No. 336, Lodgment 8.)

Respondent argues that Petitioner has failed to meet his burden of showing that the California Supreme Court's denials on the merits amounted to an unreasonable application of clearly established federal law, or an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. §2254(d); *Pinholster*, 563 U.S. at 181-82.

As discussed above, any errors in the prosecutor's challenged statements were harmless. In light of the benign or non-existent errors Petitioner alleges, the Court cannot find trial court error that rendered the trial fundamentally unfair. Any trial court error in permitting the arguments did not have a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 638. In fact, the trial court properly instructed the jury regarding the weighing of mitigating and aggravating evidence. The California Supreme Court's determination rejecting this claim was not contrary to, or an unreasonable application of, clearly established federal law, nor was it based on an unreasonable determination of the facts. Claim 53 is DENIED.

9. CLAIM 56 – *The Trial Court Erred in Failing Properly to Answer the Jury's Question as to Whether They Could Return a Verdict of Life Without Possibility of Parole if the Aggravating Factors Outweighed Those in Mitigation*

In Claim 56, Petitioner argues that the trial court violated his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments when it failed to properly answer the jury's question regarding the weighing of aggravating and mitigating evidence. (Dkt. No. 317 at 304-09.)

The jury began penalty phase deliberations at 3:05 p.m. on May 21, 1987. (RT 8711; CT 1348.) The next day, May 22, 1987, the jury made a series of requests. In relevant part to the claim raised here, the jury asked the following question: "If the jury finds aggravating circumstances exceed the mitigating circumstances, is it still possible for the jury to find the appropriate sentence is life

1 without the possibility of parole?” (CT 1350; RT 8714.) In a hearing held outside
2 of the presence of the jury, the defense took the position that the trial court should
3 simply respond to the question, “yes.” (RT 8712.) The prosecution, on the other
4 hand, asked the court to read the jury the relevant instruction regarding the
5 weighing of mitigating and aggravating evidence. (RT 8713.) At 2:35 p.m. on
6 May 22, 1987, the Court reread Jury Instruction 8.84.2 to the jury, in accord with
7 the district attorney’s request. The Court instructed the jury:

8 It is now your duty to determine which of the two penalties,
9 death or confinement in the state prison without possibility of parole,
10 shall be imposed on the defendant.

11 After having heard all of the evidence, and after having heard
12 and considered the arguments of counsel, you shall consider, take into
13 account, and be guided by the applicable factors of aggravating and
14 mitigating circumstances upon which you have been instructed.

15 The weighing of aggravating and mitigating circumstances
16 does not mean a mere mechanical counting of factors on each side of
17 an imaginary scale. You are free to assign whatever weight you deem
18 appropriate to each and all of the various factors upon which you
19 have been instructed. By weighing the totality of the various
20 circumstances you must determine which penalty is appropriate,
21 death, or life without the possibility of parole.

22 If, in your reasoned judgment, you conclude that the
23 aggravating circumstances outweigh the mitigating circumstances and
24 you personally believe death is the appropriate sentence under all the
25 circumstances, then you shall impose death. In the event that you
26 cannot so find, you shall impose life without the possibility of parole.
27 (RT 8714-16.) Twenty minutes after receiving the instruction, the jury returned a
28 verdict of death. (CT 1353; RT 8717.)

1 Petitioner contends that the trial court erred in answering the jury's inquiry,
 2 and the error violated his right to a fundamentally fair and reliable penalty phase
 3 proceeding. Petitioner suggests that the jury's question made clear that it was
 4 confused about the legal standard, and argues that rereading the same instruction
 5 that led to the confusion amounted to a failure to guide the juror's discretion and
 6 to prevent arbitrary action.

7 Petitioner raised this claim for the first time as Claim 39 of his June 9, 2003,
 8 exhaustion petition. (Dkt. No. 336, Lodgment 9 at 172–75.) The California
 9 Supreme Court summarily denied the claim on the merits and, alternatively, found
 10 the claim to be untimely, barred for having been raised on direct appeal, barred to
 11 the extent it was not raised on appeal, and barred as successive. (Dkt. No. 336,
 12 Lodgment 12.)

13 Respondent argues that Petitioner has failed to meet his burden of showing
 14 that the California Supreme Court's denials on the merits amounted to an
 15 unreasonable application of clearly established federal law, or an unreasonable
 16 determination of the facts in light of the evidence presented in the state court
 17 proceeding. 28 U.S.C. §2254(d); *Pinholster*, 563 U.S. at 181-82.

18 The trial court's response to the jury's question, considered in the context of
 19 the instructions as a whole and the trial record, did not violate Petitioner's due
 20 process rights. *See Estelle v. McGuire*, 502 U.S. at 71–72. When a trial judge
 21 responds to a “jury's question by directing its attention to the precise paragraph of
 22 the constitutionally adequate instruction that answers its inquiry,” the Constitution
 23 does not require anything more. *Weeks v. Angelone*, 528 U.S. 225, 234 (2000).
 24 There is a strong presumption that juries understand and follow the trial court's
 25 instructions. *Id.*; *Richardson v. Marsh*, 481 U.S. at 211. Contrary to Petitioner's
 26 contention,²³ the trial court's instruction was a correct statement of state law.

27
 28 ²³ Petitioner contends that “[t]he court's original instruction was both legally wrong and
 confusing.” (Dkt. No. 317 at 308.) The Supreme Court specifically considered CALJIC 8.84.2 in
Boyde, and the mandatory language of penalty phase instructions more generally in *Blystone v.*

Petitioner has not demonstrated that the trial court's decision to re-read the agreed upon jury instruction was erroneous, or that it had a "substantial and injurious effect on the verdict." *Brecht*, 507 U.S. at 623. The California Supreme Court's decision denying Petitioner's claim was not contrary to or an unreasonable application of clearly established federal law, nor was it based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. Claim 56 is DENIED.

**10. CLAIMS 58 & 59 – Aggravating Evidence Was Improperly
Admitted at the Penalty Phase of Petitioner's Trial**

During the penalty phase of Petitioner's trial, the prosecution introduced aggravating evidence through the testimony of John Antenucci, the victim of an attempted robbery and car theft in August, 1983. Antenucci testified that Petitioner responded to an advertisement Antenucci placed in the newspaper listing his car for sale. After taking the car for a test drive, Petitioner pulled the car

Pennsylvania, 494 U.S. 299 (1990). In *Boyde*, the petitioner argued that CALJIC 8.84.2 did not adequately inform the jury as to its discretion in determining the appropriate sentence to be imposed. 494 U.S. at 376. The Court held that the mandatory language of the instruction did not unconstitutionally restrict jury sentencing discretion. *Id.* at 377 ("But there is no such constitutional requirement of unfettered sentencing discretion in the jury, and States are free to structure and shape consideration of mitigating evidence 'in an effort to achieve a more rational and equitable administration of the death penalty.' Petitioner's claim that the 'shall impose' language of CALJIC 8.84.2 unconstitutionally prevents 'individualized assessment' by the jury is thus without merit.") (quoting *Franklin v. Lynaugh*, 487 U.S. 164, 181 (1988) (plurality opinion)). The Supreme Court thus reasoned that there is no constitutional requirement of unfettered sentencing discretion that permits a jury to have the freedom to decline to impose the death penalty even if the jury decides that the aggravating circumstances outweigh the mitigating circumstances. *Id.*; see also *Kansas v. Marsh*, 548 U.S. 163, 171 (2006) ("So long as the sentencer is not precluded from considering relevant mitigating evidence, a capital sentencing statute cannot be said to impermissibly, much less automatically, impose death."); *Turner v. Calderon*, 281 F.3d 851, 871 (9th Cir.2002); *Bonin v. Calderon*, 59 F.3d 815, 849 (9th Cir.1995) (finding this argument foreclosed by the decisions in *Boyde* and *Blystone*), *cert. denied*, 516 U.S. 1051 (1996). Additionally, *Blystone* involved a Pennsylvania death penalty statute that in part mandated the death penalty if the jury unanimously found at least one aggravating circumstance and no mitigating circumstances. *Blystone*, 494 U.S. at 301. The petitioner in that case had argued that the mandatory nature of the instruction unconstitutionally restricted the discretion of the sentencing jury to weigh the aggravating and mitigating circumstances however it deemed appropriate. *Id.* at 302. In rejecting the petitioner's argument, the Supreme Court held that the requirement of individualized sentencing in capital cases is met by allowing the jury to consider all relevant mitigating factors and that the heightened standards of the Eighth Amendment are thereby satisfied. *Id.* at 307-08.

1 over to the side road, ostensibly to allow Antenucci to retake the driver's seat.
2 When Antenucci got out of the car, Petitioner tried to drive away, but the car
3 stalled. (RT 8368.) Once Antenucci was back in the car, Petitioner's cousin pulled
4 a gun and Petitioner told Antenucci to get out, but Antenucci grabbed the keys
5 from the ignition and ran away. (RT 8369-71.) Antenucci stopped a stranger on
6 the street and told him that someone was trying to steal his car. The stranger said
7 he had a gun and the two men returned to the car to find Petitioner and his cousin
8 were trying to hot-wire the car. Petitioner and his cousin fled when they saw the
9 gun. (RT 8372-73.)

10 In Claim 58, Petitioner contends that the trial court erroneously admitted
11 this aggravating evidence because the statute of limitations on the attempted
12 robbery and car theft had expired. Further, in Claim 59, Petitioner argues that his
13 rights were violated because evidence of this unadjudicated crime was admitted in
14 the penalty phase.

15 Petitioner raised these claims for the first time on direct appeal. The
16 California Supreme Court rejected the claims in conjunction with other claims
17 addressing "multiple flaws in the capital sentencing process [that] render the death
18 penalty unconstitutional." *People v. Noguera*, 1 Cal.4th at 649. He raised the
19 claims again as Claims 18 and 19 of his March 2, 1998, exhaustion petition. (Dkt.
20 No. 336, Lodgment 4 at 173-78.) The California Supreme Court summarily
21 denied the claims on the merits and, alternatively, found the claims to be untimely,
22 and barred for having been raised and rejected on direct appeal. (Dkt. No. 336,
23 Lodgment 8.)

24 Respondent argues that Petitioner has failed to meet his burden of showing
25 that the California Supreme Court's denials on the merits amounted to an
26 unreasonable application of clearly established federal law, or an unreasonable
27 determination of the facts in light of the evidence presented in the state court
28 proceeding. 28 U.S.C. §2254(d); *Pinholster*, 563 U.S. at 181-82.

1 Admission or exclusion of evidence in state court is ordinarily not a matter
2 for federal habeas review unless the admission or exclusion violates a particular
3 constitutional guarantee or is so prejudicial that it results in a denial of due
4 process. *See Estelle v. McGuire*, 502 U.S. at 68; *Windham v. Merkle*, 163 F.3d
5 1092, 1103 (9th Cir.1998), *cert. denied*, 541 U.S. 950. In support of his claims,
6 Petitioner cites *Godfrey v. Georgia*, 446 U.S. at 423 and Justice Marshall's dissent
7 from the denial of certiorari in *Miranda v. California*, 486 U.S. 1038 (1988)
8 (Marshall J, dissenting) ("I would grant the petition to resolve the question
9 whether the Eighth and Fourteenth Amendments preclude the introduction of
10 evidence of unadjudicated criminal conduct at the sentencing phase of a capital
11 case."). Neither of these cites supports the suggestion the California Supreme
12 Court's denial of habeas corpus relief amounted to an unreasonable application of
13 *clearly established federal law*. Petitioner fails to cite any authority for his claim
14 that the prosecution violated his due process rights in presenting aggravating
15 evidence of offenses that might be barred from prosecution by a statute of
16 limitations. Moreover and in fact, California's death penalty statute expressly
17 provides that the prosecution in a capital case *may* introduce, in aggravation,
18 evidence of prior felony convictions and evidence of "criminal activity. . . which
19 involved . . . the express or implied threat to use force or violence." Cal. Penal
20 Code §190.3 (b)-(c). The United States Supreme Court has upheld the
21 constitutionality of this law. *California v. Brown*, 479 U.S. 538, 543 (1987); *see*
22 *also Tuilaepa v. California*, 512 U.S. 967, 975-80 (1994); *see also Campbell v.*
23 *Kincheloe*, 829 F.2d 1453, 1461 (9th Cir. 1987) (holding unadjudicated criminal
24 conduct may be introduced to support the aggravating factor of probable future
25 violence), *cert. denied*, 488 U.S. 948 (1988). Not only are Petitioner's claims
26 inconsistent with the statutory scheme, they also contravene the fundamental
27 principle consistently relied on by the United States Supreme Court that the jury
28 should be provided "with all possible relevant information about the individual

1 defendant whose fate it must determine.” *Jurek v. Texas*, 428 U.S. 262, 276
 2 (1976). In *Williams v. New York*, the United States Supreme Court upheld the trial
 3 court’s consideration of thirty-some burglaries allegedly committed by the
 4 defendant, despite the fact that he had not been convicted of these crimes. 337
 5 U.S. 241 (1949). Petitioner does not identify any clearly established authority
 6 from the United States Supreme Court holding that a jury may not consider prior
 7 unadjudicated criminal activity as a factor in aggravation during the penalty phase
 8 of a capital case. Claims 58 and 59 are DENIED.

9 **11. CLAIM 90 – *The Trial Court Misunderstood Its Authority***
 10 ***with Regard to the Automatic Motion for Modification of the***
 11 ***Judgment***

12 In Claim 90, Petitioner argues that his trial judge indicated he
 13 “misunderstood” his authority when he “agreed” with the prosecutor’s
 14 characterization of trial counsel’s motion for new trial and modification of
 15 judgment as “similar to a 1385 motion to reduce the penalty.” (Dkt. No. 317 at
 16 355.) In actuality, the prosecutor did not characterize the motion, but rather asked
 17 a question, was it “similar to 1385 a motion to reduce the penalty of death down to
 18 life?” The judge answered, “Yes” and added, “The Court, of course, has authority,
 19 sitting as a 13th juror, to make those kinds of decisions.” (RT at 8848.) Petitioner
 20 goes on to state, “the trial court only has the authority to determine the sufficiency
 21 of the evidence,” and conclusorily argues “[t]he trial judge was biased in favor of
 22 the death penalty and was therefore unable to perform his duties in a fair and
 23 impartial manner” such that “Petitioner was prejudiced at sentencing.” (Dkt. No.
 24 317 at 355.)

25 Petitioner raised this claim for the first time in state court as Claim 30 of his
 26 March 1998 exhaustian petition. (Dkt. No. 336, Lodgment 4 at 197-98.) The
 27 California Supreme Court summarily denied the claim on the merits and,
 28 alternatively, found it to be untimely and *Dixon* barred. (Dkt. No. 336, Lodgment

1 8.

2 Respondent argues that Petitioner has failed to meet his burden of showing
3 that the California Supreme Court's denial on the merits amounted to an
4 unreasonable application of clearly established federal law, or an unreasonable
5 determination of the facts in light of the evidence presented in the state court
6 proceeding. 28 U.S.C. §2254(d); *Pinholster*, 563 U.S. at 181-82. This Court
7 agrees.

8 Petitioner ignores the fact that, in arguing the motion, Petitioner's trial
9 attorney noted the trial court's use of the phrase "13th juror," and pointed out that
10 "the Court is in a slightly different position in a capital case in this review than the
11 Court is when it rules on sufficiency of evidence as a 13th juror typically after a
12 straight homicide trial." (RT at 8850.) Mr. Pereyda argued that "the Court, like the
13 jury, has the power and obligation to impose death in this case only if those
14 aggravating factors, which in this case is basically the crime itself, so substantially
15 outweigh any mitigating factors about this defendant that the Court can be sure
16 that death is the final appropriate judgment." (RT at 8850-51.) Subsequently, in
17 announcing its decision on the application to modify the verdict, the trial court
18 clearly stated,

19 In ruling on this application, the judge shall review the
20 evidence, consider, take into account, and be guided by the
21 aggravating and mitigating circumstances referred to in section 190.4
22 of the penal code, and shall make a determination as to whether the
23 jury's findings and verdicts that the aggravating circumstances
24 outweigh the mitigating circumstances, are contrary to law or to the
25 evidence presented. The judge shall then state on the record the
26 reasons for his findings.

27 In this particular case, the Court specifically agrees with the
28 jury's findings that the circumstances in aggravation outweigh the

1 circumstances in mitigation, and that they are supported by the weight
 2 of the evidence.
 3 (RT at 8856-57.)

4 The California Supreme Court's decision denying Petitioner's claim was not
 5 contrary to or an unreasonable application of clearly established federal law, nor
 6 was it based on an unreasonable determination of the facts in light of the evidence
 7 presented in the state court proceedings. Claim 90 is DENIED.

8 **F. Instructional Error**

9 **1. *Legal Standard***

10 A claim of instructional error does not raise a cognizable federal claim
 11 unless the error "so infected the entire trial that the resulting conviction violates
 12 due process." *McGuire*, 502 U.S. at 71–72; *Henderson v. Kibbe*, 431 U.S. 145,
 13 154 (1977); *Cupp v. Naughten*, 414 U.S. 141, 146–47 (1973). In determining
 14 whether a constitutional violation has occurred, the claimed instructional error
 15 must be viewed in the light of all the instructions given and the trial record, taken
 16 as a whole. *See McGuire*, 502 U.S. at 72; *Cupp*, 414 U.S. at 146–47.

17 "The fact that a jury instruction violates state law is not, by itself, a basis for
 18 federal habeas corpus relief." *Clark v. Brown*, 450 F.3d 898, 904 (9th Cir.), *cert.*
 19 *denied*, 549 U.S. 1027 (2006). "An appraisal of the significance of an error in the
 20 instructions to the jury requires a comparison of the instructions which were
 21 actually given with those that should have been given." *Kibbe*, 431 U.S. at 154.
 22 "Federal habeas courts therefore do not grant relief, as might a state appellate
 23 court, simply because the instruction may have been deficient in comparison to the
 24 CALJIC model." *Id.* (internal quotation omitted). "The question in a collateral
 25 proceeding is whether the ailing instruction by itself so infected the entire trial that
 26 the resulting conviction violates due process, not merely whether the instruction is
 27 undesirable, erroneous, or even universally condemned." *Id.* (internal quotations
 28 omitted).

1 The record indicates that petitioner did not object to any of the challenged
 2 instructions at trial. Nevertheless, the California Supreme Court considered the
 3 challenges on the merits.

4 **2. CLAIMS 31-34: The Trial Court Erred When It Gave**
 5 **Contradictory, Misleading, and Ambiguous Instructions that**
 6 **Permitted the Jury to Find Guilt Based On the**
 7 **Uncorroborated Testimony of an Accomplice**

8 In Claim 31, which Petitioner now pleads to include Claims 32 through 34,
 9 Petitioner argues that the trial court violated his rights under the Fifth, Sixth,
 10 Eighth and Fourteenth Amendments when it simultaneously instructed the jury
 11 pursuant to CALJIC 3.11, that the testimony of an accomplice requires
 12 corroboration,²⁴ and pursuant to CALJIC 2.27, that the testimony of a single
 13 witness is enough to prove a fact.²⁵ Petitioner argues that these instructions
 14 confused the jury and, thus, his constitutional right to trial by jury was violated.
 15 (Dkt. No. 317 at 206-12.)

16 Petitioner raised this claim for the first time in state court as claim 6 of his
 17 direct appeal. (Dkt. No. 148, Lodgment 1 at 102-08.) The California Supreme
 18 Court rejected the claim on the merits, finding “nothing in the combined
 19 instructions suggested to the jurors that corroboration of Abram’s testimony was
 20 not required: ‘A reasonable juror would have recognized [the single witness

21 ²⁴ The CALJIC 3.11 instruction stated,

22 A defendant cannot be found guilty based upon the testimony of an accomplice
 23 unless such testimony is corroborated by other evidence which tends to connect
 24 such defendant with the commission of the offense.
 (CT 1722; RT 8268.)

25 ²⁵ The CALJIC 2.27 instruction stated,

26 Testimony which you believe given by one witness is sufficient for the proof of any
 27 fact. However, before finding any fact [required to be established by the
 28 prosecution] to be proved solely by the testimony of such a single witness, you
 should carefully review all the testimony upon which the proof of such fact
 depends.
 (CT 1708; RT 8259-60.)

1 instruction] as setting forth the general rule and the charge on accomplice
2 testimony as an exception to it. Nothing before us indicates that the jurors may
3 have acted otherwise.” *People v. Noguera*, 4 Cal.4th at 631 (internal citations
4 omitted). Petitioner raised the claims again in his June 2003 exhaustion petition,
5 adding constitutional arguments that the instructions denied him effective
6 assistance of counsel, a reliable special circumstance determination, a reliable
7 penalty phase determination, and equal protection. (Dkt. No. 336, Lodgment 9 at
8 125-30.) The California Supreme Court summarily denied the claims on the merits
9 and, alternatively, found them to be untimely, *Dixon* barred with respect to those
10 arguments not raised on direct appeal, and successive. (Dkt. No. 336, Lodgment
11 12.)

12 Respondent argues that Petitioner has failed to meet his burden of showing
13 that the California Supreme Court’s merits denials of the claims amounted to an
14 unreasonable application of clearly established federal law, or an unreasonable
15 determination of the facts in light of the evidence presented in the state court
16 proceeding. 28 U.S.C. §2254(d); *Pinholster*, 563 U.S. at 181-82.

17 The propriety of a jury instruction must be considered in light of the
18 instructions as a whole. *Estelle v. McGuire*, 502 U.S. at 72. To obtain federal
19 habeas corpus relief for an instructional error, a petitioner must demonstrate that
20 the error “so infused the trial with unfairness as to deny due process of law.” *Id.* at
21 75. In the present matter, the state court found no instructional error because
22 “nothing in the combined instructions suggested to the jurors that corroboration of
23 Abram’s testimony was not required. . . . Moreover, because there was no error in
24 giving the jury the combined single witness and accomplice corroboration charges,
25 there is no basis upon which to conclude that the jurors relied solely on the
26 uncorroborated testimony of Abram to convict defendant.” *People v. Noguera*, 4
27 Cal.4th at 631. There is also no reason to believe that the jury relied solely on
28 Abram’s testimony to find the special circumstances to be true. This Court finds

1 no reason to reject the state court's determination and find that the jury was
 2 confused by the instructions. Nothing in the record suggests that the jury
 3 instructions were misleading or that the jury applied the instructions in a way that
 4 violated the Constitution. *Estelle v. McGuire*, 502 U.S. at 72.

5 The Court finds Petitioner has not carried his burden to show that the
 6 California Supreme Court's decision denying his claims was an unreasonable
 7 application of clearly established federal law under section 2254(d)(1), or an
 8 unreasonable determination of the facts under section 2254(d)(2). Claims 31, 32,
 9 33 and 34 are DENIED.

10 **3. CLAIMS 35-36: Petitioner's Death Sentence Must Be**
 11 ***Vacated Because It Is Based Upon the Inherently Unreliable***
 12 ***Accomplice Testimony of Prosecution Witness Ricky Abram***

13 In Claim 35, which Petitioner pleads to include Claim 36, Petitioner argues
 14 that Ricky Abram's testimony was inherently unreliable as that of an accomplice
 15 and, as such, his conviction and death sentence violate his Fifth, Sixth, Eighth and
 16 Fourteenth Amendment rights to effective assistance of counsel, a fair trial, an
 17 impartial jury, a reliable special and due process. (Dkt. No. 317 at 211-15.)
 18 Petitioner raised this claim for the first time in state court as claim 6 of his direct
 19 appeal. (Dkt. No. 148, Lodgment 1 at 102-108.) The California Supreme Court
 20 rejected the claim on the merits, finding that it rested on the erroneous
 21 presumption that the jury was confused by the trial court's instructions regarding
 22 witness testimony. *People v. Noguera*, 4 Cal.4th at 631-32. Petitioner raised the
 23 claim again in his June 2003 exhaustion petition, adding the constitutional claims
 24 that the testimony violated his rights to effective assistance of counsel, a fair trial,
 25 an impartial jury, and equal protection. (Dkt. No. 336, Lodgment 9 at 130.) The
 26 California Supreme Court summarily rejected the claim on the merits and,
 27 alternatively, found it to be untimely, *Dixon* barred as to the portions of the claim
 28 not raised on direct appeal, and successive. (Dkt. No. 336, Lodgment 12.)

Respondent argues that Petitioner has failed to meet his burden of showing that the California Supreme Court's merits denials of the claim amounted to an unreasonable application of clearly established federal law, or an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. §2254(d); *Pinholster*, 563 U.S. at 181-82.

Petitioner's claim is based upon his contention, as discussed with respect to Claims 31-34, that "the trial court allowed the jury to believe that they could find the financial gain special circumstance to be true, based solely on the testimony of this particularly unreliable accomplice[, Ricky Abrams]." (Dkt. No. 317 at 214.) This Court has already rejected the premise of Petitioner's argument in denying Claims 31-34. Moreover, even if, as Petitioner contends, "Abram's testimony provided *the primary support for the financial gain special circumstance* that made Petitioner eligible for a death sentence," it was not the *sole* evidence introduced by the prosecution in support of the special circumstance. Petitioner has not demonstrated that the California Supreme Court's decision denying his claims was an unreasonable application of clearly established federal law under section 2254(d)(1), or an unreasonable determination of the facts under section 2254(d)(2). Claims 35 and 36 are DENIED.

4. CLAIM 37: *The Trial Court Erred in Giving California Jury Instructions that Impermissibly Discouraged the Jury from Viewing Accomplice Witness Ricky Abram's Testimony With Distrust or Requiring Corroboration*

In Claim 37, Petitioner argues that the trial court violated his constitutional rights when it instructed the jury pursuant to CALJIC 3.02, that an accomplice "can end his responsibility for the crime by notifying the other party or parties of whom he has knowledge of his intention to withdraw from the commission of the crime and by doing everything in his power to prevent its commission," and pursuant to CALJIC 6.20 that "any member of a conspiracy may withdraw from

1 and cease to be a party to a conspiracy, but his liability for the acts of his
2 coconspirators continues until he effectively withdraws from the conspiracy.”
3 (Dkt. No. 317 at 215-22; CT 1625, 1642.) Petitioner suggests that these
4 instructions permitted the jury to find that Abram was not an accomplice and, thus,
5 that they were not required to view his testimony with distrust or require
6 corroboration. (Dkt. No. 317 at 218.)

7 Petitioner raised this claim for the first time in state court as claim 7 on
8 direct appeal. (Dkt. No. 148, Lodgment 1 at 109-114.) The California Supreme
9 Court rejected the claim on the merits, finding that, in contradiction to Petitioner’s
10 contention, the instructions informed the jury “that withdrawal required something
11 more than impossibility,” and “favor[ed] a finding that Abram was an accomplice”
12 because he had not communicated his withdrawal to his coconspirators. *People v.*
13 *Noguera*, 4 Cal.4th at 633. As such, the instructions “require[d] . . . that his
14 testimony be evaluated skeptically as well as corroborated.” *Id.* Petitioner raised
15 the claim again in his June 2003 exhaustion petition, adding arguments that the
16 instructions denied him effective assistance of counsel, an impartial jury, and
17 equal protection. (Dkt. No. 336, Lodgment 9 at 132-35.) The California Supreme
18 Court summarily denied the claim on the merits and, alternatively, found the claim
19 to be untimely, *Dixon* bared, and successive. (Dkt. No. 336, Lodgment 12.)

20 Respondent argues that Petitioner has failed to meet his burden of showing
21 that the California Supreme Court’s merits denials of the claim amounted to an
22 unreasonable application of clearly established federal law, or an unreasonable
23 determination of the facts in light of the evidence presented in the state court
24 proceeding. 28 U.S.C. §2254(d); *Pinholster*, 563 U.S. at 181-82.

25 The propriety of a jury instruction must be considered in light of the
26 instructions as a whole. *Estelle v. McGuire*, 502 U.S. at 72. To obtain federal
27 habeas corpus relief for an alleged instructional error, a petitioner must
28 demonstrate that the error “so infused the trial with unfairness as to deny due

1 process of law.” *Id.* at 75. In the present matter, the state court found no
2 instructional error because “the contested instructions informed the jurors that
3 withdrawal required something more than impossibility, that is, required Abram to
4 communicate his withdrawal to his conspirators.” *People v. Noguera*, 4 Cal.4th at
5 633. During the in-chambers conference in which the parties conferred regarding
6 proposed jury instruction, the defense lodged a general objection to any
7 instructions regarding conspiracy. (RT 7959, 7971.) As such, it is clear from the
8 record that the district attorney advocated for 6.20 to protect the record. Mr. King
9 argued that it was “important to give the instruction *for the defense view*” because
10 it informed the jury that Abram’s incarceration was insufficient for withdrawal,
11 “that [it was] necessary for him to have communicated,” and it was relevant to
12 how the jury “view[ed] [Abram’s] testimony [because it] gets back to the
13 accomplice instructions.” (RT 7971.) Mr. King stated for the record that he
14 believed Abram was an accomplice. (RT 7963.) Without the instruction advising
15 the jury that communication of withdrawal was necessary, the jury might “feel that
16 [because of his incarceration] at the time of the murder he was not an accomplice”
17 and they were “not required to view his testimony with distrust.” (RT 7971.) This
18 Court finds no reason to reject the state court’s determination and find that the jury
19 misunderstood or ignored the instructions. Nothing in the record suggests that the
20 jury applied the instructions in a way that violated the Constitution. *Estelle v.*
21 *McGuire*, 502 U.S. at 72.

22 Petitioner has not demonstrated that the California Supreme Court’s
23 decision denying his claims was an unreasonable application of clearly established
24 federal law under section 2254(d)(1), or an unreasonable determination of the
25 facts under section 2254(d)(2). Claim 37 is DENIED.

26 //

27 //

1 **5. CLAIM 38: The Trial Court Erred in Giving the Standard**
 2 **Reasonable Doubt Instruction in Combination with the**
 3 **Circumstantial Evidence Instruction**

4 In Claim 38, Petitioner takes issue with the fact that the trial court gave both
 5 the standard reasonable doubt instruction and instructions on the relationship
 6 between reasonable doubt and circumstantial evidence. Citing *Cage v. Louisiana*,
 7 498 U.S. 39 (1990), he argues that, in combination, the instructions redefined
 8 reasonable doubt, “render[ing] the process prejudicially unreliable” in violation of
 9 his Fifth, Sixth, Eighth and Fourteenth Amendment rights. (Dkt. No. 317 at 222-
 10 27.) Petitioner contends that “[t]he instructions as a whole. . . led the jury to find
 11 guilt based on reasonable interpretations of events, rather than facts found beyond
 12 any reasonabl[e] doubt.” (Dkt. No. 317 at 224.)

13 Petitioner raised this claim for the first time in state court as Claim 8 of his
 14 direct appeal. (Dkt. No. 148, Lodgment 1 at 115-18.) The California Supreme
 15 Court rejected the claim on the merits, finding that the trial court gave the standard
 16 CALJIC 2.90 reasonable doubt instruction defining reasonable doubt “as one that
 17 leaves ‘the minds of the jurors in that condition that they cannot say that they feel
 18 an abiding conviction to a moral certainty of the truth of the charge.’” *People v.*
 19 *Noguera*, 4 Cal.4th at 634. “[T]here was no *Cage*-like dilution of the standard
 20 required to convict” and no “transformation of true reasonable doubt . . . into a
 21 higher degree of doubt [required to acquit].” *Id.* With respect to the circumstantial
 22 evidence instruction, the court rejected Petitioner’s “claim that the standard
 23 reasonable doubt instructions regarding circumstantial evidence are in effect
 24 irrebuttable presumptions of guilt.” *Id.* Rather, “[r]ead in context, the instructions
 25 merely require the jury to reject unreasonable interpretations of the evidence, and
 26 to accept the reasonable version of the events which fits the evidence.” *Id.*

27 Petitioner raised the claim again in his June 2003 exhaustion petition,
 28 adding claims that the error denied him effective assistance of counsel, an

1 impartial jury, and equal protection. (Dkt. No. 336, Lodgment 9 at 135-36.) The
 2 California Supreme Court summarily denied the claim on the merits and,
 3 alternatively, found it untimely, *Dixon* barred as to the arguments not raised on
 4 appeal, and successive. (Dkt. No. 336, Lodgment 12.)

5 Respondent argues that Petitioner has failed to meet his burden of showing
 6 that the California Supreme Court's merits denials of the claim amounted to an
 7 unreasonable application of clearly established federal law, or an unreasonable
 8 determination of the facts in light of the evidence presented in the state court
 9 proceeding. 28 U.S.C. §2254(d); *Pinholster*, 563 U.S. at 181-82.

10 To obtain federal habeas corpus relief for an instructional error, a petitioner
 11 must demonstrate that the error "so infused the trial with unfairness as to deny due
 12 process of law." *Estelle v. McGuire*, 502 U.S. at 75. The propriety of a jury
 13 instruction must be considered in light of the instructions as a whole, and the
 14 proper inquiry is not whether the instruction "could have" been applied
 15 unconstitutionally but whether there is a reasonable likelihood that the jury did so
 16 apply it. *Id.* at 72; *Victor v. Nebraska*, 511 U.S. 1, 6 (1994). In the present matter,
 17 the state court found no instructional error and there is also no reason to believe
 18 that the jury applied the instructions in a way that violated the Constitution. *Estelle*
 19 *v. McGuire*, 502 U.S. at 72.

20 Petitioner has not demonstrated that the California Supreme Court's
 21 decision denying his claims was an unreasonable application of clearly established
 22 federal law under section 2254(d)(1), or an unreasonable determination of the
 23 facts under section 2254(d)(2). Claim 38 is DENIED.

24 **6. CLAIM 39 – *The Trial Court Erred In Giving a Penalty***
 25 ***Instruction that was Inconsistent with People v. Brown***

26 In Claim 39, Petitioner contends that the trial court's penalty phase
 27 instructions improperly required the jury to determine penalty by mechanically
 28 weighing aggravating evidence against mitigating evidence, in direct

1 contravention of the California Supreme Court's decisions in *People v. Brown*, 40
2 Cal.3d 512 (1985) and *People v. Burgener*, 41 Cal.3d 505 (1986). (Dkt. No. 317 at
3 228-29.)

4 Petitioner raised this claim for the first time on direct appeal as Claim 15 of
5 his appellate opening brief. (Dkt. No. 148, Lodgment 1 at 165-172.) The
6 California Supreme Court rejected the claim, noting that the trial court had tailored
7 its instruction to comply with *Brown*. *People v. Noguera*, 4 Cal.4th at 640. It
8 disagreed with Petitioner's contention that he "suffered substantial prejudice when
9 the trial [court] failed to fully modify the [Penal Code section 190.3] instruction."
10 (Dkt. No. 148, Lodgment 1 at 168.) Rather, the Court held that

11 [g]iven the modifications in the instruction made in light of the
12 concerns expressed in *Brown*,...we do not think there is a reasonable
13 likelihood that a juror would have misunderstood the nature of his or
14 her role in the capital sentencing process – either as one involving
15 mechanical quantification of relevant factors or *requiring* the
16 imposition of the death penalty.

17 *People v. Noguera*, 4 Cal.4th at 641 (citing *People v. Clair*, 2 Cal.4th 629, 662-63
18 (1992)). Petitioner again presented this claim to the California Supreme Court as
19 Claim 24 in his June 9, 2003 exhaustion petition. (Dkt. No. 336, Lodgment 9 at
20 136-38.) The California Supreme Court summarily denied the claim on the merits
21 and, alternatively, found the claim to be untimely, barred to the extent it was raised
22 on direct appeal, barred to the extent it was not raised on direct appeal, and barred
23 as successive. (Dkt. No. 336, Lodgment 12.)

24 Respondent argues that Petitioner has failed to meet his burden of showing
25 that the California Supreme Court's denials on the merits amounted to an
26 unreasonable application of clearly established federal law, or an unreasonable
27 determination of the facts in light of the evidence presented in the state court
28 proceeding. 28 U.S.C. §2254(d); *Pinholster*, 563 U.S. at 181-82.

1 At the close of the penalty phase, the trial court instructed Petitioner's jury
2 concerning the scope of its sentencing function as follows:

3 After having heard all of the evidence and having heard and
4 considered the argument of counsel, you shall consider and take into
5 account and be guided by the applicable factors of aggravating and
6 mitigating circumstance upon which you have been instructed.

7 The weighing of aggravating and mitigating circumstances
8 does not mean a mere mechanical counting of factors on each side of
9 an imaginary scale. You are free to assign whatever weight you deem
10 appropriate to each and all of the various factors upon which you
11 have been instructed. By weighing the totality of various
12 circumstances, you must determine which penalty is appropriate,
13 death, or life without the possibility of parole.

14 If, in your reasoned judgment, you conclude that the
15 aggravating circumstances outweigh the mitigating circumstances and
16 you personally believe death is the appropriate sentence under all the
17 circumstances, then you shall impose death. In the event that you
18 cannot so find, you shall impose life without the possibility of parole.

19 (RT 8702-703; CT 1254.) Petitioner contends that this instruction was improper
20 under *People v. Brown*, 40 Cal.3d 512, in which the California Supreme Court
21 considered an appellant's claim that the unadorned language of section 190.3 of
22 the 1978 death penalty statute could mislead penalty phase juries as to their role in
23 the capital sentencing process, thereby leading to unconstitutional capital
24 sentences. Looking at the language of *the statute*, the state court agreed that it
25 "would be invalid if . . . it required jurors to render a death verdict on the basis of
26 some arithmetic formula, or if it forced them to impose death on any basis other
27 than their own judgment that such a verdict was appropriate under all the facts and
28 circumstances of the individual case." *People v. Brown*, 40 Cal.3d at 540.

1 However, the Court agreed with the People, that the statute “need not, and should
2 not, be so interpreted.” *Id.* at 531. The Court did acknowledge that, under some
3 circumstances, the statute’s language could confuse a penalty jury regarding its
4 role in the capital sentencing process, and it instructed “trial courts in future death
5 penalty trials . . . [to] instruct the jury as to the scope of its discretion and
6 responsibility in accordance with the principles set forth in this opinion.” *Id.* at
7 544 n. 17.

8 As the California Supreme Court noted in denying Petitioner’s claim on
9 direct appeal, “[t]he penalty determination instruction given in this case was not
10 the instruction challenged in *People v. Brown* . . . ”²⁶ *People v. Noguera*, 4 Cal.4th
11 at 640. Rather, “the transcript of the chambers conference at which counsel and
12 the trial judge discussed proposed penalty instructions indicates that the
13 instruction challenged by [Petitioner] as erroneous under *Brown* was drawn with
14 full knowledge of [the] opinion in that case . . . [and] passes muster in light of the
15 the twin concerns . . . expressed in *Brown*.” *Id.* First, the instruction clearly
16 informed the jury that its sentencing decision should not be the result of a
17 “mechanical counting of factors on each side of an imaginary scale,” and the jurors
18 were “free to assign whatever weight [they] deem[ed] appropriate to each and all
19 of the various factors.” (RT at 8715.) Second, the inclusion of the word “shall”
20 was not fatal to the instruction’s validity where, in light of the whole instruction,
21 there was virtually no risk that a juror misunderstood his or her sentencing
22 discretion or the penalty determination process. Each juror was instructed to abide
23 by their own “reasoned judgment,” in coming to a penalty decision – “if , in your
24 reasoned judgment, you conclude that the aggravating circumstances outweigh the
25 mitigating circumstances *and you personally believe death is the appropriate*

26
27 ²⁶ CALJIC 8.84.2 told the jury to consider all applicable aggravating and mitigating circumstances
28 and followed with this direction: “If you conclude that the aggravating circumstances outweigh the
mitigating circumstances, you shall impose a sentence of death. However, if you determine that
the mitigating circumstances outweigh the aggravating circumstances, you shall impose a sentence
of confinement in the state prison for life without the possibility of parole.”

1 *sentence under all the circumstances*, then you shall impose death. In the event
 2 that you cannot so find, you shall impose life without the possibility of parole.”
 3 (RT at 8715-16 (emphasis added).)

4 The California Supreme Court’s determination rejecting this claim was not
 5 contrary to, or an unreasonable application of, clearly established federal law, nor
 6 was it based on an unreasonable determination of the facts. Claim 39 is DENIED.

7 **7. CLAIM 57 – The Trial Court Erred in Refusing Pinpoint**
 8 **Instructions Requested by Petitioner**

9 In Claim 57, Petitioner argues that the trial court violated his rights under
 10 the Fifth, Sixth, Eighth and Fourteenth Amendments when it refused to give a
 11 special pinpoint instruction, offered by the defense, that listed the mitigating
 12 evidence presented in Petitioner’s case and directed the jurors to “consider, take
 13 into account, and be guided” by each of mitigating factors “if [they] deem[ed]
 14 them applicable.” (CT 1266.) Petitioner suggests that, in denying this claim, the
 15 California Supreme Court erroneously and unreasonably decided the state legal
 16 issues and failed to decide the federal substantive issues. (Dkt. No. 317 at 312.)

17 Petitioner raised this claim for the first time on direct appeal, and the
 18 California Supreme Court rejected it finding that a defendant is not entitled to
 19 have the trial court direct the jury to favorable evidence, but rather has a “right to
 20 an instruction that “pinpoint[s] the *theory* of the defnse.” ’ ” *People v. Noguera*, 1
 21 Cal.4th at 647-48 (internal citations omitted) (emphasis in original). Petitioner
 22 raised the claim again as Claim 40 of his June 9, 2003, exhaustion petition. (Dkt.
 23 No. 336, Lodgment 9 at 175-77.) The California Supreme Court summarily
 24 denied the claim on the merits and, alternatively, found the claim to be untimely,
 25 barred for having been raised on direct appeal, barred to the extent it was not
 26 raised on appeal, and barred as successive. (Dkt. No. 336, Lodgment 12.)

27 Respondent argues that Petitioner has failed to meet his burden of showing
 28 that the California Supreme Court’s denials on the merits amounted to an

1 unreasonable application of clearly established federal law, or an unreasonable
 2 determination of the facts in light of the evidence presented in the state court
 3 proceeding. 28 U.S.C. §2254(d); *Pinholster*, 563 U.S. at 181-82.

4 Beyond generally referring to constitutional provisions, Petitioner cites no
 5 authority in support of his claim, and there is no clearly established federal law
 6 requiring courts to give the kind of instruction requested here. Broad, conclusory
 7 allegations of unconstitutionality are insufficient to state a cognizable claim.
 8 *Jones v. Gomez*, 66 F.3d at 205; *Greyson v. Kellam*, 937 F.2d 1409, 1412 (9th
 9 Cir.1991) (bald assertions of ineffective assistance of counsel did not entitle the
 10 petitioner to an evidentiary hearing); *see also Hiivala v. Wood*, 195 F.3d 1098,
 11 1106 (9th Cir.1999) (*citing Gray v. Netherland*, 518 U.S. 152, 162-63 (1996) for
 12 the proposition that “general appeals to broad constitutional principles, such as
 13 due process, equal protection, and the right to a fair trial, are insufficient to
 14 establish exhaustion”), *cert. denied*, 529 U.S. 1009 (2000). A petitioner in federal
 15 court cannot merely characterize some state act as unconstitutional and expect the
 16 court to explore all possible grounds under each article and amendment of the
 17 Constitution. Petitioner’s claim is insufficiently pled to raise a federal question in
 18 these habeas proceedings. Claim 57 is DENIED.

19 **8. CLAIM 60 – *The Trial Court Improperly Instructed the Jury***
 20 ***That It Must Consider All the Evidence Which Has Been***
 21 ***Received During Any Part of This Trial***

22 In Claim 60, Petitioner argues that the trial court improperly instructed the
 23 jury pursuant to CALJIC 8.84.1 that, “in determining which penalty is to be
 24 imposed,” it must “consider *all of the evidence which as been received during any*
 25 *part of this trial.*” (CALJIC 8.84.1 (1986 Revision); CT 1245; RT 8696-97).
 26 Petitioner contends that this instruction invited the jury “to consider any evidence
 27 from the penalty phase, without any guidelines.” (Dkt. No. 317 at 319-20.)

28 Petitioner raised this claim for the first time as Claim 20 in his March 2,

1 1998, exhaustion petition. (Dkt. No. 336, Lodgment 4 at 179-80.) The California
2 Supreme Court summarily denied the claim on the merits and, alternatively, found
3 the claim to be untimely, and barred because it could have been but was not raised
4 and direct appeal. (Dkt. No. 336, Lodgment 8.)

5 Respondent argues that Petitioner has failed to meet his burden of showing
6 that the California Supreme Court's denial on the merits amounted to an
7 unreasonable application of clearly established federal law, or an unreasonable
8 determination of the facts in light of the evidence presented in the state court
9 proceeding. 28 U.S.C. §2254(d); *Pinholster*, 563 U.S. at 181-82.

10 For decades capital habeas petitioners have been calling into question the
11 validity of CALJIC 8.84.1, with particular attention to the validity of the "factor
12 (k)" instruction, which they argue prevents jurors from considering mitigating
13 evidence of background and character. Addressing such a claim in 1990, the
14 United States Supreme Court held in *Boyde v. California* that, through CALJIC
15 8.84.1,

16 the jury was instructed that it "*shall consider all of the evidence*
17 *which has been received during any part of the trial of this case,*" and
18 in our view reasonable jurors surely would not have felt constrained
19 by the factor (k) instruction to *ignore all* of the evidence presented by
20 petitioner during the sentencing phase.

21 494 U.S. at 383-84 (emphasis in original). In the present matter, Petitioner turns
22 the factor (k) argument on its head, suggesting that, by permitting the jury to
23 consider evidence received at any point during the trial, CALJIC 8.84.1 abandons
24 the jury to the wind, encouraging jurors to use "unfettered discretion to decide
25 whether Petitioner should live or die." (Dkt. No. 317 at 320.) In so arguing,
26 Petitioner ignores the entirety of the penalty phase instructions, and the history of
27 judicial approval of CALJIC 8.84.1. Petitioner's claim is entirely without merit
28 and the California Supreme Court's decision denying the claim was in no way an

1 unreasonable application of clearly established federal law. Claim 60 is DENIED.

2 **9. CLAIM 67 – The Trial Court Failed to Make Clear that**
3 **Petitioner’s Age Could Only Be Used as a Mitigating Factor**

4 In Claim 67, Petitioner argues that the trial court erred in failing to “make
5 clear that Petitioner’s age could only be considered as a mitigating factor” and that
6 this error violated his “constitutional right to a reliable, individualized sentencing
7 decision based on the jury’s exercise fo properly guided discretion...” (Dkt. No.
8 317 at 334-35.)

9 Petitioner raised this claim for the first time as Claim 47 in his June 9, 2003,
10 exhaustion petition. (Dkt. No. 336, Lodgment 9 at 184.) The California Supreme
11 Court summarily denied the claim on the merits. (Dkt. No. 336, Lodgment 12.)

12 Respondent argues that Petitioner has failed to meet his burden of showing
13 that the California Supreme Court’s denials on the merits amounted to an
14 unreasonable application of clearly established federal law, or an unreasonable
15 determination of the facts in light of the evidence presented in the state court
16 proceeding. 28 U.S.C. §2254(d); *Pinholster*, 563 U.S. at 181-82.

17 Petitioner was eighteen years old at the time of the murder. His trial
18 attorney argued in penalty phase closing argument that Petitioner’s age was a
19 mitigating factor. In countering the prosecutor’s contention that Petitioner “had
20 all the blessings of life and, therefore, maybe [the jury] should not take into
21 account his young age”, Mr. Pereyda noted:

22 . . . [I]t is important to realize that at age 18, he probably – had he
23 been a few months younger, he would not have had to face the death
24 penalty and be spared this ordeal just by a mere factor of months.

25 And I think that when you consider age, you have to consider
26 age and the experiences of life up to that young age of 18 and it’s a
27 factor of mitigation, something that you have to consider, I think.
28 (RT 8664.) Subsequently, the trial court instructed the jury that, in making its

1 sentencing recommendation, among the things it must consider was “. . . (i) the
2 age of the defendant at the time of the crime.” (CT 1245-46; RT 8697-98.) While
3 Petitioner now suggests that the trial court should have included another
4 instruction that made “clear that Petitioner’s age could only be considered as a
5 mitigating factor,” he provides no clearly established federal law to support this
6 claim. In *Tuilaepa v. California*, 512 U.S. at 976, the Supreme Court rejected
7 petitioner’s challenge to the “equivocal” nature of the jury’s consideration of the
8 defendant’s age at the time of the crime, holding that “[i]t is neither surprising nor
9 remarkable that the relevance of the defendant’s age can pose a dilemma for the
10 sentencer.” *Id.* at 977 (observing that “difficulty in application is not equivalent to
11 vagueness.”). Moreover, in *Ayers v. Belmontes*, 549 U.S. 7 (2006), the Court
12 observed that “California’s overall balancing process” provided by the 1978 death
13 penalty statute “requires juries to consider and balance. . . factors . . . that are
14 labeled neither as mitigating nor as aggravating . . . [T]he jury itself must
15 determine the side of the balance on which each listed factor falls.” 549 U.S. at 23
16 (rejecting challenge to factor (k) instruction); *see also Pulley v. Harris*, 465 U.S.
17 37, 51, 52 n. 14 (1984) (holding that, notwithstanding the fact that “[th]e statute
18 does not separate aggravating and mitigating circumstances,” the 1977 California
19 statute was not unconstitutionally arbitrary); *Babbitt v. Calderon*, 151 F.3d at 117-
20 79 (rejecting argument the 1978 statute “was erroneous because the jury was not
21 specifically told which factors it could consider as extenuating”); *Williams*, 52
22 F.3d at 1484 (holding that the 1977 statute’s “failure to label aggravating and
23 mitigating factors is constitutional”).

24 In *Lockett v. Ohio*, 438 U.S. 586 (1978) the United States Supreme Court
25 made clear that the Constitution guarantees a capital defendant not only the right
26 to introduce evidence mitigating against the death penalty, but also the right to
27 consideration of that evidence by the sentencing authority. Two years prior, in
28 *Jurek v. Texas*, 428 U.S. 262, the Supreme Court held that the state of Texas’s

1 sentencing procedures satisfied the Eighth Amendment that the sentencer be
2 allowed to consider circumstances mitigating against capital punishment where the
3 special verdict question regarding a defendant's future dangerousness permitted
4 the jury to consider mitigating evidence of the defendant's prior criminal record,
5 age, mental state, and the circumstances of the crime. *Id.* at 271-73. Here,
6 Petitioner's trial counsel argued that the jury should weigh his age as a mitigating
7 factor, and CALJIC 8.84.1 adequately instructed the jury that Petitioner's age was
8 a factor for its consideration in coming to its penalty phase determination. The
9 California Supreme Court's decision denying the claim was neither an
10 unreasonable application of clearly established federal law nor an unreasonable
11 determination of the facts under §2254(d). Claim 67 is DENIED.

12 **10. CLAIM 69 – *The Trial Court Failed to Instruct the Jury Not***
13 ***to Draw an Adverse Inference from Petitioner's Failure to***
14 ***Testify at the Penalty Phase***

15 In Claim 69, Petitioner contends that the trial court committed prejudicial
16 error in failing to instruct the jury not to draw an adverse inference from
17 Petitioner's failure to testify at the penalty phase.

18 Petitioner raised this claim for the first time as Claim 49 in his June 9, 2003,
19 exhaustion petition. (Dkt. No. 336, Lodgment 9 at 185-86.) The California
20 Supreme Court summarily denied the claim on the merits. (Dkt. No. 336,
21 Lodgment 12.)

22 Respondent argues that Petitioner has failed to meet his burden of showing
23 that the California Supreme Court's denials on the merits amounted to an
24 unreasonable application of clearly established federal law, or an unreasonable
25 determination of the facts in light of the evidence presented in the state court
26 proceeding. 28 U.S.C. §2254(d); *Pinholster*, 563 U.S. at 181-82.

27 In 2014, the United States Supreme Court held in *White v. Woodall*, that the
28 Kentucky Supreme Court's conclusion, that the Fifth Amendment did not require a

1 no-adverse-inference instruction to protect a nontestifying defendant at the penalty
 2 phase of a capital trial, did not constitute a decision “contrary to” clearly
 3 established federal law. ___ U.S. ___, 134 S.Ct. 1697, 1702 (2014). The Court
 4 noted that it has ““never directly held that *Carter* applies at a sentencing phase
 5 where the Fifth Amendment interests of the defendant are different.”” *Woodall*,
 6 134 S.Ct. at 1703 (internal citation omitted). Moreover, “if *Mitchell [v. United*
 7 *States*, 526 U.S. 314] suggests that *some* actual inferences might be permissible at
 8 the penalty phase, it certainly cannot be read to require a blanket no-adverse-
 9 inference instruction at every penalty-phase trial.” *Woodall*, 134 U.S. at 1704.
 10 Here, as in *Woodall*, this Court cannot find that the state court was unreasonable in
 11 its decision refusing to extend *Carter* to the penalty phase context. *Id.* at 1705-06.
 12 Claim 69 is DENIED.

13 **G. Cumulative Error Claims**

14 **1. *CLAIM 40: The Cumulative Effect of the Guilt-Phase Errors*** 15 ***Denied Petitioner a Fair Trial and Constitutionally Reliable*** 16 ***Penalty Phase Verdicts***

17 In Claim 40, Petitioner argues that the cumulative effect of numerous guilt-
 18 phase errors denied him a fair trial and a constitutionally reliable penalty phase
 19 verdict. (Dkt. 317 at 231-35.) Petitioner raised this claim for the first time in state
 20 court as claim 10 of his direct appeal. (Dkt. No. 148, Lodgment 1 at 133-35.) The
 21 California Supreme Court rejected the claim, finding that none of the alleged guilt
 22 phase errors were prejudicial in light of the other evidence of Petitioner’s guilt,
 23 and the trial court’s limiting instructions. *People v. Noguera*, 4 Cal.4th at 637.
 24 Because the prosecution’s case for guilt was strong, and the problems with Ricky
 25 Abram’s testimony were made evident to the jury through cross-examination,
 26 Petitioner could not demonstrate a reasonable probability of a different result
 27 without the alleged errors; any error was harmless beyond a reasonable doubt. *Id.*
 28 Petitioner raised the claim again as claim 25 in his June 2003 exhaustion petition,

1 adding claims that the cumulative error denied him effective assistance of counsel,
 2 an impartial jury, equal protection and due process. (Dkt. No. 336, Lodgment 9 at
 3 138-41.) The California Supreme Court summarily denied the claim on the merits
 4 and, alternatively, found it untimely, *Dixon* barred as to the arguments not
 5 previously raised on direct appeal, and successive. (Dkt. No. 336, Lodgment 12.)

6 Respondent argues that Petitioner has failed to meet his burden of showing
 7 that the California Supreme Court's merits denials of the claim amounted to an
 8 unreasonable application of clearly established federal law, or an unreasonable
 9 determination of the facts in light of the evidence presented in the state court
 10 proceeding. 28 U.S.C. §2254(d); *Pinholster*, 563 U.S. at 181-82.

11 The Ninth Circuit has recognized that “[a]lthough individual errors might
 12 not rise to the level of a constitutional violation, a collection of errors might
 13 violate a defendant’s constitutional rights.” *Woods v. Sinclair*, 764 F.3d 1109,
 14 1139 (9th Cir. 2014), *cert. denied*, 135 S.Ct. 2311 (2015); *Davis v. Woodford*, 384
 15 F.3d 628, 654 (9th Cir. 2004), ; *see also Killian v. Poole*, 282 F.3d 1204 (9th Cir.
 16 2002) (“[E]ven if no single error were prejudicial, where there are several
 17 substantial errors, ‘their cumulative effect may nevertheless be so prejudicial as to
 18 require reversal.’”), *cert. denied*, 537 U.S. 1179 (2003). In light of this Court’s
 19 finding, granting relief on Claims 1, 4, 6, 7, 10 and 14, the Court grants relief on
 20 Claim 40.

21 **2. CLAIM 61 – The Cumulative Effect of the Penalty Phase**
 22 ***Errors and the Prosecutorial Misconduct Requires That***
 23 ***Petitioner’s Death Judgment Be Vacated***

24 In Claim 61, Petitioner asserts that he is entitled to relief based upon “the
 25 cumulative effect of the penalty-phase error[s] and the prosecutor’s misconduct.”
 26 (Dkt. 317 at 321.) Petitioner raised this claim for the first time in state court as
 27 Claim 21 of this direct appeal. (Dkt. No. 148, Lodgment 1 at 211-13.) The
 28 California Supreme Court denied the claim on the merits, finding there were “no

1 errors to cumulate.” *Noguera*, 4 Cal.4th at 649. He raised the argument again as
 2 claim 41 of his June 2003 exhaustion petition. (Dkt. No. 336, Lodgment 9 at 178.)
 3 The California Supreme Court summarily denied the claim on the merits and,
 4 alternatively, found the claim to be untimely, *Dixon* barred and successive. (Dkt.
 5 No. 336, Lodgment 12.)

6 Respondent argues that Petitioner has failed to meet his burden of showing
 7 that the California Supreme Court’s merits denials of the claim amounted to an
 8 unreasonable application of clearly established federal law, or an unreasonable
 9 determination of the facts in light of the evidence presented in the state court
 10 proceeding. 28 U.S.C. §2254(d); *Pinholster*, 563 U.S. at 181-82.

11 As discussed, *infra*, with respect to Petitioner’s claim of cumulative guilt-
 12 phase error, the Ninth Circuit has recognized that “[a]lthough individual errors
 13 might not rise to the level of a constitutional violation, a collection of errors might
 14 violate a defendant’s constitutional rights.” *See e.g., Woods v. Sinclair*, 764 F.3d at
 15 1139. In light of this Court’s finding, granting relief on Claims 1, 4, 6, 7, 10, and
 16 14, the Court grants relief on Claim 61.

17 **H. Systemic Error**

18 **1. *CLAIM 25: The Death-Qualification of Petitioner’s Jury*** 19 ***Violated His Constitutional Rights’***

20 In Claim 25, Petitioner argues that the death qualification procedure,
 21 whereby jurors who opposed the death penalty were removed for cause, violated
 22 his right to trial by a fair and impartial jury. (Dkt. No. 317 at 182-84.) Petitioner
 23 raised this claim for the first time in state court as claim 11 of his June 2003
 24 exhaustion petition. (Dkt. No. 336, Lodgment 9 at 101-02.) The California
 25 Supreme Court summarily denied the claim on the merits and, alternatively, found
 26 the claim to be untimely, *Dixon* barred, and successive. (Dkt. No. 336, Lodgment
 27 12.)

28 Respondent argues that Petitioner has failed to meet his burden of showing

1 that the California Supreme Court's resolution of the claim amounted to an
 2 unreasonable application of clearly established Federal law, or an unreasonable
 3 determination of the facts in light of the evidence presented in the state court
 4 proceeding and, as such, Petitioner is barred from relitigating the claim in federal
 5 court. 28 U.S.C. §2254(d); *Pinholster*, 563 U.S. at 181-82. This Court agrees.

6 It is well established that death qualification does not violate a defendant's
 7 right to a fair and impartial jury. *Lockhart v. McCree*, 476 U.S. at 178; *Wainwright*
 8 *v. Witt*, 469 U.S. at 424; *Adams v. Texas*, 448 U.S. at 45. The California Supreme
 9 Court's finding of no constitutional error was not an unreasonable application of
 10 clearly established federal law under section 2254(d). Claim 25 is DENIED.

11 **2. CLAIM 26: Petitioner's Jury Was Not Representative of the**
 12 **Community, Because Hispanics and Other People of Color**
 13 **Were Underrepresented and Systematically Excluded**

14 In Claim 26, Petitioner claims that his Fifth, Sixth, Eighth and Fourteenth
 15 Amendment rights were violated because "[t]he process of selecting prospective
 16 jurors in Orange County is constitutionally defective." (Dkt. No. 317 at 184-86.)
 17 Petitioner raised this claim for the first time in state court as Claim 15 of his
 18 March 1998 exhaustion petition. (Dkt. No. 336, Lodgment 4 at 164-65.) The
 19 California Supreme Court summarily denied the claim on the merits and,
 20 alternatively, found the claim to be untimely. (Dkt. No. 336, Lodgment 8.)

21 Respondent argues that Petitioner has failed to meet his burden of showing
 22 that the California Supreme Court's resolution of the claim amounted to an
 23 unreasonable application of clearly established Federal law, or an unreasonable
 24 determination of the facts in light of the evidence presented in the state court
 25 proceeding and, as such, Petitioner is barred from relitigating the claim in federal
 26 court. 28 U.S.C. §2254(d); *Pinholster*, 563 U.S. at 181-82. This Court agrees.

27 Petitioner's claim is entirely conclusory. He fails to cite any factual support
 28 for his allegations. The California Supreme Court's finding of no constitutional

1 error was not an unreasonable application of clearly established federal law under
2 section 2254(d). Claim 26 is DENIED.

3 **3. CLAIM 41 – The Special Circumstance, on Its Face and as**
4 **Applied, Is Unconstitutional**

5 In Claim 41, Petitioner argues that the his convictions and sentence are
6 unconstitutional because the financial gain special circumstance is vague and
7 overbroad, generally, and was vague and overbroad as applied in his case.
8 Petitioner claims that the jury was improperly instructed because it was not
9 required to find that financial gain was the motivating force behind the murder; he
10 argues that the “the financial gain motive contemplated by the statute must be
11 more than merely incidental to the killing.” Finally, Petitioner claims that, by
12 instructing the jury under CALJIC 2.51, the trial court confused the jury and
13 eliminated motive from the jury’s consideration. (Dkt. No. 317 at 235-45.)

14 Petitioner raised the allegations included in this claim for the first time in
15 Claim 9(B) of his direct appeal. The California Supreme Court denied the claim on
16 the merits. *People v. Noguera*, 4 Cal.4th at 634-37. Petitioner raised the claim
17 again in Claims 26 and 27 of his June 9, 2003, exhaustion petition. (Dkt. No. 336,
18 Lodgment 9 at 142-47.) The California Supreme Court summarily denied the
19 claim on the merits and alternatively denied the claim as untimely, barred to the
20 extent it was raised and rejected on appeal, barred to the extent it was not raised on
21 appeal, and barred as successive. (Dkt. No. 336, Lodgment 12.)

22 Respondent argues that Petitioner has failed to meet his burden of showing
23 that the California Supreme Court’s denials on the merits amounted to an
24 unreasonable application of clearly established federal law, or an unreasonable
25 determination of the facts in light of the evidence presented in the state court
26 proceeding. 28 U.S.C. §2254(d); *Pinholster*, 563 U.S. at 181-82.

27 a. Vague and Overbroad

28 In support of his contention that the financial gain special circumstance is

1 unconstitutionally vague and overbroad, Petitioner cites *Godfrey v. Georgia*, 446
2 U.S. 420, in which the Supreme Court held that the Constitution requires that a
3 state statutory scheme provide a “meaningful basis for distinguishing the few
4 cases in which [the death penalty] is imposed from the many cases in which it is
5 not.” *Id.* at 427–28. Petitioner argues that the special circumstance fails to provide
6 “clear, specific and detailed guidelines for determining death eligibility.” (Dkt.
7 No. 317 at 238.)

8 In *Tuilaepa v. California*, the United States Supreme Court discussed the
9 “two different aspects of the capital decisionmaking process: the eligibility
10 decision and the selection decision.” 512 U.S. at 971-72. With regard to the
11 eligibility decision, the Court provided that the qualifying circumstance must meet
12 two requirements: it must not apply to every defendant convicted of a murder, and
13 it must not be “unconstitutionally vague.” *Id.* at 972 (citing *Godfrey v. Georgia*,
14 446 U.S. at 428). “The eligibility decision fits the crime within a defined
15 classification. Eligibility factors almost of necessity require an answer to a
16 question with a factual nexus to the crime or the defendant so as to ‘make
17 rationally reviewable the process for imposing a sentence of death.’” *Tuilaepa*, 512
18 U.S. at 973 (quoting *Arave v. Creech*, 507 U.S. 463, 471 (1993)). The Supreme
19 Court noted that “[b]ecause ‘the proper degree of definition’ of eligibility. . .
20 factors often ‘is not susceptible of mathematical precision,’ [the Court’s]
21 vagueness review is quite deferential.” *Tuilaepa*, 512 at 973 (quoting *Walton v.*
22 *Arizona*, 497 U.S. 639, 655 (1990)). The Court held, “a factor is not
23 unconstitutional if it has some ‘common-sense core of meaning. . . . that criminal
24 juries should be capable of understanding.’” *Tuilaepa*, 512 U.S. at 973-74
25 (quoting *Jurek*, 428 U.S. at 279) (White, J., concurring in judgment)).

26 Under California’s death penalty statute, a defendant is eligible for the death
27 penalty when the jury finds him guilty of first-degree murder and finds one of the
28 §190.2 special circumstances true. *See California v. Ramos*, 463 U.S. 992, 1008

(1983). Petitioner argues that the financial gain special circumstance is unconstitutionally vague, but he fails carry his burden of demonstrating that it does not have a “common-sense core of meaning” that a criminal jury “should be capable of understanding.” *Tuilaepa*, 512 U.S. at 973-74. The California Supreme Court's resolution of this claim did not “result[] in a decision that was contrary to, or involve[] an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States;” nor did it “result[] in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State Court proceeding.” 28 U.S.C. § 2254(d). The financial gain special circumstance is not vague and overbroad generally, or as applied in this case. Accordingly, this issue presents no basis for habeas corpus relief.

b. *Instruction Did Not Require Financial Gain to be the Motivating Force Behind the Murder*

Citing *People v. Edelbacher*, 47 Cal.3d 983, 1027 (1989), Petitioner argues that, in order for a jury to find the financial gain special circumstance true, it must believe that the financial gain was the “motivating force” behind the murder, not simply “incidental motive for the killing.” (Dkt. No. 317 at 240-43). As the California Supreme Court noted in rejecting this claim on direct appeal, “the drafters [of the death penalty statute] intended no such limitation.” *People v. Noguera*, 4 Cal.4th at 635. In fact, the Court noted that it held in *Edelbacher* that “Proof of actual pecuniary benefit to the defendant from the victim’s death is neither necessary nor sufficient to establish the financial-gain special circumstance. . . . ‘the relevant inquiry is whether the defendant *committed the murder in the expectation that he would thereby obtain the desired financial gain.*’” *Id.* at 636 (emphasis added) (quoting *Edelbacher*, 47 Cal.3d at 1025). Here, the evidence demonstrated that Petitioner did, in fact, commit the murder with an expectation that he would obtain proceeds from Jovita’s life insurance.

1 As with all of Petitioner's state law claims, his claims regarding the correct
 2 interpretation of the financial gain special circumstance provide no basis for
 3 habeas corpus relief. Petitioner fails carry his burden of demonstrating how the
 4 California Supreme Court's resolution of this claim "resulted in a decision that was
 5 contrary to, or involved an unreasonable application of, clearly established Federal
 6 law, as determined by the Supreme Court of the United States;" or "resulted in a
 7 decision that was based on an unreasonable determination of the facts in light of
 8 the evidence presented in the State Court proceeding." 28 U.S.C. § 2254(d).

9 c. CALJIC 2.51 Eliminated Motive from the Jury's
 10 Consideration

11 On direct appeal, the California Supreme Court addressed this argument as
 12 follows:

13 [D]efendant's claim that giving the jury CALJIC No. 2.51 (motive is
 14 not an element of the crime charged and need not be proven)
 15 permitted it to dispense with proof of financial gain also fails. We
 16 rejected the identical claim in *People v. Edelbacher*, supra, 47 Cal.3d
 17 at page 1027, 254 Cal.Rptr. 586, 766 P.2d 1, on the commonsense
 18 ground that here, as there, the " 'crime charged' was murder and any
 19 reasonable juror would have understood the instruction as referring to
 20 this substantive offense only and not to any special circumstance
 21 allegation."

22 *People v. Noguera*, 4 Cal.4th at 637.

23 The state court's rejection of this claim was not objectively unreasonable.
 24 Based upon its express language, CALJIC No. 2.51 was applicable only to the
 25 substantive charge and not to the special circumstance allegations. (See RT 8261
 26 ("motive is not an element of the *crime charged* and need not be shown."
 27 (emphasis added)). There is no likelihood that a reasonable juror understood the
 28 terms "motive" and "intent" to be interchangeable." Motive was not listed as an

1 element of any of the charged crimes, or special circumstance allegations.

2 Petitioner has not shown any reasonable probability that the jurors understood the
3 motive instruction to mean that they did not have to find that petitioner had the
4 required *intent* for the financial gain special circumstance allegation. *Cf. People v.*
5 *Guerra*, 37 Cal.4th 1067, 1135 (2006). Thus, he cannot demonstrate that the
6 giving of CALJIC No. 2.51 rendered his trial fundamentally unfair. The California
7 Supreme Court's resolution of this claim was not contrary to, or an unreasonable
8 application of, Supreme Court precedent. 28 U.S.C. § 2254(d).

9 Claim 41 is DENIED.

10 **4. CLAIM 62 – *The California Death Penalty Statute***
11 ***Unconstitutionally Fails to Designate Which Factors Are***
12 ***Aggravating and Which Are Mitigating***

13 In Claim 62, Petitioner alleges that the California death penalty statute is
14 unconstitutional because it fails to specify which factors are mitigating and which
15 factors are aggravating. (Dkt. No. 317 at 322.)

16 Petitioner raised this claim for the first time as Claim 42 in his June 9, 2003,
17 exhaustion petition. (Dkt. No. 336, Lodgment 9 at 178.) The California Supreme
18 Court summarily denied the claim on the merits. (Dkt. No. 336, Lodgment 12.)

19 As discussed *supra* with respect to Claim 67, in rejecting a challenge to the
20 factor (k) instruction, the United States Supreme Court noted in *Belmontes*, that the
21 balancing process provided by California's 1978 death penalty statute "requires
22 juries to consider and balance . . . factors . . . that are labeled neither as mitigating
23 nor as aggravating. . . . [Rather,] the jury itself must determine the side of the
24 balance on which each listed factors falls." 549 U.S. at 23; *see also Pulley v.*
25 *Harris*, 465 U.S. at 51, 52 n. 14 (holding that, notwithstanding the fact that "[th]e
26 statute does not separate aggravating and mitigating circumstances," the 1977
27 California statute was not unconstitutionally arbitrary); *Babbitt v. Calderon*, 151
28 F.3d at 1178-79 (rejecting argument the 1978 statute "was erroneous because the

1 jury was not specifically told which factors it could consider as extenuating”);
 2 *Williams*, 52 F.3d at 1484 (holding the 1977 statute’s “failure to label aggravating
 3 and mitigating factors is constitutional”).

4 Petitioner’s claim lacks support in clearly established federal law. Thus, the
 5 state court’s rejection of the claim was not contrary to or an unreasonable
 6 application of clearly established federal law. Claim 62 is DENIED.

7 **5. CLAIM 63 – *The California Death Penalty Statute***
 8 ***Unconstitutionally Fails to Require that Aggravation***
 9 ***Outweigh Mitigation Beyond a Reasonable Doubt***

10 In Claim 63, Petitioner alleges that the California death penalty statute
 11 unconstitutionally fails to require that aggravation outweigh mitigation beyond a
 12 reasonable doubt. (Dkt. No. 317 at 324.)

13 Petitioner raised this claim for the first time as Claim 43 in his June 9, 2003,
 14 exhaustion petition. (Dkt. No. 336, Lodgment 9 at 179.) The California Supreme
 15 Court summarily denied the claim on the merits. (Dkt. No. 336, Lodgment 12.)

16 In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Supreme Court held
 17 that “[i]f a State makes an increase in a defendant’s authorized punishment
 18 contingent on the finding of a fact, that fact – no matter how the State labels it –
 19 must be found by a jury beyond a reasonable doubt.” *Ring v. Arizona*, 536 U.S.
 20 584, 602 (2002) (discussing *Apprendi*). The Court applied *Apprendi* in *Ring* to
 21 hold that a state cannot “allow[] a sentencing judge, sitting without a jury, to find
 22 an aggravating circumstance necessary for imposition of the death penalty.

23 Because Arizona’s enumerated aggravating factors operate as ‘the functional
 24 equivalent of an element of a greater offense,’ the Sixth Amendment requires that
 25 they be found by a jury.” *Ring*, 536 U.S. at 609 (quoting *Apprendi*, 530 U.S. at
 26 494 n. 19; internal citation omitted). The Court distinguished California’s death
 27 penalty statute from Arizona’s, observing that California commits sentencing
 28 decisions to juries, while Arizona was one of only four states to “commit both

1 capital sentencing factfinding and the ultimate sentencing decision entirely to
2 judges.” *Id.* at 608 n.6.

3 In California, “[s]pecial circumstances. . . make a criminal defendant eligible
4 for the death penalty [and] operate as ‘the functional equivalent of an element of a
5 greater offense.’” *Webster v. Woodford*, 369 F.3d 1062, 1068 (9th Cir. 2004)
6 (quoting *Ring*, 536 U.S. at 609). Once the jury has found a special circumstance to
7 be true, unanimously and beyond a reasonable doubt, death is an authorized
8 punishment. The jury need not make any additional findings beyond a reasonable
9 doubt.

10 In *United States v. Mitchell*, 502 F.3d 931 (9th Cir. 2007), *cert. denied*, 553
11 U.S. 1094 (2008), the Ninth Circuit denied a federal capital defendant’s claim that
12 the jury was required to find “that aggravating factors sufficiently outweigh
13 mitigating factors beyond a reasonable doubt.” *Id.* at 993. The Court of Appeals
14 distinguished the finding of a death eligibility factor, made by the jury beyond a
15 reasonable doubt, from the weighing of aggravating and mitigating factors. The
16 Court explained that, during the weighing stage,

17 the jury’s task is no longer to find whether factors exist; rather, each
18 juror is to consider the [eligibility] factors already found and to make
19 an individualized judgment whether a death sentence is justified.

20 Thus, the weighing step is an ‘equation’ that ‘merely channels a jury’s
21 discretion by providing it with criteria by which it may determine
22 whether a sentence of life or death is appropriate.’ *See Kansas v.*

23 *Marsh*, 548 U.S. at 177. [Defendant] does not suggest how a beyond-
24 reasonable-doubt standard could sensibly be superimposed upon this
25 process, or why it must be in order to comport with due process, or to
26 make his death sentence reliable, or to comply with the Sixth
27 Amendment.

28 *Id.* (internal quotation omitted; internal citation edited).

1 The California Supreme Court may have reasonably determined that
 2 Petitioner did not have a constitutional right to unanimous findings beyond a
 3 reasonable doubt that aggravating factors existed and outweighed mitigating
 4 factors. Claim 63 is DENIED.

5 **6. CLAIM 64 – *The 1978 Death Penalty Statute is***
 6 ***Unconstitutional on Its Face and As Applied***

7 In Claim 64, Petitioner alleges that the 1978 California Death Penalty
 8 Statute is unconstitutional on its face and as applied in his case. (Dkt. No. 317 at
 9 326.) The claim includes six specific constitutional challenges to California's
 10 death penalty statute. (Dkt No. 317 at 328.)

11 Petitioner raised aspects of this claim for the first time in Claim 22 of his
 12 direct appeal. (Dkt. No. 148, Lodgment 1 at 214-17.) The California Supreme
 13 Court denied the claim, citing its multiple prior decisions rejecting similar attacks
 14 on the 1978 death penalty law. *People v. Noguera*, 4 Cal.4th at 649. Petitioner
 15 raised the Claim again as Claim 44 in his June 9, 2003, exhaustion petition. (Dkt.
 16 No. 336, Lodgment 9 at 180.) The California Supreme Court summarily denied
 17 the claim on the merits. (Dkt. No. 336, Lodgment 12.)

18 a. *Failure to Require Written Findings as to the*
 19 *Aggravating Factors*

20 First, Petitioner faults California's death penalty statute for failing to require
 21 written findings as to the aggravating factors found by the jury. As discussed with
 22 reference to Claim 63, the jury need not make any additional findings at the
 23 penalty phase, unanimously or otherwise, as the special circumstance finding at the
 24 guilt phase makes death an authorized punishment. Further, the California
 25 Supreme Court may have reasonably concluded, as the Ninth Circuit did in
 26 reviewing the 1977 California death penalty statute, that its "statute ensures
 27 meaningful appellate review, and need not require written jury findings in order to
 28 be constitutional." *Williams*, 52 F.3d at 1484-85 (internal citation omitted).

b. Failure to Require Proof Beyond a Reasonable Doubt

Second, Petitioner argues that California's statute is unconstitutional because it fails to require "proof beyond a reasonable doubt of any aggravating factors," "a finding that aggravating factors outweigh mitigating factors beyond a reasonable doubt," or "a finding that death is the appropriate punishment beyond a reasonable doubt." (Dkt. No. 317 at 328.) The California Supreme Court reasonably rejected Petitioner's arguments. The court may have reasonably determined that Petitioner has no such constitutional rights.

As discussed above with reference to Claim 63, the Supreme Court held in *Apprendi* that "[i]f a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." *Ring*, 536 U.S. at 602 (discussing *Apprendi*). The Court distinguished California's death penalty statute from Arizona's, observing that California commits sentencing decisions to juries, while Arizona was one of only four states to "commit both capital sentencing factfinding and the ultimate sentencing decision entirely to judges." *Id.* at 608 n.6.

In California, once the jury has found a special circumstances to be true, unanimously and beyond a reasonable doubt, death is an authorized punishment. *See Belmontes*, 529 F.3d at 876 ("[T]he maximum sentence authorized by the jury's guilt phase verdict was death"). The jury need not make any additional findings beyond a reasonable doubt. *See e.g., Williams v. Calderon*, 52 F.3d 1465, 1484–85 (9th Cir. 1995) ("[T]he failure of the [California death penalty] statute to require a specific finding that death is beyond a reasonable doubt the appropriate penalty does not render it unconstitutional."), *cert. denied*, 516 U.S. 1124 (1996).

The California Supreme Court's decision, that Petitioner's constitutional rights were not violated by the lack of requirements that the jury find that aggravating circumstances be proven beyond a reasonable doubt, that aggravating

1 factors outweigh mitigating factors beyond a reasonable doubt, or that death be the
 2 appropriate sentence beyond a reasonable doubt, was not objectively unreasonable.

3 c. Failure to Require Jury Unanimity on Aggravating
 4 Factors

5 Petitioner argues that the California death penalty statute is unconstitutional
 6 because it does not require the jury to find aggravating factors with unanimity. As
 7 this Court noted in *Bonin v. Vasquez*, 79 F.Supp. 957 (C.D. Cal. 1992), *aff'd*, 59
 8 F.3d 815 (9th Cir. 1995), *cert. denied*, 516 U.S. 1051 (1996), “the United States
 9 Supreme Court has never embraced such a requirement.” *Id.* at 989. While jurors
 10 must agree on the ultimate decision, that aggravating factors outweigh mitigating
 11 factors, “the Constitution does not require jury unanimity on aggravating factors.”
 12 *Id.*

13 d. Failure to Require a Procedure to Enable a Reviewing
 14 Court to Evaluate Meaningfully the Sentencer’s Decision

15 Petitioner argues that the 1978 death penalty statute is unconstitutional
 16 because it does not provide for a procedure that would enable a “reviewing court to
 17 evaluate meaningfully the sentencer’s decision.” (Dkt. No. 317 at 328.) As
 18 Respondent properly noted in its informal response to Petitioner’s 2003 exhaustion
 19 petition, California’s appellate and collateral review processes provide adequate
 20 means for reviewing the sentencer’s decision. There is no need for the statute to
 21 provide an alternative procedure.

22 Claim 64 is, therefore, DENIED.

23 7. ***CLAIM 65 – The California Death Penalty Statute***
 24 ***Unconstitutionally Fails to Require that Inapplicable***
 25 ***Sentencing Factors Be Deleted from Jury Instructions***

26 In Claim 65, Petitioner alleges that the California death penalty statute is
 27 unconstitutional in failing to require inapplicable sentencing factors be deleted
 28 from penalty phase jury instructions. (Dkt. No. 317 at 329.) In particular,

1 Petitioner claims that his rights to effective assistance of counsel, a fair trial, an
2 impartial jury, a reliable special circumstance determination, equal protection, and
3 due process were violated because the failure to delete inapplicable sentencing
4 factors confused the jury. (Dkt. No. 317 at 330.)

5 Petitioner raised this claim for the first time as Claim 45 in his June 9, 2003,
6 exhaustion petition. (Dkt. No. 336, Lodgment 9 at 182.) The California Supreme
7 Court summarily denied the claim on the merits. (Dkt. No. 336, Lodgment 12.)

8 The Ninth Circuit has found no constitutional violation in the inclusion of
9 inapplicable factors in the jury's penalty phase instructions. *See Bonin v.*
10 *Calderon*, 59 F.3d at 848 (rejecting a petitioners argument that the inclusion of
11 inapplicable factors allowed the jury "to consider the absence of numerous
12 possible mitigating circumstances to be aggravating circumstances"); *Williams v.*
13 *Calderon*, 52 F.3d at 1481 (finding no constitutional error in the trial court's
14 instructions on "the entire list of factors the state considered relevant to the
15 sentencing decision, even when some did not apply"). The Circuit has held that
16 where the jury was instructed "to consider the listed factors only 'if applicable,'" it
17 was "warned . . . that not all of the factors would be relevant and the absence of a
18 factor made it inapplicable rather than an aggravating factor." *Bonin*, 59 F.3d at
19 848. Petitioner's jury was instructed that it should "consider, take into account and
20 be guided by the following [factors provided to the jury], *if applicable*. (RT 8697
21 (emphasis added).)

22 The decision of the California Supreme Court rejecting this claim was
23 neither contrary to nor an unreasonable application of clearly established federal
24 law, nor was it based on an unreasonable interpretation of the facts. Claim 65 is
25 DENIED.

26 //

27 //

1 **8. CLAIM 66 – The California Death Penalty Statute**
2 ***Unconstitutionally Fails to Require Jury Unanimity on Prior***
3 ***Criminal Activity***

4 In Claim 66, Petitioner alleges that the California death penalty statute is
5 unconstitutional in failing to require a unanimous jury determination of prior
6 criminal activity. (Dkt. No. 317 at 331.)

7 Petitioner raised this claim for the first time as Claim 22(H) on direct appeal.
8 (Dkt. No. 148, Lodgment 1 at 216.) The California Supreme Court denied the
9 claim on the merits. *People v. Noguera*, 4 Cal.4th at 649. Noguera raised the
10 claim again as Claim 46 in his June 9, 2003, exhaustion petition. (Dkt. No. 336,
11 Lodgment 9 at 183.) The California Supreme Court summarily denied the claim on
12 the merits. (Dkt. No. 336, Lodgment 12.)

13 Respondent argues that Petitioner has failed to meet his burden of showing
14 that the California Supreme Court's denials on the merits amounted to an
15 unreasonable application of clearly established federal law, or an unreasonable
16 determination of the facts in light of the evidence presented in the state court
17 proceeding. 28 U.S.C. §2254(d); *Pinholster*, 563 U.S. at 181-82.

18 Petitioner does not cite any clearly established authority from the United
19 States Supreme Court holding that a jury must unanimously find Petitioner's prior
20 criminal activity to be true in order to consider it as a factor in aggravation during
21 the penalty phase. *See Cummings v. Polk*, 475 F.3d 230, 238 (4th Cir.) (recognizing
22 that the United States Supreme Court has not resolved this issue and thus, under
23 AEDPA, the claim must be denied), *cert. denied*, 552 U.S. 961 (2007). Moreover,
24 an issue solely of state law is not a basis for habeas relief. *Estelle v. McGuire*, 502
25 U.S. at 67-68.

26 Petitioner's citation to *Apprendi v. New Jersey*, 530 U.S. 466, does not
27 support this claim. As discussed *supra*, *Apprendi* requires that any fact that
28 increases the penalty for a crime beyond the prescribed statutory maximum, must

1 be submitted to a jury and proved beyond a reasonable doubt. It is not contravened
2 by California's death penalty scheme. Once a California jury convicts of first
3 degree murder with a special circumstance, "the defendant stands convicted of an
4 offense whose maximum penalty is death." *People v. Ochoa*, 26 Cal.4th 398, 454
5 (2001), *abrogated on other grounds as stated in People v. Prieto*, 30 Cal. 4th 226,
6 263 n.14 (2003). The jury need not make any additional findings beyond a
7 reasonable doubt. *Ramos*, 463 U.S. at 1008 n.22, (*quoting Zant v. Stephens*, 462
8 U.S. at 875) ("the constitutional prohibition on arbitrary and capricious capital
9 sentencing determinations is not violated by a capital sentencing 'scheme that
10 permits the jury to exercise unbridled discretion in determining whether the death
11 penalty should be imposed after it has found that the defendant is a member of the
12 class made eligible for that penalty by statute.' ") Aggravating circumstances are
13 not separate penalties but are standards to guide the making of the choice between
14 death and life imprisonment. *People v. Raley*, 2 Cal. 4th 870, 910 (1992). A factor
15 set forth in Penal Code § 190.3 does not require a "yes" or "no" answer to a
16 specific question, but points the sentencer to the subject matter which guides the
17 choice between the two punishments. *Tuilaepa*, 512 U.S. at 975.

18 In *Williams v. Calderon*, 52 F.3d 1465, the Ninth Circuit rejected the
19 argument that, to satisfy constitutional requirements, a jury must unanimously find
20 other criminal acts to be proven before they may be considered in aggravation.
21 The Court of Appeals held that any failure to instruct the jury that "it could
22 consider any [other] criminal activity only if proved beyond a reasonable doubt. . .
23 . is state law error, not cognizable on federal habeas." *Id.* at 1480. Petitioner has
24 failed to establish that the California Supreme Court unreasonably applied
25 controlling United States Supreme Court authority in rejecting Petitioner's claim
26 that the California death penalty statute unconstitutionally fails to require jury
27 unanimity on prior criminal activity. Claim 66 is DENIED.
28

1 **9. CLAIM 70 – The Death Penalty is Arbitrary, Capricious,**
 2 **Fundamentally Unfair and Disproportionate**

3 In Claim 70, Petitioner alleges that the death penalty “is arbitrary,
 4 capricious, fundamentally unfair and disproportionate in light of the circumstances
 5 of the crime, Petitioner’s age and other mitigating evidence and the sentence of co-
 6 defendant Dominique Navarro who was sentenced as a minor to the Youth
 7 Authority in violation of the Eighth Amendment and the Due Process Clause of the
 8 U.S. Constitution.” (Dkt. No. 317 at 339.)

9 Petitioner raised this claim for the first time as Claim 22(K) on direct appeal,
 10 alleging violations of California law. (Dkt. No. 148, Lodgment 1 at 217.) The
 11 California Supreme Court denied the claim on the merits. *People v. Noguera*, 4
 12 Cal.4th at 649. Noguera raised the claim again as Claim 50 in his June 9, 2003,
 13 exhaustion petition, adding federal claims that he was denied effective assistance
 14 of counsel, equal protection, and due process. (Dkt. No. 336, Lodgment 9 at 186.)
 15 The California Supreme Court summarily denied the claim on the merits. (Dkt. No.
 16 336, Lodgment 12.)

17 Respondent argues that Petitioner has failed to meet his burden of showing
 18 that the California Supreme Court’s denials on the merits amounted to an
 19 unreasonable application of clearly established federal law, or an unreasonable
 20 determination of the facts in light of the evidence presented in the state court
 21 proceeding. 28 U.S.C. §2254(d); *Pinholster*, 563 U.S. at 181-82.

22 In *Pulley v. Harris*, the United States Supreme Court considered the
 23 argument that the Constitution mandates a comparative proportionality review that
 24 “purports to inquire ... whether the penalty is ... unacceptable in a particular case
 25 because [it is] disproportionate to the punishment imposed on others convicted of
 26 the same crime.” 465 U.S. at 44. The Court rejected this argument as contrary to its
 27 holdings in *Jurek v. Texas*, 428 U.S. 262, *Gregg v. Georgia*, 428 U.S. 153 (1976),
 28 and *Proffitt v. Florida*, 428 U.S. 242 (1976). *Pulley v. Harris*, 465 U.S. at 50–51.

1 The Court reaffirmed *Pulley* in *McCleskey v. Kemp*, 481 U.S. 279 (1987),
 2 expressly holding that a defendant could not “prove a constitutional violation by
 3 demonstrating that other defendants who may be similarly situated did not receive
 4 the death penalty.” *McCleskey*, 481 U.S. at 306–07. The Ninth Circuit has
 5 recognized this principle. *See Beardslee v. Woodford*, 358 F.3d 560, 579–81 (9th
 6 Cir.) (rejecting argument that “different sentences for equally culpable
 7 co-defendants violate the prohibition against arbitrary imposition of the death
 8 penalty”), *cert. denied*, 543 U.S. 842 (2004). The decision of the California
 9 Supreme Court rejecting this claim was neither contrary to nor an unreasonable
 10 application of clearly established federal law, nor was it based on an unreasonable
 11 interpretation of the facts. Claim 70 is DENIED.

12 **10. CLAIM 89 – *The Prosecutor Committed Misconduct,***
 13 ***Petitioner’s Trial Counsel was Ineffective, and the Trial Court***
 14 ***Erred in Failing to Address Discriminatory Charging by the***
 15 ***District Attorney’s Office***

16 In Claim 89, Petitioner alleges that the Orange County District Attorney’s
 17 Office engaged in “discriminatory charging” in violation of his constitutional
 18 rights. (Dkt. No. 317 at 353.)

19 Petitioner raised this claim for the first time as Claim 29 in his March 2,
 20 1998, exhaustion petition. (Dkt. No. 336, Lodgment 4 at 196.) The California
 21 Supreme Court summarily denied the claim on the merits and, alternatively, found
 22 the claim to be untimely, and barred because it could have been but was not raised
 23 and direct appeal. (Dkt. No. 336, Lodgment 8.)

24 Respondent argues that Petitioner has failed to meet his burden of showing
 25 that the California Supreme Court’s denials on the merits amounted to an
 26 unreasonable application of clearly established federal law, or an unreasonable
 27 determination of the facts in light of the evidence presented in the state court
 28 proceeding. 28 U.S.C. §2254(d); *Pinholster*, 563 U.S. at 181-82.

1 A selective prosecution claim is not a defense on the merits to the criminal
2 charge itself, but an independent assertion that the prosecutor has brought the
3 charge for reasons forbidden by the Constitution. *See United States v. Armstrong*,
4 517 U.S. 456, 463 (1996). Although the decision whether to prosecute and what
5 charges to bring generally rests entirely in the prosecutor's discretion, this
6 discretion is subject to constitutional constraints. *Id.* at 464. One of these
7 constraints is that the prosecutorial decision may not violate equal protection by
8 resting on "an unjustifiable standards such as race, religion, or other arbitrary
9 classification." *Id.*

10 Courts presume that prosecutors have properly discharged their official
11 duties. *See id.* In order to dispel the presumption that a prosecutor has not
12 violated equal protection, a criminal defendant must present "clear evidence to the
13 contrary." *Id.* at 465 (citation omitted). Unsupported allegations of selective
14 prosecution are not enough. *See United States v. Davis*, 36 F.3d 1424, 1433 (9th
15 Cir. 1994), *cert. denied*, 513 U.S. 1171 (1995); *see also United States v.*
16 *Buffington*, 815 F.2d 1292, 1305 (9th Cir. 1987) (finding that speculation of
17 selective prosecution, without additional proof, insufficient to establish selective
18 prosecution).

19 A prosecutor's charging decision cannot be judicially reviewed absent a
20 prima facie showing that it rested on an impermissible basis, such as gender, race
21 or denial of a constitutional right. *See United State v. Diaz*, 961 F.2d 1417, 1420
22 (9th Cir. 1992). To establish a prima facie case of selective prosecution, the
23 claimant must show that the prosecutorial policy: (1) had a discriminatory effect;
24 and (2) was motivated by a discriminatory purpose. *See Armstrong*, 517 U.S. at
25 465.

26 Petitioner's claim falls far short of stating a prima facie case of selective
27 prosecution. He offers no statistical evidence and no evidence specific to his case
28 that discriminatory considerations played a part in his charging. Rather, Petitioner

1 makes conclusory allegations without factual support. It is within the purview of a
 2 reviewing court to “not accept conclusory allegations.” *Pinholster*, 563 U.S. at 188
 3 n. 12. The California Supreme Court’s summary decision denying this claim was
 4 not objectively unreasonable under clearly established federal law. Claim 89 is
 5 DENIED.

6 **11. CLAIM 91 – Execution by Any Means, Including Lethal**
 7 **Injection, Is Constitutionally Prohibited**

8 In Claim 91, Petitioner alleges that execution by any means, including lethal
 9 injection, violates the constitutional prohibition against cruel and unusual
 10 punishment. (Dkt. No. 317 at 357.)

11 Petitioner raised this claim for the first time as Claim 32 in his March 2,
 12 1998, exhaustion petition. (Dkt. No. 336, Lodgment 4 at 201.) The California
 13 Supreme Court summarily denied the claim on the merits. (Dkt. No. 336,
 14 Lodgment 8.)

15 Respondent argues that Petitioner has failed to meet his burden of showing
 16 that the California Supreme Court’s denials on the merits amounted to an
 17 unreasonable application of clearly established federal law, or an unreasonable
 18 determination of the facts in light of the evidence presented in the state court
 19 proceeding. 28 U.S.C. §2254(d); *Pinholster*, 563 U.S. at 181-82.

20 In 2015, addressing a §1983 action challenging the constitutionality of
 21 Oklahoma’s lethal injection protocol, the United States Supreme Court
 22 categorically stated, “we have time and again reaffirmed that capital punishment is
 23 not *per se* unconstitutional.” *Glossip v. Gross*, ___ U.S. ___, 135 S. Ct. 2726, 2739,
 24 *reh’g denied*, 136 S. Ct. 20 (2015) (citing *Baze v. Rees*, 553 U.S. 35, 47 (2008);
 25 *Gregg*, 428 U.S. at 187; *Francis v. Resweber*, 329 U.S. 459, 464 (1947); *In re*
 26 *Kemmler*, 136 U.S. 436, 447 (1890); *Wilkerson v. Utah*, 99 U.S. 130, 134-135
 27 (1879)). The California Supreme Court’s decision denying this claim was not
 28 objectively unreasonable under clearly established federal law, nor was it an

1 unreasonable determination of the facts under §2254(d). Claim 91 is DENIED.

2 **12. CLAIM 93 – *The Enforcement of the Death Penalty on***
 3 ***Petitioner, A Person Who, Because of His Mental Age, Lacks***
 4 ***Moral Culpability, Violates the Eighth Amendment’s***
 5 ***Prohibition Against the Imposition of Cruel and Unusual***
 6 ***Punishment***

7 In Claim 93 Petitioner argues that although he was 18 years old at the time
 8 of the crime, imposition of the death sentence violated his Eighth and Fourteenth
 9 Amendment right to be free from cruel and unusual punishment because he is
 10 “developmentally similar to 17-year-olds, who are categorically ineligible for the
 11 death penalty.” (Dkt. 317 at 364.)

12 Petitioner raised this claim for the first time as Claim 3 in his August 29,
 13 2005, exhaustion petition. (Dkt. No. 336, Lodgment 13 at 13-34.) The California
 14 Supreme Court summarily denied the claim on the merits. (Dkt. No. 336,
 15 Lodgment 15.)

16 Respondent argues that Petitioner has failed to meet his burden of showing
 17 that the California Supreme Court’s denials on the merits amounted to an
 18 unreasonable application of clearly established federal law, or an unreasonable
 19 determination of the facts in light of the evidence presented in the state court
 20 proceeding. 28 U.S.C. §2254(d); *Pinholster*, 563 U.S. at 181-82.

21 At the time of Petitioner’s trial, Supreme Court precedent permitted the
 22 imposition of the death penalty on intellectually disabled defendants. *See Penry v.*
 23 *Lynaugh*, 492 U.S. 302, 340 (1989). Subsequently, in *Atkins v. Virginia*, 536 U.S.
 24 304 (2002), the Court held that “in light of . . . ‘evolving standards of decency,’”
 25 the Eighth Amendment “ ‘places a substantive restriction on the State’s power to
 26 take the life’ of a mentally retarded offender.” 536 U.S. at 321 (quoting *Ford v.*
 27 *Wainwright*, 477 U.S. 399, 405 (1986). Acknowledging the “disagreement”
 28 regarding how to “determin[e] which offenders are in fact” intellectually disabled,

1 the Court left “to the State[s] the task of developing appropriate ways to enforce
2 the constitutional restriction upon [their] execution of sentences.” *Atkins*, 536 U.S.
3 at 317 (internal quotation marks omitted).

4 In 2003 the California Legislature enacted Penal Code section 1376, which
5 sets forth standards and procedures for determining whether a defendant against
6 whom the prosecution seeks the death penalty is mentally retarded within the
7 meaning of *Atkins*. In 2005, the California Supreme Court in *In re Hawthorne*, 35
8 Cal.4th 40 (2005), that postconviction claims of mental retardation should be
9 raised by petition for writ of habeas corpus and adjudicated in substantial
10 conformance with the section 1376 statutory model. *Id.* at 44. To state a prima
11 facie claim for relief, the petition must contain “a declaration by a qualified expert
12 stating his or her opinion that the [petitioner] is mentally retarded.” Cal. Pen. Code
13 §1376(b)(1).

14 Similar to the American Psychiatric Association’s definition, section 1376
15 defines “mentally retarded” as “the condition of significantly subaverage general
16 intellectual functioning existing concurrently with deficits in adaptive behavior
17 and manifested before the age of 18.” Cal. Pen. Code §1376(a). Thus, in post-
18 conviction, “[u]pon the submission of a declaration by a qualified expert stating his
19 or her opinion that he defendant is mentally retarded, the court shall order a [show
20 cause] hearing to determine whether the defendant is mentally retarded.” Cal. Pen.
21 Code §1376(b)(1); *Hawthorne*, 35 Cal.4th at 49. Mental retardation is a question of
22 fact and the petitioner bears the burden of proof by a preponderance of the
23 evidence.... Cal. Pen. Code §1376(b)(3). Mental retardation “is not measured
24 according to a fixed intelligence test score or a specific adaptive behavior
25 deficiency, but rather constitutes an assessment of the individual’s overall capacity
26 based on a consideration of all the relevant evidence.” *Hawthorne*, 35 Cal.4th at
27 49.
28

1 Petitioner has not submitted evidence from a qualified expert opining that he
2 is mentally *retarded*. Rather, he contends that “[a]t the time of the crime, he lacked
3 the cognitive capacity of an adult” as a result of “neurological, physiological and
4 psychological deficits.” (Dkt. No. 317 at 364.) He argues that his history of mental
5 illness and abuse impaired his cognitive functions such that, although
6 chronologically eighteen years old at the time of the crime, he was
7 developmentally delayed, had the mental age of a seventeen year old, and lacked
8 adult moral culpability. Specifically, Petitioner cites the declarations of experts
9 who opine that his mental age at the time of the crime was “well below that of an
10 18-year-old” due to “long-standing mental illness” and “organic brain damage.”
11 (Dkt. No. 317 at 365; Exhibits B, Y, Z and BB.) In so arguing, Petitioner relies not
12 on *Atkins*, but on *Roper v. Simmons*, 543 U.S. 551 (2005), in which the United
13 States Supreme Court held that, with a majority of states rejecting the imposition of
14 the death penalty on juvenile offenders, a national consensus against the death
15 penalty for juveniles had arisen. As such, the Court held that Eighth and
16 Fourteenth Amendments prohibit the imposition of the death penalty on persons
17 who were less than 18 years old at the time of the crimes for which they were
18 convicted. *Id.* at 567-68.

19 As the Supreme Court discussed in *Simmons*, clearly there will be those, like
20 Petitioner, who disagree with drawing the line at 18 years old because “[t]he
21 qualities that distinguish juveniles do not disappear when an individual turns 18.”
22 *Id.* at 574. “[H]owever, the line must be drawn. . . The age of 18 is the point where
23 society draws the line for many purposes between childhood and adulthood. It is,
24 [the Court] conclude[d], the age at which the line for death eligibility ought to
25 rest.” *Id.* at 574.

26 While Petitioner cites his neurological, physiological, and psychological
27 deficits, as well as his history of mental illness and traumatic/abusive childhood, as
28 factors contributing to his lower developmental age, there is simply no clearly
established federal law to support his contention that his death sentence violates

1 the Eighth and Fourteenth Amendments. He was neither intellectually disabled nor
 2 a juvenile at the time of the murder. Rather, each of the deficiencies and
 3 circumstances he cites could properly have been presented in mitigation, for the
 4 jury's consideration in determining the appropriate penalty. The California
 5 Supreme Court's rejection of Petitioner's argument that he should have been
 6 *exempted* from the death penalty under *Simmons* and *Atkins*, was not unreasonable.
 Claim 93 is DENIED.

7 **I. Post-Conviction Process**

8 **1. *CLAIM 84 – Petitioner's Appointed Counsel Incompetently***
 9 ***and Inadequately Represented Him During State Post-***
 10 ***Conviction and Appellate Proceedings***

11 In Claim 84, Petitioner contends that his state postconviction counsel
 12 provided inadequate representation on direct appeal and in state habeas
 13 proceedings. (Dkt. No 317 at 344.)

14 Petitioner raised this claim for the first time as Claim 25 in his March 2,
 15 1998, exhaustion petition. (Dkt. No. 336, Lodgment 4 at 187.) The California
 16 Supreme Court summarily denied the claim on the merits and, alternatively, found
 17 the claim to be untimely. (Dkt. No. 336, Lodgment 8.)

18 Respondent argues that Petitioner has failed to meet his burden of showing
 19 that the California Supreme Court's denials on the merits amounted to an
 20 unreasonable application of clearly established federal law, or an unreasonable
 21 determination of the facts in light of the evidence presented in the state court
 22 proceeding. 28 U.S.C. §2254(d); *Pinholster*, 563 U.S. at 181-82.

23 Petitioner claims that his direct appeal counsel provided ineffective
 24 representation in failing to raise a claim regarding trial counsel's failure to
 25 participate in a pre-charging conference with the district attorney and in failing to
 26 raise the issues raised by trial counsel in the motion for new trial. In order to
 27 satisfy *Strickland*, Petitioner must show that appellate counsel's performance was
 28 objectively unreasonable and demonstrate a reasonable probability that, but for

1 appellate counsel's failure to raise the claim(s), he would have prevailed on appeal.
 2 *Smith v. Robbins*, 528 U.S. 259, 285 (2000); *Moorman v. Ryan*, 628 F.3d 1102,
 3 1106 (9th Cir. 2010), *cert. denied*, 565 U.S. 921 (2011). Petitioner fails to elaborate
 4 regarding the "issues" he alleges appellate counsel failed to raise from the motion
 5 for new trial. A quick review of the motion and the appellate opening brief reveals
 6 that counsel did, in fact, raise two of the three claims from the motion on direct
 7 appeal.²⁷ Moreover, because this Court has considered the third claim, and found it
 8 to be without merit,²⁸ Petitioner cannot demonstrate that he suffered any prejudice
 9 from appellate counsel's alleged deficient representation in failing to raise the
 10 claim on direct appeal.

11 With respect to Petitioner's claim that appellate counsel provided deficient
 12 representation in failing to raise trial counsel's failure to participate in a pre-
 13 charging conference with the district attorney, because this subclaim is integrally
 14 related to Claim 14, the Court grants relief on this aspect of Claim 84.

15 To the extent that Petitioner raises ineffective assistance of state habeas
 16 counsel, his claim is not cognizable because there is no federal constitutional right
 17 to the effective assistance of counsel in state post-conviction proceedings.
 18 *Pennsylvania v. Finley*, 481 U.S. 551, 554 (1987); *Bonin v. Vasquez*, 999 F.2d 425,
 19 430 (9th Cir. 1993). While the Supreme Court recognized an equitable exception to
 20 the procedural default doctrine based on ineffective assistance of post-conviction
 21 counsel in *Martinez v. Ryan*, 566 U.S. 1 (2012), the Court's ruling in *Finley*, that

22
 23 ²⁷ In Claim II of the Motion for New Trial, Petitioner argued that the court erred in failing to
 24 instruct the jury in accordance with *People v. Bigelow*, 37 Cal.3d 731 (1984), as to the special
 25 circumstance alleged. (CT at 693.) In Claim 9 of the Appellate Opening Brief, Petitioner argued
 26 that the financial gain special circumstance must be vacated for multiple reasons, including those
 27 raised in the motion for new trial. (Dkt. No. 148, Lodgment No. 1 at 119.) In Claim III of the
 28 Motion for New Trial, Petitioner argued that the court erred in instructing the jury that if "the
 aggravating circumstances outweigh the mitigating circumstances and you personally believe
 death is the appropriate sentence under all the circumstances, the you *shall* impose death." (CT at
 697.) In Claim 15 of the Appellate Opening Brief, Petitioner argued that the trial court failed to
 give a proper *People v. Brown* instruction. (Dkt. No. 148, Lodgment No. 1 at 165.)

²⁸ See this Court's discussion with respect to Claim 51 (alleging prosecutorial misconduct with
 respect to the admission of evidence that Dominique Navarro had refused to testify).

1 there is no freestanding constitutional right to effective assistance of counsel in
 2 post-conviction proceedings, remains the law. The California Supreme Court's
 3 decision denying this claim was not objectively unreasonable under clearly
 4 established federal law, nor was it an unreasonable determination of the facts under
 5 §2254(d). Claim 84 is DENIED in all respects save Petitioner's claim regarding
 6 appellate counsel's failure to raise trial counsel's failure to participate in a pre-
 7 charging conference with the district attorney.

8 **2. CLAIM 88 – Petitioner's Convictions and Death Judgment**
 9 ***Must Be Vacated Because State Appellate Counsel Has***
 10 ***Uncovered New Evidence that the Prosecution's Key Witness***
 11 ***Is a Perjurer***

12 In Claim 88, Petitioner argues that his conviction and death sentence must
 13 be vacated because “newly discovered evidence conclusively demonstrates that the
 14 prosecution's key witness is unreliable.” (Dkt. No. 317 at 350-52.) Petitioner
 15 raised this claim for the first time in state court as claim 5 of his initial state habeas
 16 petition. (Dkt. No. 148, Lodgment 4 at 77-78.) The California summarily denied
 17 the claim on the merits. (Dkt. No. 1336, Lodgment 3.) He subsequently raised the
 18 argument again in claim 60 of his June 2003 exhaustion petition, addition
 19 additional arguments that he was denied effective assistance of counsel, an
 20 impartial jury, and equal protection. (Dkt. No. 336, Lodgment 9 at 198-99.) The
 21 California Supreme Court summarily denied the claim on the merits and,
 22 alternatively, found it to be untimely and successive. (Dkt. No. 336, Lodgment 12.)

23 Respondent argues that Petitioner has failed to meet his burden of showing
 24 that the California Supreme Court's denials on the merits amounted to an
 25 unreasonable application of clearly established federal law, or an unreasonable
 26 determination of the facts in light of the evidence presented in the state court
 27 proceeding. 28 U.S.C. §2254(d); *Pinholster*, 563 U.S. at 181-82.

28 The “newly discovered evidence” Petitioner cites includes an Information
 and minute order from Abram's 1989 prosecution for perjury in connection with a

1 personal injury case in Louisiana. (Dkt. No. 318-2, Exhibits T & U.) Petitioner
 2 argues that “[t]his evidence casts fundamental doubt both on the accuracy of
 3 Abram’s testimony, . . . and on the reliability of the guilt and penalty phase
 4 verdicts.” (Dkt. No. 317 at 351.) The fact that Abram committed perjury two years
 5 after Petitioner’s trial in a different case does not amount to a violation of
 6 Petitioner’s constitutional rights in this matter. The California Supreme Court’s
 7 decision denying this claim was not objectively unreasonable under clearly
 8 established federal law, nor was it an unreasonable determination of the facts under
 9 §2254(d). Claim 88 is DENIED.

10 **J. Actual Innocence – CLAIMS 87 & 92– Petitioner is Innocent of**
 11 **First Degree Murder and the Special Circumstance and Facts that**
 12 **Resulted in the Death Verdict**

13 In Claims 87 and 92, Petitioner argues that he is actually innocent of first
 14 degree murder and the special circumstance finding because (1) no reasonable fact-
 15 finder would have found he had the mens rea for first degree murder or for the
 16 financial gain special circumstance as defined under California law; and (2) the
 17 bitemark testimony admitted at trial was unreliable. (Dkt. No. 317 at 347, 357.)

18 Respondent argues that Petitioner has failed to meet his burden of showing
 19 that the California Supreme Court’s denials on the merits amounted to an
 20 unreasonable application of clearly established federal law, or an unreasonable
 21 determination of the facts in light of the evidence presented in the state court
 22 proceeding. 28 U.S.C. §2254(d); *Pinholster*, 563 U.S. at 181-82.

23 The Supreme Court has assumed that a freestanding innocence claim is
 24 cognizable on federal habeas review, but it has noted that “the threshold showing
 25 for such an assumed right would necessarily be extraordinarily high.” *Herrera v.*
 26 *Collins*, 506 U.S. 390, 417 (1993). Petitioner does not meet this high threshold of
 27 proof as the evidence before the state court did not support his contentions that he
 28 (1) lacked the mens rea for first degree murder or for the financial gain special
 circumstance as defined under California law; or (2) the bitemark testimony

1 admitted at trial was unreliable. Petitioner's evidence in support of his claim is
2 much less compelling than that submitted by the petitioner in *Herrera*. *See id.* at
3 396–98 (denying Herrera's actual innocence claim even though several individuals,
4 including one eyewitness, submitted affidavits claiming that Herrera's brother
5 committed the murders for which Herrera had been convicted). The Supreme
6 Court's denial of Herrera's freestanding innocence claim urges the same result here.
7 The California Supreme Court's dismissal of these claims was therefore not
8 unreasonable under §2254(d). Claims 87 and 92 are DENIED.

9 **V. ORDER**

10 For the reasons set forth above, Claims 3, 5, 8, 9, 11-13, 15, 17-39, 41, 43-
11 54, 56-60, 62-67, 69, 70, 84 (in all respects save Petitioner's claim regarding
12 appellate counsel's failure to raise trial counsel's failure to participate in the
13 pretrial penalty evaluation process), and 87-93 are DENIED.

14 Petitioner omitted Claims 2, 42, 55, 68, 71-83 and 85-86 from the Fourth
15 Amended Petition. They are deemed abandoned.

16 Claims 1, 4, 6, 7, 10, 14, 16, 40, 61 and the aspect of Claim 84 raising
17 appellate counsel's failure to raise trial counsel's failure to participate in the
18 pretrial penalty evaluation process, are GRANTED. The Court concludes that
19 conflicted counsel provided constitutionally deficient representation during
20 pretrial, guilt and penalty-phase proceedings, denying Petitioner a fair trial, and
21 that the appropriate remedy is a new trial free from the taint which plagued all
22 phases of the original trial.

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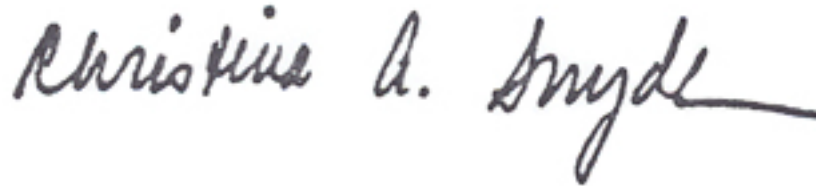
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1 The judgment of conviction in the matter of *People v. William Noguera*,
2 Case No. C-53691 of the California Superior Court of Orange County, shall be
3 VACATED. The State of California shall, within 120 days, either release
4 petitioner or grant petitioner a new trial.

5 IT IS SO ORDERED.

6
7 Dated: November 17, 2017
8

A handwritten signature in dark ink, reading "Christina A. Snyder", with a long horizontal flourish extending to the right.

9 —
10 CHRISTINA A. SNYDER
11 United States District Judge
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7 of 99 DOCUMENTS

In re WILLIAM ADOLF NOGUERA on Habeas Corpus

S136826

SUPREME COURT OF CALIFORNIA

2007 Cal. LEXIS 10954

October 10, 2007, Filed

PRIOR HISTORY: *Noguera (William A.)*, 2006 Cal. LEXIS 10939 (Cal., Aug. 4, 2006)

OPINION
[*1]

The petition for writ of habeas corpus, filed August 29, 2005, is denied.

All claims are denied on the merits.

Claims 1 and 2 are denied as untimely. (*In re Robbins (1998) 18 Cal.4th 770, 780-781 [77 Cal. Rptr. 2d 153, 959 P.2d 311]; In re Clark (1993) 5 Cal.4th 750, 763-799 [21 Cal. Rptr. 2d 509, 855 P.2d 729].*)

Claims 1 and 2 are denied as successive because they could have been, but were not, raised on habeas corpus

previously. (*In re Robbins (1998) 18 Cal.4th 770, 788, fn. 9 [77 Cal. Rptr. 2d 153, 959 P.2d 311]; In re Clark (1993) 5 Cal.4th 750, 767-768 [21 Cal. Rptr. 2d 509, 855 P.2d 729]; In re Horowitz (1949) 33 Cal.2d 534, 546-547 [203 P.2d 513].*)

Except to the extent they allege ineffective assistance of trial counsel, claims 1 and 2 are denied because petitioner failed to raise them in the trial court. (*In re Seaton (2004) 34 Cal.4th 193, 199-201 [17 Cal. Rptr. 3d 633, 95 P.3d 896].*)

Justice Werdegarr would not hold that any of petitioner's claims are barred under *In re Seaton (2004) 34 Cal.4th 193, 201, fn 4 [17 Cal. Rptr. 3d 633, 95 P.3d 896]*.

**SUPREME COURT
FILED**

MAR 10 1993

Robert Wandruff Clerk

DEPUTY

No. CR26428
S005170

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

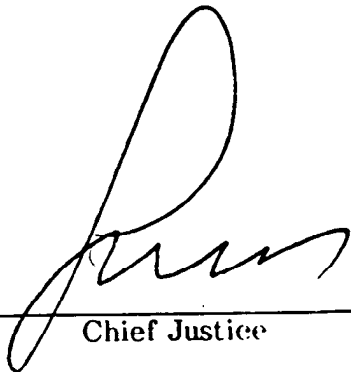
IN BANK

THE PEOPLE, Respondent

v.

WILLIAM ADOLF NOGUERA, Appellant

Petition for rehearing DENIED.



Chief Justice

[View National Reporter System version](#)

THE PEOPLE, Plaintiff and Respondent,
v.
WILLIAM ADOLF NOGUERA, Defendant and Appellant.
No. S005170.
Supreme Court of California
Crim. No. 26428.
Dec 28, 1992.

SUMMARY

A jury convicted defendant of first degree murder ([Pen. Code, §§ 187, 189](#)), and found that in committing the murder, defendant used dangerous and deadly weapons ([Pen. Code, § 12022](#), subd. (b)). The jury also found true a special circumstance allegation that the murder was committed for financial gain ([Pen. Code, § 190.2](#), subd. (a)(1)). Defendant was sentenced to death. (Superior Court of Orange County, No. C-53691, Robert R. Fitzgerald, Judge.)

The Supreme Court affirmed. It held that, since neither the victim's state of mind nor conduct was at issue, admission of the victim's hearsay statements about her fear and dislike of defendant was not authorized by [Evid. Code, § 1250](#), subd. (a)(1) (state of mind exception to hearsay exclusion rule), but the trial court's error in admitting the statements was harmless. The court held that the trial court properly admitted testimony relating to prior fights in which defendant had used martial arts, since the testimony put defendant's familiarity with martial arts close to the date of the murder and helped to prove his identity as the victim's killer. The court also held that admission of hearsay statements by the victim's daughter relating to the existence of an insurance conspiracy was proper, since the statements fell within the hearsay rule's coconspirator exception ([Evid. Code, § 1223](#)). The court held further that the trial court properly instructed the jury on reasonable doubt and consideration of circumstantial evidence, and that it did not need to instruct the jury to find, for purposes of the special circumstance, that the financial gain motive was a dominant motive, or the primary goal of the killing, or that defendant harbored such a motive at the time of the killing.

As to the penalty phase, the court held that the trial court properly instructed the jury regarding the weighing of aggravating and mitigating factors, and the role of sympathy in the jury's evaluation of the circumstances relevant to its penalty determination. The trial court did not err, the court held, by rereading the penalty instruction in response to a question from the jury regarding the imposition of the sentence. The court held that the trial court did not err in permitting the prosecutor to ask during voir dire if each prospective juror would consider imposing the death penalty in a case in which the defendant was only 18 or 19, and in which only one victim was killed. Additionally, the court held that it was not error to permit the prosecutor to refer to those voir dire questions during the penalty phase argument. (Opinion by Arabian, J., with Lucas, C. J., Panelli, Kennard, Baxter and George, JJ., concurring. Separate concurring opinion by Mosk, J.)

HEADNOTES

Classified to California Digest of Official Reports

(1a , 1b) Criminal Law § 418--Evidence--Hearsay--Exceptions to Exclusionary Rule--Victim's State of Mind Regarding Defendant.

In a capital homicide prosecution ([Pen. Code, §§ 187, 189](#)), admission of the victim's hearsay statements about her fear and dislike of defendant was not authorized by [Evid. Code, § 1250](#), subd. (a)(1) (state of mind exception to hearsay exclusion rule), since neither the victim's state of mind nor conduct was at issue, and therefore the statements failed to satisfy that statute's requirement that the declarant's state of mind, emotion, or physical sensation be itself an issue in the action. However, the trial court's error in admitting the statements was harmless beyond a reasonable doubt, since there was substantial evidence supporting defendant's guilt. Furthermore, much of the hearsay testimony admitted was heard by the jury through other witnesses, and the trial court gave the jury a limiting instruction to use the challenged hearsay testimony only as it related to the victim's state of mind. Thus, admission of the statements did not violate defendant's rights under the confrontation clauses of the federal and the California Constitutions ([U.S. Const., 6th Amend.](#); [Cal. Const., art. I, § 15](#)).

(2) Criminal Law § 418--Evidence--Hearsay--Exceptions to Exclusionary Rule--Victim's State of Mind as Proof of Accused's Conduct.

Hearsay statements of victims concerning their fears of the accused, or threats against them by the accused, when offered to prove the conduct of the accused, are not within the exception to the hearsay rule embodied in [Evid. Code, § 1250](#) (statement of declarant's then existing mental or physical state).

(3) Criminal Law § 311--Evidence--Admissibility--Evidence of Other Crimes or Misconduct--Exceptions to Rule of Inadmissibility--To Prove Material Facts Including Defendant's Identity.

In a capital homicide prosecution ([Pen. Code, §§ 187, 189](#)), the trial court did not err in admitting a witness's testimony relating to fights in which defendant had used martial arts, notwithstanding that such evidence might have been construed as "prior bad acts" of defendant, since the testimony put defendant's familiarity with martial arts close to the date of the victim's death, and directly contradicted defense testimony that defendant had only limited use of his left leg due to a stab wound occurring a year before the murder. Thus the bar imposed by [Evid. Code, § 1101](#) (inadmissibility of character evidence to prove conduct), was inapplicable. While it was true that there was other evidence of defendant's knowledge of martial arts, it was comparatively remote in time to the murder. Further, the witness's evidence was relevant to prove defendant's identity, which was an additional exception to the bar of [Evid. Code, § 1101](#), subd. (b).

(4) Criminal Law § 413--Evidence--Hearsay--Exceptions to Exclusionary Rule--Statements Not Offered to Prove Truth of Their Content.

In a capital homicide prosecution ([Pen. Code, §§ 187, 189](#)), the trial court did not err in admitting certain exculpatory hearsay statements by the victim's daughter into evidence, since the statements were not offered by the prosecution to prove the truth of their content. Rather, the statements were offered to help prove to the trier of fact the existence of a preconceived plan by defendant and the victim's daughter to murder the victim and plan a false trail of evidence indicating a burglary and rape. Given that evidentiary role, the nonhearsay statements were not subject to the independent corroboration requirements of [Evid. Code, § 1223](#) (coconspirator exception to hearsay rule).

(5) Criminal Law § 413--Evidence--Hearsay--Exceptions to Exclusionary Rule--Coconspirator Exception--Sufficiency of Evidence.

In a capital homicide prosecution ([Pen. Code, §§ 187, 189](#)), the trial court did not err in admitting hearsay statements by the victim's daughter relating to the existence of an insurance conspiracy, where there was sufficient evidence to show that the statements fell within the hearsay rule's coconspirator exception ([Evid. Code, § 1223](#)). Another witness had testified about a plan between himself, the victim's daughter, and defendant, to murder the victim and divide the proceeds of the victim's estate. Such testimony established the three preliminary facts necessary for admission of hearsay statements under the coconspirator exception: the victim's daughter was participating in the conspiracy when she made the hearsay statements, her declarations were in furtherance of the conspiracy, and defendant was a member of the conspiracy at the time the declarations offered against him were made. Further, since the statements fell within a firmly rooted exception to the hearsay rule, no independent inquiry into their reliability was needed to satisfy the confrontation clause of the federal Constitution.

[See 1 **Witkin**, Cal. Evidence (3d ed. 1986) § 678 et seq.]

(6) Criminal Law § 413--Evidence--Hearsay--Exceptions to Exclusionary Rule--Coconspirator Exception--Inadmissibility of Statement Not in Furtherance of Conspiracy.

In a capital homicide prosecution ([Pen. Code, §§ 187, 189](#)), the trial court erred in admitting a hearsay statement by the victim's daughter under the hearsay rule's coconspirator exception ([Evid. Code, § 1223](#)) to the effect that she removed her makeup every night before going to bed, which statement enabled the prosecution to argue that her account of her mother's murder was fabricated (she testified she was awakened by sounds of a struggle from her mother's bedroom, yet she was wearing makeup following the murder). The challenged hearsay statement was not in furtherance of a conspiracy, as required by [Evid. Code, § 1223](#), subd. (a). However, the error was not seriously prejudicial, since there was unchallenged evidence that the daughter was wearing makeup, and the challenged statement likely played only a minor, cumulative role in the jury's deliberations. Given the early hour, and the daughter's own testimony that she had been awakened by sounds of a struggle, it was probable that a reasonable juror would have been more impressed by the fact that the daughter was wearing makeup at all, rather than by the contested "habit" evidence that she always removed her makeup before going to bed.

(7) Criminal Law § 421--Evidence--Hearsay--Prior Testimony--Prosecution Witness's Prior Testimony--Where Defense Suggests Improper Motive for Witness's Present Testimony.

In a capital homicide prosecution ([Pen. Code, §§ 187, 189](#)), the trial court properly admitted, on redirect examination, a recording and transcript of an interview between a prosecution witness and a police officer, after defense counsel suggested on cross-examination that the witness had a motive to testify against defendant in exchange for lenient treatment in his own criminal cases. Such evidence was not inadmissible as a prior consistent statement ([Evid. Code, § 791](#)), since an otherwise inadmissible prior consistent statement is admissible if it was made before the existence of any one of the motives that the opposing party suggests may have influenced the witness's testimony. Cross-examination of the witness sought to explore possible agreements for more favorable treatment made subsequent to his interview with the officer. While the witness may have had a motive to minimize his potential penal liability as soon as the officer told him he was liable as a coconspirator in the present case, the focus under [Evid. Code, § 791](#), is the specific agreement or other inducement suggested by cross-examination as supporting the witness's improper motive.

(8a , 8b) Criminal Law § 430--Evidence--Sufficiency--Number of Witnesses--Necessity for Corroboration of Accomplice Testimony--Instructions.

In a capital homicide prosecution ([Pen. Code, §§ 187, 189](#)), the trial court did not err in instructing the jury pursuant to both CALJIC No. 2.27 (testimony of single witness is sufficient for proof of any fact) and CALJIC No. 3.11 (accomplice testimony must be corroborated in order to convict). The combined instructions did not permit a conviction based on an accomplice's uncorroborated testimony alone, since, although the trial judge read the jury an unmodified version of CALJIC No. 2.27 together with CALJIC No. 3.11, he also added the full array of accomplice instructions. Further, both sides proceeded on the assumption that the accomplice testimony required corroboration, and nothing in the combined instructions suggested otherwise. Finally, the accomplice's testimony was not so unreliable as to offend federal rights to a jury trial ([U.S. Const., 6th](#) Amend.) and due process ([U.S. Const., 14th](#) Amend.). While the testimony had its frailties, they were not concealed from exposure and consideration by the jury, or from attack by defense counsel.

(9) Criminal Law § 434--Evidence--Sufficiency--Accomplice Testimony-- Instructions Regarding Corroboration.

The test for whether a jury has been properly instructed with regard to corroboration of accomplice testimony encompasses determinations as to whether the jury is instructed on the kind of evidence necessary to constitute corroboration, on the method of determining whether an accomplice's testimony was corroborated, and on viewing the accomplice's testimony with distrust, along with whether the parties proceeded on the premise that corroboration is required. Where these criteria are met, there is no error in also instructing pursuant to CALJIC criteria are met, there is no error in also instructing pursuant to CALJIC No. 2.27 (testimony of single witness is sufficient for proof of any fact).

(10a , 10b) Homicide § 70--Evidence--Sufficiency--Accomplices and Corroboration--Jury Instructions and Determination of Accomplice's Credibility.

In a capital homicide prosecution ([Pen. Code, §§ 187, 189](#)), evidence supporting the jury's true finding of a financial gain special circumstance ([Pen. Code, § 190.2](#), subd. (a)(1)), was not so insubstantial as to violate defendant's rights under [U.S. Const., 8th](#) Amend., notwithstanding alleged defects in the testimony of an accomplice who testified on the issue for the prosecution. The trial court's jury instructions as to accomplice and single witness testimony were sufficiently clear to prevent the jury from believing that the accomplice's testimony did not require corroboration. Furthermore, the jury was fully capable of judging the accomplice's credibility.

(11) Homicide § 70--Evidence--Sufficiency--Accomplices and Corroboration-- Proof of Special Circumstance.

Accomplice testimony admitted to prove the financial gain special circumstance ([Pen. Code, § 190.2](#), subd. (a)(1)) need not be corroborated. To the contrary, when the special circumstance alleged requires only proof of the motive for the murder for which a defendant has already been convicted, the requirement to corroborate accomplice testimony ([Pen. Code, § 1111](#)) does not apply.

(12) Criminal Law § 245--Trial--Instructions--Relation to Facts in Evidence--Withdrawal From Conspiracy.

In a capital homicide prosecution ([Pen. Code, §§ 187, 189](#)), the trial court did not err by instructing the jury on termination of penal liability through aider and abettor withdrawal (CALJIC No. 3.02) and coconspirator withdrawal (CALJIC No. 6.20), notwithstanding defendant's claim that such instructions permitted the jury to improperly conclude that a particular prosecution witness had ceased to be an accomplice, which would have eliminated the need to corroborate, or evaluate with skepticism, his testimony. The witness's status as a jail inmate during the victim's murder reasonably raised the issue of the effect of his incarceration on his accomplice liability. In effect, the instructions informed the jurors that withdrawal required more than impossibility; it required the witness to communicate his withdrawal to his coconspirators. There was nothing erroneous or prejudicial in such a result, especially since the effect of the challenged instructions was to favor a finding that the witness was an accomplice, and thus to require that his testimony be evaluated skeptically as well as corroborated.

(13) Criminal Law § 251--Trial--Instructions--Reasonable Doubt--Pattern Jury Instruction.

In a capital homicide prosecution ([Pen. Code, §§ 187, 189](#)), the trial court properly instructed the jury on reasonable doubt and circumstantial evidence, where it instructed the jury with the standard pattern jury instructions on the relationship between circumstantial evidence and reasonable doubt (CALJIC Nos. 2.01, 2.02, 2.21 and 2.27). The fact that those instructions directed the jury to choose reasonable interpretations of circumstantial evidence over unreasonable interpretations did not improperly cause the jury to interpret the instructions to permit a conviction where the evidence showed defendant was "apparently" guilty, yet not guilty beyond a reasonable doubt. Similarly, the standard reasonable doubt instructions regarding circumstantial evidence are not, in effect, irrebuttable presumptions of guilt. Read in context, the instructions merely require the jury to reject unreasonable interpretations of the evidence, and to accept the reasonable version of the events that fits the evidence.

(14) Homicide § 74--Trial and Punishment--Instructions--Financial-gain Special Circumstance--Constitutionality.

In a capital homicide prosecution ([Pen. Code, §§ 187, 189](#)), in which the jury found true a special circumstance allegation that the murder was committed for financial gain ([Pen. Code, § 190.2](#), subd. (a)(1)), the failure of the standard CALJIC instruction to require the jury to find that the financial gain motive was a dominant, substantial, or significant motive did not violate the federal Constitution's requirement that capital offenses be narrowly defined to encompass the limited class of crimes that morally justify imposition of the death penalty ([U.S. Const., 8th Amend.](#)). The relevant inquiry was whether defendant committed the murder with the expectation that he would thereby obtain the desired financial gain. So construed, the special circumstance provision is not unconstitutionally vague or overbroad.

(15) Homicide § 74--Trial and Punishment--Instructions--Financial-gain Special Circumstance--Financial Gain as Primary Goal.

In a capital homicide prosecution ([Pen. Code, §§ 187, 189](#)), in which the jury found true a special circumstance allegation that the murder was committed for financial gain ([Pen. Code, § 190.2](#), subd. (a)(1)), the trial court did not err in failing to instruct the jury that, for purposes of the special circumstance, it was necessary to find that financial gain was the primary goal of the killing. The facts did not indicate that the requisite intent for the special circumstance finding was somehow ancillary to the commission of the murder, or only a "technical" special circumstance. Defendant either had an expectation of financial benefit at the time of the killing or he did not. It was for the jury to make that determination, applying a commonsense, nontechnical understanding of "financial gain."

(16) Homicide § 74--Trial and Punishment--Instructions--Financial-gain Special Circumstance--Necessity That Defendant Harbor Requisite Intent at Time of Killing.

In a capital homicide prosecution ([Pen. Code, §§ 187, 189](#)), in which the jury found true a special circumstance allegation that the murder was committed for financial gain ([Pen. Code, § 190.2](#), subd. (a)(1)), the trial court did not err in failing to instruct the jury that the financial-gain special circumstance could only be found if defendant harbored such a motive at the time of the killing. The special circumstance of murder for financial gain is not a technical one, and the Legislature intended it to cover a broad range of situations. Where terms have no technical meaning peculiar to the law, but are commonly understood by those familiar with the English language, instructions as to their meaning are not required. Therefore, in the present case there was no necessity for further refinement or restrictive interpretation of the financial-gain special circumstance in the absence of additional indications that the statutory language itself could have caused confusion.

(17) Homicide § 74--Trial and Punishment--Instructions--Substantive Offense Instruction as Affecting Financial-gain Special Circumstance Allegation.

In a capital homicide prosecution ([Pen. Code, §§ 187, 189](#)), in which the jury found true a special circumstance allegation that the murder was committed for financial gain ([Pen. Code, § 190.2](#), subd. (a)(1)), the trial court did not err in giving the standard language of CALJIC No. 2.51 (motive is not an element of the crime and need not be proven) with respect to the murder of the victim. Such an instruction would not have misled the jury into believing that the financial-gain special circumstance did not have to be proved. The crime charged was murder, and any reasonable juror would have understood the instruction as referring to the substantive offense only, and not to any special circumstance allegation.

(18) Homicide § 107--Appeal--Harmless and Reversible Error--Cumulative Effect of Errors.

In a capital homicide prosecution ([Pen. Code, §§ 187, 189](#)) resulting in conviction, the cumulative effect of the trial court's errors in the guilt phase did not require reversal. The erroneous admission of hearsay declarations of the victim, that she feared and disliked defendant, and the victim's daughter, regarding her nightly makeup habits, was not prejudicial in light of other evidence of guilt and the limiting instruction given the jury. Furthermore, the frailties in the testimony of one of the prosecution witnesses were exposed to the jury through extensive cross-examination by defense counsel. On such a record, it was not reasonably probable that defendant would have secured a more favorable result had the challenged evidence not been admitted. Similarly, any errors were harmless beyond a reasonable doubt.

(19a , 19b) Criminal Law § 559--Appellate Review--Presenting and Preserving Objections--Argument and Conduct of Prosecutor--Penalty Phase Closing Argument.

In a capital homicide prosecution ([Pen. Code, §§ 187, 189](#)), claims of prosecutorial misconduct in the closing argument of the penalty phase were waived by trial counsel's failure to make any objection. If there had been misconduct, all the claims, including assertions that the prosecutor expressed a personal opinion about the gravity of the offense, compared defendant to an imaginary and less culpable defendant, improperly relied on less serious noncapital homicides to claim that defendant's offense could not be mitigated, and attempted to remove sympathy from the jury's penalty consideration, could have been cured by a timely objection, followed by an instruction from the trial court to cease the line of objectionable argument, and a curative admonition to the jury to disregard the prosecutor's improper remarks.

(20) Criminal Law § 559--Appellate Review--Presenting and Preserving Objections--Argument and Conduct of Prosecutor--Capital Cases.

To preserve for appellate review a claim of prosecutorial misconduct, a defendant must raise a timely objection and, if practicable, request a curative admonition. Except where a timely objection would be futile, absent such an opportunity for

the trial court to consider the claim of misconduct and to remedy its effect, any error is waived and will not be reviewed. Capital cases do not require a different rule regarding the effect of a failure to interpose claims of curable prosecutorial misconduct.

(21) Criminal Law § 109--Rights of Accused--Competence of Defense Counsel-- Failure to Object to Alleged Prosecutorial Misconduct During Closing Argument of Penalty Trial.

In a capital homicide prosecution ([Pen. Code, §§ 187, 189](#)), the failure of defense counsel to object to alleged prosecutorial misconduct during the closing argument of the penalty phase did not amount to ineffective assistance of counsel, since there was not a reasonable likelihood that any of the comments challenged by defendant might have been misconstrued by the jurors. The prosecutor neither vouched personally for the death penalty as an appropriate sentence, nor argued on the basis of facts not in evidence, and a reasonable juror would not have understood the prosecutor to have urged the death sentence based on either a personal opinion or facts not in evidence.

(22) Criminal Law § 523--Punishment--Penalty Trial--Instructions--Weighing of Aggravating and Mitigating Factors.

In a capital homicide prosecution ([Pen. Code, §§ 187, 189](#)), the trial court's instruction to the jury regarding the weighing of aggravating and mitigating factors in order to decide between the death penalty or a life sentence without parole was not erroneous, where it incorporated language conveying unmistakably that the sentencing determination was not the result of a mechanical sequence of weighing aggravating against mitigating factors. The instruction also emphasized the discretionary nature of the jurors' weighing function, and underlined the requirement that each juror be personally convinced before deciding that death was the appropriate judgment.

(23) Criminal Law § 523--Punishment--Penalty Trial--Instructions--Use of Mandatory Term "Shall" in Regard to Imposition of Death Penalty.

In the penalty phase of a capital homicide prosecution ([Pen. Code, §§ 187, 189](#)), the trial court's instruction to the jury using the mandatory term "shall" in regard to imposition of the death penalty, if such penalty was found appropriate, was not per se fatal to the instruction's validity. Defendant's concerns about the instruction were satisfied by other emphases on the jurors' discretion in valuing the weight given to each of the relevant sentencing factors. When jurors are informed that they have discretion to assign whatever value they deem appropriate to the factors listed, they necessarily understand that they have discretion to determine the appropriate penalty. Therefore, it was not reasonably likely in the present case that a juror would have misunderstood the nature of his or her role in the capital sentencing process, either as one involving a mechanical quantification of relevant factors, or as one requiring the imposition of the death penalty.

(24) Criminal Law § 523--Punishment--Penalty Trial--Instructions--Role of Sympathy in Jury's Evaluation of Circumstances Relevant to Penalty Determination.

In the penalty phase of a capital homicide prosecution ([Pen. Code, §§ 187, 189](#)), the trial court did not err in failing to instruct the jury regarding the role of sympathy in the jury's evaluation of the circumstances relevant to its penalty determination. In a supplemental instruction given to the jury immediately after the challenged penalty determination instruction, the trial court told the jurors that they could "consider pity and sympathy for the defendant in deciding the penalty to be imposed on the defendant." There was nothing to suggest, given the close proximity of the supplemental and initial penalty determination instructions, that a reasonable juror would have retired to deliberate under the impression that sympathy was not a legitimate component of the sentencing equation.

(25) Homicide § 96--Trial and Punishment--Instructions--Jurors, Verdict, and Punishment--Rereading Instructions in Response to Jury's Question.

In the penalty phase of a capital homicide prosecution ([Pen. Code, §§ 187, 189](#)), the trial court did not err by rereading the penalty determination instruction as its response to the jury's question of whether, if the jury found that aggravating circumstances exceeded mitigating circumstances, it was nevertheless possible to sentence defendant to life imprisonment rather than the death penalty. The penalty instruction, considered alone, was proper, and, given its propriety, repetition of the instruction was not error. The most that could be said of the trial court's response was that it represented an unwillingness to venture beyond the safety of standardized instructions. Given the record, such a decision was not an abuse of discretion. Moreover, any claim that the prejudicial effect of the instruction was established by the speed with which the jury returned a verdict of death after receiving it rested on unprovable speculation as to the course of the jury's deliberations. It must be assumed that a penalty jury, properly instructed as to its sentencing responsibility in a capital case, will deliberate in accordance with those instructions.

(26a , 26b, 26c) Criminal Law § 559--Appellate Review--Presenting and Preserving Objections--Argument and Conduct of Prosecutor--Closing Penalty Argument.

On appeal from a conviction in a capital homicide prosecution ([Pen. Code, §§ 187, 189](#)), defendant was precluded from raising claims of error based on the prosecutor's allegedly improper and prejudicial introduction of aggravating penalty evidence not embraced by the factors enumerated in [Pen. Code, § 190.3](#) (determination as to penalty of death or life imprisonment without parole), during the closing penalty argument, where defense counsel raised no objection, sought no

admonition, and requested no curative instruction. The alleged misconduct was amenable to remedial measures by the trial judge, given a timely objection, and the claims of error were thus waived. Further, in reviewing the record as a whole, the alleged errors were harmless, since, had a timely objection been made, and a curative instruction given, it was not probable that defendant would have obtained a more favorable result. Moreover, in the absence of the alleged errors, defense counsel's failure to make timely objections did not amount to ineffective assistance of counsel under the federal Constitution ([U.S. Const., 6th Amend.](#)).

(27a , 27b) Criminal Law § 522--Punishment--Penalty Trial--Argument-- Introduction of Aggravating Penalty Evidence.

In a capital homicide prosecution ([Pen. Code, §§ 187, 189](#)), the prosecutor's penalty phase argument did not improperly introduce aggravating penalty evidence not embraced by the factors enumerated in [Pen. Code, § 190.3](#)(determination as to penalty of death or life imprisonment without parole), since the prosecutor did no more than argue, on the basis of evidence already before the jury, in rebuttal to character evidence offered by defendant under [Pen. Code, § 190.3](#), factor (k). [Pen. Code, § 190.3](#), factor (k), and its implementing instruction, CALJIC No. 8.84.1, directed the jury to consider extenuating circumstances, as well as sympathetic aspects of the accused's character or record. Once the defense presents admissible evidence under [Pen. Code, § 190.3](#), factor (k), prosecution rebuttal evidence is admissible to disprove any disputed fact that is of consequence to the action. The prosecutor could properly refer in closing argument to prior criminal conduct that had not been admitted as evidence in aggravation under [Pen. Code, § 190.3](#), since it related directly to a particular incident or character trait defendant offered in his own behalf.

(28) Jury § 24--Selection and Formation of Jury--Qualifications--Propriety of Questions in Selection of "Death Qualified" Jury.

In a capital homicide prosecution ([Pen. Code, §§ 187, 189](#)), the trial court did not err in permitting the prosecutor, during voir dire proceedings to select a "death qualified" jury, to ask each prospective juror whether he or she would consider imposing the death penalty in a case in which the defendant was only 18 or 19, and in which only one victim was killed. Whether evaluated under the standard prevailing at the time of trial, or under the current version of [Code Civ. Proc., § 223](#), which, after passage of Prop. 115, provides that examination of prospective jurors shall be conducted only in aid of the exercise of challenges for cause, the questions were entirely proper since they were directly relevant to whether a juror would be subject to a challenge for cause. If a juror would not even consider the death penalty in the situations raised by the prosecutor, he or she properly would have been subject to challenge for cause. Since the challenged questions were directly relevant to, and in aid of, the exercise of a challenge for cause, the questions were proper, both under the standards governing voir dire in effect at the time of trial, and the narrower standard enacted by Prop. 115.

(29) Criminal Law § 522--Punishment--Penalty Trial--Argument--Reference to Voir Dire Questions and Answers.

In the penalty phase of a capital homicide prosecution ([Pen. Code, §§ 187, 189](#)), the prosecutor did not improperly refer in his closing argument to the earlier voir dire questions and answers regarding whether each juror would consider imposing the death penalty in a case in which the defendant was only 18 or 19, and in which only one victim was killed, since those questions were not improper voir dire questions. Furthermore, in arguing those points to the jurors, the prosecutor was not contending that defendant's relative youth, or the fact that he did not kill more than one victim, could not be taken into consideration by the jury in determining whether the death penalty was appropriate. Rather, he was merely making the entirely proper argument that the circumstances under which the murder occurred were sufficiently aggravating to warrant the death penalty, despite defendant's youth and the fact that there was only one victim. Such an argument did not limit the jury's sentencing discretion.

(30) Criminal Law § 523--Punishment--Penalty Trial--Instructions--Trial Court's Refusal to Give Defendant's Proffered Penalty Instruction.

In a capital homicide prosecution ([Pen. Code, §§ 187, 189](#)), the trial court did not err during the penalty phase by refusing to give defendant's proffered pinpoint penalty instruction to the jury regarding certain mitigating circumstances, since other instructions adequately covered the defense theory of the penalty phase. Those elements of defendant's special instruction that were not argumentative were thus duplicative, and the trial court did not err in declining to give them.

(31) Criminal Law § 523--Punishment--Penalty Trial--Instructions--Jury's Sentencing Discretion.

In a capital homicide prosecution ([Pen. Code, §§ 187, 189](#)), the trial court's permitting the jury to consider [Pen. Code, § 190.3](#), factor (a) (circumstances of capital crime), and [Pen. Code, § 190.3](#), factor (i) (age of defendant at time crime was committed), without more specific instructional guidance did not impermissibly enlarge the sentencing discretion of the jury and thereby violate vagueness limitations imposed by the federal Constitution ([U.S. Const., 8th Amend.](#)). Both factors direct the attention of the penalty jury to specific, provable, and commonly understandable facts about a defendant and the capital crime that might bear on his or her moral culpability. Having met these standards of relevance and specificity, these factors are not illusory or otherwise impermissibly vague simply because they leave the sentencer free to evaluate the evidence in accordance with his or her own subjective values.

Donald Specter and Alison Hardy, under appointments by the Supreme Court, and Arnold Erickson for Defendant and Appellant.

Daniel E. Lungren, Attorney General, George Williamson, Chief Assistant Attorney General, Harley D. Mayfield, Assistant Attorney General, Rudolf *612 Corona, Jr., and Janelle B. Davis, Deputy Attorneys General, for Plaintiff and Respondent.

ARABIAN, J.

Defendant William Adolf Noguera was convicted by a jury of one count of first degree murder. ([Pen. Code, §§ 187, 189](#); all statutory references are to this code except as indicated.) The jury also found that in committing the murder, defendant used dangerous and deadly weapons, namely, a martial arts tonfa and a wooden dowel ([§ 12022](#), subd. (b)); it also found true a special circumstance allegation that the murder was committed for financial gain. ([§ 190.2](#), subd. (a)(1).) Following a penalty trial, the jury returned a verdict of death. We affirm the judgment.

Facts

I. Guilt Phase Evidence

A. The murder of Jovita Navarro: the prosecution's case.

Sometime between 11:30 on the night of April 23, 1983, and 4:30 the following morning, Jovita Navarro was murdered in the bedroom of her La Habra bungalow. La Habra police found Jovita's body after being summoned by a "911" call from Mindy Jackson, Jovita's next-door neighbor. After securing the area, investigating officers went to the Jackson residence where they interviewed Dominique Navarro, Jovita's 16-year-old daughter. Dominique told them she had returned from a date with her then-18-year-old boyfriend around 2:00 that morning; after chatting briefly with her mother, who was reading in bed, and removing her makeup, Dominique had gone to bed and to sleep. She was awakened a few hours later, she said, by muffled noises coming from her mother's adjacent bedroom.

After a few minutes, Dominique heard her mother cry out, "get out, mi hija ("hija" is Spanish for "daughter"), get out, mi hija." Frightened, and unsure what was afoot in the darkened house, Dominique told Mindy Jackson that she sat at the end of her bed for "about 5 to 15 minutes," before running blindly down the hall and out the back door. As she ran, she heard a "thumping" sound coming from her mother's bedroom, followed by what sounded like the footsteps of someone close behind her.

Reaching Mindy Jackson's house, Dominique banged on the door until Jackson answered. In tears and near hysteria, according to Jackson, Dominique said that someone was hurting her mother; she begged Jackson to return *613 to the house with her. Jackson refused. Instead, she managed to telephone 911. Authorities logged in the emergency call at 4:43 a.m.

To the casual observer, the murder scene suggested that Jovita had been killed in the course of a combined rape and burglary. Her body was found lying across the bed, her feet touching the floor. Her nightgown had been pulled up around her neck, and a pair of blue women's underpants was wadded between her thighs. The contents of the bedroom were in disorder—bedding and blankets had been pulled from the bed and thrown haphazardly on the floor; a jewelry box, normally resting on a dresser, was found upended on the hall floor, its contents of costume jewelry scattered along the hallway.

Jovita had been badly beaten, mainly on the face and head. She had suffered extensive facial injuries, including dental and eye damage from at least 18 blows to the face and head; her skull had multiple depressed fractures and her scalp had been loosened and torn by the force of the beating; her nose almost touched her left cheek and "defensive wounds" were evident on her arms and hands. On her left thigh, examiners found oval shaped wounds.^{FN1} Blood was spattered on the walls, furniture, and ceiling of the bedroom.

FN1 At trial, extensive testimony by forensic odontologists was presented by both sides, pro and con, as to whether the wounds were human bite marks and, if so, when they were inflicted. The prosecution placed in evidence casts of the teeth of 12 individuals, including defendant, to support its claim that defendant had bitten Jovita in the act of killing her.

The pathologist who examined the body testified that the proximate cause of Jovita Navarro's death was not the beating but asphyxiation-induced by pressing a rounded object against her throat with such force that her larynx was crushed, choking off her airway. Extensive cyanosis, or blueing, of her lips and pinpoint hemorrhaging beneath her eyelids confirmed that Jovita had, in effect, been strangled. Had she not died from a lack of oxygen, the pathologist concluded, the severity of the beating would have resulted in her death.

In the bedroom, La Habra police investigators found a "tonfa," a martial arts weapon fashioned from red oak and resembling a police baton; it lay shattered in two pieces, testimony to the savagery of the beating. In a neighboring yard, police recovered a piece of wood shaped like a broom handle, with traces of blood on it. In another yard, they found a bloodstained tan leather glove; bloodstains were also found on a cinder block wall adjoining a nearby lot. The bloodstains on the tonfa, the wooden dowel, and the glove were the same type as Jovita's. An analysis of fibers removed from *614 the brick wall and the glove were consistent with those found on the bedroom blanket.

La Habra and Orange County authorities began an extensive forensic investigation of the crime scene. As a result, investigators concluded that much of the evidence pointing to a burglary and rape/murder of Jovita had been faked. An autopsy failed to reveal the presence of sperm in Jovita's vagina. An analysis of vaginal swabs was consistent with a finding that the victim might have had intercourse several hours earlier the preceding evening, but there was no external evidence of sexual trauma consistent with a forcible rape. Tests of the blue underwear for semen or other stains indicative of forcible sex were negative.

Although the bedroom appeared to have been rifled, nothing of value was missing, including a clear plastic change purse stuffed with small bills that the intruder could not have overlooked. The jewelry box had been knocked from its place and its contents scattered, but none of the jewelry had been taken. An analysis of the blood-spattering pattern on the bed linen suggested that it had been removed from the bed and arranged on the floor *after* the murder, rather than during a struggle. Moreover, the spatter analysis indicated that Jovita had probably been murdered *before* the contents of the bedroom had been upended. Finally, investigators could find no evidence that Jovita's killer had gained entry into the house by force.

The on-scene criminalist, examining the body at 6:30 that morning, initially estimated the time of death at between three and six hours prior to his examination, or between 12:30 and 3:30 a.m. Although routine examinations for lividity and rigor mortis-two crude measures used to approximate time of death-confirmed that estimate, it was later revised upward, to 4:45 a.m., based on Dominique's statement to the police that she had heard her mother cry out around 4:30 that morning.

After conducting an autopsy on the morning of April 24, the examining pathologist concluded on the basis of the quantity and state of the contents of her stomach that Jovita died sometime between 12:30 and 2:30 that morning. Another criminalist, who observed the body at the autopsy, testified that the 4:45 a.m. time of death stated in the certificate of death was based on Dominique's account of the murder. Although that hour was not substantially out of line with the results of the lividity and rigor tests, had it not been for Dominique's statement the condition of the body suggested that death *615 had occurred between three and seven hours earlier, or between 11:30 the preceding evening and 3:30 that morning.^{FN2}

FN2 As of 2 a.m. on April 24, 1983, the seasonal change from standard to daylight saving time occurred; clocks were set forward by one hour.

An inquiry into Jovita's financial circumstances disclosed that she carried \$13,000 in life insurance and at the time of her death had approximately \$14,000 in accumulated retirement benefits from her job as an Orange County welfare clerk. The house, with a market value of around \$90,000, had an existing mortgage balance of \$7,000; Jovita carried mortgage insurance in the event of her death. Dominique was her sole heir.

As their investigation deepened, police learned from interviews with Margaret Garcia, a coworker, and Mindy Jackson that relations between Jovita and Dominique's boyfriend, the defendant, were not always pleasant. Jovita had quarrelled with both over Dominique's repeated violations of curfew hours, over her pregnancy and subsequent abortion, and over what Jovita regarded as a steep decline in Dominique's schoolwork and attendance beginning with the onset of her relationship with defendant. Garcia and Jackson both testified that Jovita was planning to sell the house and move to the beach, or to enlist Dominique in the Army, in an attempt to separate her from defendant. According to Garcia, Jovita had considered hiring a "hit man" to kill defendant. About two weeks before her death, Garcia said, Jovita told her that she had awakened in the middle of the night to find the front door open and all the outside lights off. Jovita found Dominique wandering the house; Dominique told her that she had opened the front door, but could not explain why.

About two or three weeks before Jovita's murder, Jackson had witnessed her screaming into the telephone and had seen Dominique in the bathroom crying. Jovita had slammed down the handset and said that she "hated" defendant and didn't want to hear his name again. "If he [defendant] is going to use his karate on me, he has another thing coming," Jackson reported Jovita as saying.

Through interviews with Dominique and defendant, authorities learned that on the night of Jovita's death the two had gone to a party in West Covina about 7:00. They left around 11:30 that evening, they told police, and went for a hamburger with a friend; after dropping their friend off, they parked for an hour or two, returning to Jovita's house between 1:30 and 2:00 a.m. Dominique let herself in, locked the front door, opened a sliding glass door at the rear of the house in order to let the family dogs out, and turned off the outside lights. After chatting briefly with her mother, she went to bed. *616

Defendant told police that after leaving Dominique's house, he went home. Because he had missed the 1:30 curfew set by his mother, he had to knock on the front door to get in. His grandmother, who was watching television with his mother, let him in. After talking with them and being lectured by his mother about being late, he went to bed.

La Habra police also interviewed Peter LaCombe, a diesel mechanic employed by the county who had been dating Jovita for about two weeks before her death. LaCombe had spent the evening of April 23 with Jovita at her house. The two ate a substantial dinner around 7:30 and then danced and watched television. Around 11:00 that evening, LaCombe testified, he left for home.

From interviews with the adjoining neighbor, Mindy Jackson, police learned that Jackson and her husband had entertained a friend, Tom Brooks, on the night of the murder. All three had heard loud noises coming from the Navarro house around 11:00 p.m. Brooks testified that he had gone outside to investigate but had noticed nothing remarkable; the house was dark and the sliding glass door at the rear was closed. Later that night, they heard what Brooks described as "really radical noises" next door. The three had gone outside about 1:45 a.m. They heard Jovita's two dogs barking and growling; there were no lights either outside or inside the Navarro house.

Despite discrepancies in the accounts given by Dominique and defendant and others interviewed, and suspicions presented by the forensic analyses, police made no arrests in the case until late in the year. In December, the police inspector assigned to the investigation, Sergeant Keltner, received a tip from Steve Arce, an acquaintance of defendant, that Ricky Abram might have information relevant to the homicide investigation. Keltner interviewed Abram on December 14, 1983, at the Lone Juvenile Detention Facility near Sacramento, where Abram was an inmate. He tape-recorded most of their conversation.

In substance, Abram testified at trial that he decided to disclose his knowledge of the murder scheme after Keltner told him of his possible criminal liability for Jovita's murder. Abram told the jury that in March 1983, a few weeks after he first met defendant, the two had driven in defendant's car to pick up Dominique at her house. On the way over, defendant told Abram that he intended to kill Dominique's mother. He asked for Abram's help in borrowing a shotgun for that purpose. After picking up Dominique, the three drove to Bob's Big Boy, a nearby restaurant. There, according to Abram, they discussed in detail defendant's plan to murder Jovita. ***617**

The murder, Abram testified, would be staged to look as if Jovita had been killed by a burglar in the middle of the night. Dominique's role would be to let the two men into the house; Abram would fake the burglary and take any items of value; defendant would kill Jovita with a shotgun blast. Defendant and Dominique would then have intercourse, Abram said, after which Dominique, feigning a rape, would run hysterically next door to report the break-in and murder/rape. For his part in the crime, defendant promised Abram \$5,000 from the \$25,000 obtained from "the mother's insurance." In addition to his share of the insurance, Abram told the jury, defendant promised he could live in Jovita's house with defendant and Dominique, since "the house would be passed on to the daughter after the mom's death."

After leaving the restaurant and returning Dominique to her house, defendant dropped Abram off. In early April, Abram was arrested for auto theft, convicted and imprisoned. He testified that he did not see defendant or Dominique again until the trial, regarded the murder scheme as a "joke," and did not learn of Jovita's death until Keltner told him.

Police interviews with others provided additional evidence of defendant's involvement in the murder. Steve Arce told the jury of a fight he had with defendant around the Easter preceding Jovita's death. Defendant had used his feet to quickly knock Arce to the ground. Arce had also seen tonfas in defendant's car and had seen defendant spinning a tonfa in his hand. He had seen defendant wearing tan leather motorcycle gloves on occasion, and had seen him with Ricky Abram. He also related an incident about a month before Jovita's death in which defendant kicked two individuals in a street encounter, knocking one of them to the ground in "thirty seconds maybe," using martial arts techniques. A couple of weeks before the murder, Arce had heard defendant complain about Jovita's interference in his relationship with Dominique; defendant had said that he wanted "to kill that bitch," referring to Jovita.

In the months following Jovita's death, investigators learned, Dominique spoke frequently with defendant by telephone from an uncle's house, where she was now living. Once, the uncle testified, he overheard Dominique complain after completing a call from defendant that she did not want to call the family attorney again; she was upset, her uncle said. The attorney, Dominique's cousin, confirmed that Dominique made a growing number of telephone calls to him in the months following Jovita's death; her questions centered on the disposition of the family home and details concerning the amount of Jovita's insurance, the sums due creditors, and any surplus in the estate; Dominique was "very emphatic," he testified, that she did not want the house to be sold. That June, the attorney attended a meeting with ***618** defendant, his mother, Dominique, and another lawyer at which the possibility of Dominique's legal emancipation was discussed.

In December 1983, authorities arrested Dominique and defendant. Charged with one count of conspiracy to commit murder and one count of first degree murder, Dominique was tried as a juvenile, convicted and sentenced to the custody of the Youth Authority; her conviction was affirmed on appeal.

B. The defense case.

Defendant testified in his defense. His relations with Jovita were "fair," he said; sometimes they got along well, sometimes not. He had lived at the Navarro residence for a few months in 1982 with Jovita's consent. The three regularly had dinner out about once a month. Defendant denied any involvement in Jovita's death. He had talked to Ricky Abram once about selling him an automobile engine; they had gone to Bob's Big Boy with Dominique. While they had lunch, Dominique had complained that her mother had restricted her for coming home late. He never saw Abram again. Defendant had studied martial arts as a young teenager, but had not earned a black belt and had no training in the use of a tonfa; nor had he ever owned one. He had been badly stabbed in the thigh in a fight in June of 1982, still walked with a limp and had difficulty stretching one of his legs. He had never had any knowledge of Jovita's life insurance.

On the night of Jovita's murder, defendant testified, he had gone with Dominique to a party in West Covina. After a hamburger with a friend, the two had parked for awhile. He dropped Dominique off at her house around 2:00 that morning, went home and, after talking with his mother and grandmother, went to bed. About 3:30 a.m., he heard a knock on his window. It was Margaret Noone, a friend; he let her in and she stayed in bed with him for about an hour before leaving by the window. Around 6:00 a.m., Dominique had telephoned; she was very upset; defendant dressed and left immediately for her house.

Defendant's sister supported his testimony regarding the injury to his leg and the fact that he had never received training in or owned a tonfa. His grandmother confirmed that defendant had arrived home around 2:00 on the morning of Jovita's murder.

Defendant's mother testified that he returned home at exactly 2:00 on the morning of April 24, 1983-she had been watching a program on Spanish television and remembered the time. She spoke to defendant briefly as to *619 why he was late. Later that night, defendant's mother heard the sound of voices in her son's room. Through the door, she asked defendant who was there; he told her to go to sleep and later refused to tell her the identity of his visitor. Asked about the meeting with Dominique's attorney in June of 1983, at which Dominique's legal emancipation was discussed, Mrs. Noguera testified that she had earlier accompanied Dominique to the Social Security office in an effort to help her receive some benefits-she had been without any income in the five months since her mother's death. A previous attorney had done nothing, and Dominique needed help.

Margaret Noone testified that around 3:00 a.m. on April 24, 1983, she had climbed into the window of defendant's bedroom and stayed for about one and one-half hours. She left when she heard someone knocking on the bedroom door.

Two of defendant's friends testified to prior conversations with Ricky Abram and Steve Arce. Wilbur Boring told the jury that in December of 1983, after he had implicated defendant in Jovita's murder, Abram had told him that "he [defendant] got what he deserved; he put me in jail so I put him in jail." Patrick Reese testified that Arce had told him that he cooperated with the police in exchange for immediate release on a felony charge; Arce had observed a pair of nunchuku sticks in defendant's possession, not tonfas, and had told Reese that he (Arce) should not have told the police some of the things he told them.

C. Rebuttal.

The prosecution recalled Margaret Noone to the stand. She stated that, in testifying on behalf of defendant, she had "lied ... [about] basically almost everything" because she "was getting threats if I didn't say something like that [i.e., her alibi testimony] something would happen to me or my family because [defendant] has such powerful friends, even though he's in jail." She had seen nunchuku sticks in defendant's car, and he liked to "mess around with them." Noone told the jury that she had been granted immunity from prosecution by the People.

In addition, the trial court took judicial notice that Dominique had been called as a witness by the prosecution, had refused to testify, and been adjudged in contempt of court. A deputy marshal testified that shortly after Dominique was held in contempt, he heard defendant say to another inmate that Dominique "did a good job and tell her I love her." *620

II. Penalty Phase Evidence

A. The prosecution's case.

John Antenucci testified that in August 1983, he placed a newspaper advertisement to sell a used Volkswagen. Accompanied by a friend, defendant responded to the advertisement and expressed an interest in buying the automobile. The three went for a test drive, during which defendant stopped the car and told Antenucci to get out because his friend "has a gun." Defendant's friend displayed a handgun and threatened to shoot Antenucci, who managed to grab the car keys and escape.

B. The defense case.

Defendant called 15 witnesses, including a former employer, his high school girlfriend, and several friends of his family. Several witnesses testified that defendant's family was very close until his parents were divorced in 1980. His mother testified that defendant, who had hunted, fished, and gone on motorcycle trips with his father, appeared to take the divorce hard; he became quieter, more serious, less playful. She asked the jury to spare her son's life. Defendant's sister and grandmother also asked the jury not to impose the death penalty.

Several witnesses testified to defendant's participation in the California Blue Jacket Cadette Corps, a youth organization modeled on the Navy. Junior high school authorities testified to his participation in such sports as basketball, track, softball, and football; elementary school employees testified that defendant's parents had been involved actively in his schooling.

Discussion

I. Guilt Phase Issues

A. *Claims of evidentiary error.*

1. *Admission of victim's hearsay statements.*

(1a) Defendant contends that the trial court erred in admitting into evidence over objection-through the testimony of Mindy Jackson, a neighbor, and Margaret Garcia, a coworker of Jovita-several statements in which Jovita expressed both fear and a dislike amounting to hatred of defendant. If offered to prove that defendant was the killer, the statements obviously were relevant: they tended to prove that he had made threats of physical harm to *621 Jovita in the past and, inferentially, that he carried them out on the night of April 23. For that purpose, however, the statements were hearsay and inadmissible unless authorized by a recognized exception. ([Evid. Code, § 1200.](#))

The People argue that, although hearsay, Jovita's statements were admissible, not to prove their content (that is, that defendant in fact made such threats, thereby supporting the inference that he later carried them out), but for the limited purpose of establishing Jovita's state of mind at or near the time she was murdered. Such a limited "state of mind" exception is authorized by [Evidence Code section 1250](#), subdivision (a)(1), which provides in substance that, if not otherwise untrustworthy, hearsay statements reflecting an existing state of mind of the speaker are not inadmissible when limited to proof of the declarant's state of mind.^{FN3}

FN3 In full, [Evidence Code section 1250](#) provides: "(a) Subject to Section 1252, evidence of a statement of the declarant's then existing state of mind, emotion, or physical sensation (including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health) is not made inadmissible by the hearsay rule when: "(1) The evidence is offered to prove the declarant's state of mind, emotion, or physical sensation at that time or at any other time when it is itself an issue in the action; or "(2) The evidence is offered to prove or explain acts or conduct of the declarant." (b) This section does not make admissible evidence of a statement of memory or belief to prove the fact remembered or believed."

The People's argument, however, overlooks an essential requirement of [Evidence Code section 1250](#). Apart from a single anomaly, our cases approving the admission of hearsay statements under the exception codified in [Evidence Code section 1250](#), subdivision (a)(1)-the state of mind exception-explicitly recognize the requirement that the declarant's mental state be factually relevant; that is, that it be, in the words of the statute, "itself an issue in the action."

In [People v. Ruiz \(1988\) 44 Cal.3d 589, 607-610 \[244 Cal.Rptr. 200, 749 P.2d 854\]](#), for example, we held that the trial court's admission of the hearsay testimony of three murder victims expressing their fear of the defendant was error because "neither the states of mind of these victims prior to their deaths ... nor their acts or conduct ... were an issue in the case which might have been resolved or assisted by the challenged evidence." (*Id.* at p. 608.) "As our cases have made clear," we said, " 'a victim's out-of-court statements of fear of an accused are admissible under [[Evidence Code](#)] section 1250 only when the victim's conduct in conformity with that fear is in dispute. Absent such dispute, the statements are irrelevant.' " (*Ibid.*, quoting from [People v. Armendariz \(1984\) 37 Cal.3d 573, 586 \[209 Cal.Rptr. 664, 693 P.2d 243\]](#); see also [People v. Thompson \(1988\) 45 Cal.3d 86, 103 *622 \[246 Cal.Rptr. 245, 753 P.2d 37\]](#); [People v. Bunyard \(1988\) 45 Cal.3d 1189, 1204 \[249 Cal.Rptr. 71, 756 P.2d 795\]](#); [People v. Ireland \(1969\) 70 Cal.2d 522, 529 \[75 Cal.Rptr. 188, 450 P.2d 580, 40 A.L.R.3d 1323\]](#).)

We went on to observe in [People v. Ruiz, supra, 44 Cal.3d 589](#), that "a victim's prior statements of fear are not admissible to prove *the defendant's* conduct or motive (state of mind). If the rule were otherwise, such statements of prior fear or friction could be routinely admitted to show that the defendant had a motive to injure or kill." (*Id.* at p. 609; italics in original.)

The anomaly in our case law, [People v. Merkouris \(1959\) 52 Cal.2d 672 \[344 P.2d 1\]](#), upheld the admission of hearsay statements by two murder victims concerning threats against them by the defendant, offered to prove that the threats were carried out in the subsequent homicides. That holding, however, as we pointed out in [People v. Ruiz, supra, 44 Cal.3d at page 609](#), was repudiated by the Legislature in 1965 (when it enacted subdivision (b) of [Evidence Code section 1250](#)) as one “based on a rationale that destroys the very foundation of the hearsay rule.”^{FN4}

FN4 Subdivision (b) of [Evidence Code section 1250](#) provides that “This section [i.e., 1250] does not make admissible evidence of a statement of memory or belief to prove the fact remembered or believed.”

(2) Thus, hearsay statements of victims concerning fears of or threats against them by the accused, when offered to prove the conduct of the accused, are not within the exception to the hearsay rule embodied in [Evidence Code section 1250](#). (1b) Here, neither Jovita's state of mind nor her conduct was relevant to any part of the People's case; nor did the defense raise any issue concerning her state of mind or behavior at or before the night she was murdered. The entire thrust of the defense case went to the identity of the killer and defendant's alibi that he was attending a party miles away from the crime scene for much of the evening and spent the remainder of the night at home with his family.

Jovita's state of mind or conduct not being an issue in either the prosecution or defense case, her hearsay statements reflecting dislike and fear of defendant failed to satisfy the requirement that the declarant's “state of mind, emotion, or physical sensation ... [be] itself an issue in the action.” ([Evid. Code, § 1250](#), subd. (a)(1).) It was thus error for the trial court to admit them into evidence. ([People v. Ruiz, supra, 44 Cal.3d at p. 609](#).)^{FN5}

FN5 Because we conclude that the admission of Jovita's hearsay testimony was error under [section 1250](#), we need not decide defendant's additional claims that admission of the hearsay testimony violated [Evidence Code sections 1101](#) and [352](#).

Although error, we conclude that the admission of Jovita's hearsay statements does not require reversal. While much of its evidence—apart from the *623 testimony of Ricky Abram and Steve Arce—was circumstantial, the prosecution presented a strong case supporting the conclusion that Jovita Navarro was murdered by defendant. Moreover, much of the testimony admitted as part of what defendant contends was “frustrated mother's gossip” was heard by the jury through other witnesses—both defendant and Dominique admitted that his relations with Jovita were not always good, that she wanted Dominique to date others and was concerned about the decline in Dominique's schoolwork. Finally, the trial court gave the jury an instruction limiting the use it could make of the challenged hearsay testimony to Jovita's state of mind—a limitation repeated by the prosecutor in his closing guilt phase argument to the jury.^{FN6} Despite the error, admission of the hearsay statements added little to a substantial case pointing to defendant's guilt.

FN6 For example, prior to Margaret Garcia's testimony concerning Jovita's statements, the trial court instructed the jury that “the communications ... from the deceased ... to this witness are limited to the effect to [sic] the state of mind of the victim only and you're not to consider it for any other purpose.” A similar admonition accompanied Mindy Jackson's testimony.

For that reason also, we reject defendant's claim that admission of Jovita's hearsay statements violated his rights secured under the confrontation clauses of the federal and the California Constitutions. ([U.S. Const., 6th Amend.](#); [Cal. Const., art. I, § 15](#).) In light of the substantial evidence pointing to defendant's guilt, we conclude that the error in admitting the challenged hearsay statements was harmless beyond a reasonable doubt. ([Chapman v. California \(1967\) 386 U.S. 18 \[17 L.Ed.2d 705, 87 S.Ct. 824, 24 A.L.R.3d 1065\]](#).)

2. Admission of character evidence.

(3) Defendant next argues that it was error to admit, over a timely objection, Steve Arce's testimony relating his fight with defendant (in which defendant used martial arts techniques), and a subsequent street fight (in which defendant again used martial arts techniques to quickly knock down one of his opponents). Arce's testimony should have been excluded under [Evidence Code section 1101](#), defendant argues, because it was nothing more than evidence of “prior bad acts,” in effect used by the prosecution to show that defendant was a “bad character,” who habitually used martial arts to beat up others. As relevant here, [Evidence Code section 1101](#) provides that character evidence (whether shown by opinion, reputation, or conduct) is inadmissible to prove conduct on a specific occasion. Evidence of a crime or other acts is admissible, however, when relevant to prove a fact other than a disposition to commit such acts.

Both sides acknowledge that defendant's familiarity with martial arts was shown by other evidence. Indeed, defendant contends that the challenged *624 testimony was inadmissible under [Evidence Code section 1101](#) because it was “merely cumulative” ([People v. Thompson \(1980\) 27 Cal.3d 303, 318 \[165 Cal.Rptr. 289, 611 P.2d 883\]](#)). The People argue that Arce's testimony concerning the martial arts incidents was directed at countering testimony of defendant and his sister, as

well as statements by Dominique in the transcript of her police interview, that defendant had only limited use of his left leg since being stabbed in the thigh with a knife a year before Jovita's murder and thus could not have used martial arts on Jovita.

At trial, the prosecutor's theory supporting the admissibility of Arce's testimony was that it "puts [defendant's] familiarity with martial arts very close to the [date of the] victim's death." At the prosecution's request, the trial court gave a limiting instruction, telling the jury that the challenged martial arts testimony "was not offered to prove that the defendant is, in fact, a bad person, but as to the value it may have to you as to his knowledge of martial arts and skills therein." In addition, at the close of the guilt phase, the trial court gave the jury a more extensive instruction similarly limiting the use of Arce's martial arts testimony.

The rationale offered by the prosecutor adequately identified an exception to the bar on admissibility imposed by [Evidence Code section 1101](#). It is true that, as the defense points out, there was other evidence that defendant had studied and practiced martial arts. That evidence, however, was comparatively remote in time to the murder. The testimony of Arce placed defendant's use of his martial arts skills-linked to the crime scene by the presence of the broken tonfa-to within one month of Jovita's murder. In addition, the evidence was relevant to prove defendant's identity as Jovita's killer, an additional exception to the bar of [section 1101](#). ([Evid. Code, § 1101](#), subd. (b).) Under the circumstances, we conclude there was no error.^{FN7}

FN7 Because the issue is not raised by the People, we do not reach the potential question of what effect passage of the "truth in evidence" provision of Proposition 8 ([Cal. Const., art. I, § 28](#), subd. (d)) has on the evidentiary limitations embodied in [Evidence Code section 1101](#).

3. Admission of Dominique's hearsay statements under the coconspirator exception.

(4) Next, defendant contends that certain statements of Dominique-made in the course of a police interview on the morning of April 24th, to Mindy Jackson on the same day, and to a private attorney several months later-were erroneously admitted into evidence under [Evidence Code section 1223](#), the coconspirator exception to the hearsay rule, despite a defense objection. We conclude that, for the most part, the statements of Dominique were offered for a nonhearsay purpose, that is, to establish the existence of ***625** a conspiracy between Dominique and defendant by demonstrating that Dominique was lying to the police and to Mindy Jackson in the account she gave them of her role in Jovita's murder. These statements were thus not subject to the strictures of [Evidence Code section 1223](#). The remaining statements, relating to the existence of an "insurance conspiracy" between Dominique and defendant and made to her lawyer several months after the killing, were offered to prove the truth of the matter stated therein. However, although hearsay, they fell within the coconspirator exception of [Evidence Code section 1223](#).

The statements at issue consist of Dominique's description of the events surrounding Jovita's murder (e.g., her return home from her date with defendant, retiring only to be awakened by thumping sounds and her mother's screams) made to Mindy Jackson on the morning of April 24; a tape recording of Dominique's "hysterical" 911 call made about the same time; and statements made by Dominique to investigating officers the day after the murder, including a tape recording of a two-hour police interview that evening. In addition, questions asked by Dominique of her lawyer concerning the nature and value of the assets of Jovita's estate and related matters, together with an uncle's testimony concerning an overheard telephone conversation between Dominique and defendant, were admitted into evidence.

It is plain from the record before us that the facially exculpatory statements made by Dominique to Mindy Jackson, the 911 operator, and the investigating officers were not offered by the prosecution to prove the truth of their content. Rather, they were offered to help demonstrate to the trier of fact the existence of a preconceived plan by defendant and Dominique to murder Jovita and plant a false trail of evidence indicating a burglary and rape gone awry. Given that evidentiary role, the nonhearsay statements were not subject to the independent corroboration requirements of [Evidence Code section 1223](#). ([Evid. Code, § 1200](#), subd. (a).)

(5) The remaining statements of Dominique challenged by defendant as inadmissible under the coconspirator exception were offered by the prosecution to prove the truth of their content. If credited, they suggest to the trier of fact that the alliance between defendant and Dominique encompassed not only Jovita's murder, but receipt of the assets of her estate, including her house, life insurance, and pension income.

Given the prosecution's theory of the case, embracing successive but interdependent objectives, the precise evidentiary issue with respect to Dominique's statements to her lawyer and in the telephone conversation with defendant is whether there was evidence sufficient to support a prima ***626** facie finding of a so-called "insurance conspiracy" ([People v. Leach \(1975\) 15 Cal.3d 419, 436 \[124 Cal.Rptr. 752, 541 P.2d 296\]](#)) independent of the challenged declarations. We conclude that there was such evidence in the testimony of Ricky Abram. If credited by the trier of fact, Abram's testimony established the existence of a plan among the three conspirators to murder Jovita, and subsequently to divide the proceeds of her estate and reside together in the Navarro household.

Abram's testimony alone was sufficient to establish the three preliminary facts necessary for the admission of hearsay statements under the coconspirator exception, that is, that Dominique was participating in the conspiracy at the time she made the statements, that her declarations were in furtherance of the conspiracy, and that the defendant was a member of the conspiracy at the time the declarations offered against him were made. Although made months after Jovita's death, Dominique's statements to her attorney, occurred at a time when the ultimate objective of the conspiracy-securing the life insurance proceeds and the house-had yet to be achieved. ([People v. Hardy \(1992\) 2 Cal.4th 86, 139 \[5 Cal.Rptr.2d 796, 825 P.2d 781\]](#); [People v. Sully \(1991\) 53 Cal.3d 1195, 1231 \[283 Cal.Rptr. 144, 812 P.2d 163\]](#); [People v. Leach, supra, 15 Cal.3d at p. 430-431, fn. 10](#); [People v. Saling \(1972\) 7 Cal.3d 844 \[103 Cal.Rptr. 698, 500 P.2d 610\]](#).)

Finally, because Dominique's statements fell within an exception to the hearsay rule that is "firmly ... rooted in our jurisprudence," no independent inquiry into their reliability need be undertaken for purposes of satisfying the confrontation clause of the federal Constitution. ([Bourjaily v. United States \(1987\) 483 U.S. 171, 183 \[97 L.Ed.2d 144, 157, 107 S.Ct. 2775\]](#); see also [People v. Hardy, supra, 2 Cal.4th 86, 151](#); [People v. Sully, supra, 53 Cal.3d 1195, 1231](#); [People v. Brawley \(1969\) 1 Cal.3d 277, 286-291 \[82 Cal.Rptr. 161, 461 P.2d 361\]](#).) We therefore reject defendant's claim to the contrary.

4. Admission of Dominique's hearsay declarations regarding her use of makeup.

Over a defense objection, the trial judge permitted Mindy Jackson to relate to the jury a statement made to her by Dominique "two or three months" before Jovita's murder to the effect that Dominique maintained a good complexion by removing her makeup every night before going to bed. On the basis of that statement, combined with observations of Jackson and a responding officer that Dominique had makeup running down her tearstained face when interviewed early on the morning of April 24, the prosecution was able to argue to the jury that Dominique's account of Jovita's ***627** murder (i.e., that she was awakened by sounds from her mother's bedroom) was fabricated.

(6) Defendant contends that the only possible basis for admitting Dominique's hearsay declarations concerning her nightly practice of removing her makeup is the coconspirator exception of [Evidence Code section 1223](#). However, defendant argues, the statement fails to satisfy the requirement that it be made "in furtherance of the objective of [the] conspiracy." ([Evid. Code, § 1223](#), subd. (a).) Moreover, defendant argues, the erroneous admission of Dominique's hearsay statements was seriously prejudicial. In his closing argument, the prosecutor repeatedly referred to the fact that Dominique was wearing makeup when she appeared at Mindy Jackson's house the morning after the murder, and the jury asked during the course of its deliberations to review Jackson's testimony.

We agree that the challenged hearsay statement did not qualify for admission under the coconspirator exception of [Evidence Code section 1223](#), the basis specifically relied upon by both the prosecution and by the trial court in admitting it. Lacking any apparent connection with the plan to murder Jovita as alleged by the prosecution, the statement could not have been in furtherance of the conspiracy, as required by subdivision (a) of the statute. Defendant's claim that admission of the challenged statement regarding Dominique's makeup habits was "seriously prejudicial" to his defense is substantially undercut, however, by similar evidence in the record which is not challenged, and by the cumulative-indeed, minor-role the contested hearsay statement likely played in the jury's deliberations.

Evidence was admitted in the form of a transcript of a tape recording of Dominique's interview with the investigating officers on the day following Jovita's murder in which she stated that, before going to bed on the night of the murder, she had removed her makeup or "most of it." Moreover, as noted, both Mindy Jackson and Officer Rees testified that Dominique was wearing makeup on the morning of April 24. Jackson testified that Dominique wore "heavy makeup," a fact she regarded as "unusual"; Rees testified that Dominique's face was "streaked" with makeup. It was this disparate evidence of Dominique's use of makeup on the morning of April 24 that the prosecution relied on in its closing argument, including, it is true, the hearsay statement of Dominique's makeup habits erroneously admitted by the trial court. The latter testimony, however, constituted only a small part of the entire evidence on the makeup point, the bulk of which was unchallenged.

Likewise, the jury's mid-deliberation request for a transcript of Mindy Jackson's testimony was part of a request for transcripts of the testimony of ***628** Peter LaCombe and Tom Brooks. With respect to Jackson's testimony, the jury asked specifically for extracts concerning "observations of Dominique when she came to the [Jackson's] front door." In context, the request suggests that the jury was interested in reviewing much of the testimony surrounding the events of the night of April 23-24, including Dominique's appearance when she knocked on Mindy Jackson's door that morning, rather than the erroneously admitted hearsay statement regarding Dominique's nightly practice of removing her makeup.

Given the early hour, and Dominique's testimony that she had been awakened from sleep by the sounds of a struggle, it is likely that a reasonable juror would be more impressed with the fact that Dominique was wearing makeup at all, rather than by the contested "habit" evidence that she always removed her cosmetics before going to bed. We conclude, therefore, that although not admissible under the coconspirator exception, it is not reasonably probable that defendant would have obtained a more favorable result had Dominique's hearsay statement not been admitted.

B. Accomplice issues.

1. Admission of Ricky Abram's prior consistent statement.

In his cross-examination of Ricky Abram, defense counsel suggested that the witness had a motive to fabricate his testimony because of his prior confinement under California Youth Authority jurisdiction, subsequent arrests following his California Youth Authority discharge, and an expectation of benefits in exchange for his favorable testimony against defendant. On redirect examination, the trial court permitted the prosecution, over objection, to introduce into evidence a tape recording and transcript of the December 1983 interview between Abram and Sergeant Keltner. In all substantial respects, the interview corroborated Abram's trial testimony regarding the origin and details of the conspiracy to murder Jovita. It thus tended to reinforce in the jurors' minds the impression that Abram was truthful.

(7) Defendant contends that the tape recording and transcript of Abram's interview with Keltner were inadmissible as a prior consistent statement under [Evidence Code section 791](#) because they failed to meet the requirement that the statement be made "before the bias, motive for fabrication, or other improper motive is alleged to have arisen." ([Evid. Code, § 791](#), subd. (b).) Here, the defendant's claim is that any improper motive Abram might have had arose at the time of the interview with Keltner and thus that, in the words of the codifiers of the Evidence Code, "the logical thrust of the [prior *629 consistent statement] is lost." (See Cal.Law Revision Com. com. to [Evid. Code § 791](#), subd. (b), 29B [West's Ann. Evid. Code \(1966 ed.\) § 791, p. 373.](#))

Defendant relies on [People v. Coleman \(1969\) 71 Cal.2d 1159 \[80 Cal.Rptr. 920, 459 P.2d 248\]](#), a capital case in which we held it was error to admit, under the prior consistent statement exception, hearsay declarations made by a crime partner of the accused to his wife and father. The People, seizing on the specific nature of the questions concerning a motive to fabricate his testimony asked Abram on cross-examination, rely on our statements in [People v. Andrews \(1989\) 49 Cal.3d 200 \[260 Cal.Rptr. 583, 776 P.2d 285\]](#), and [People v. Bunyard, supra, 45 Cal.3d 1189](#), that "[t]he mere asking of questions [by the defense] may raise an implied charge of improper motive ..." ([49 Cal.3d at p. 210](#), quoting [45 Cal.3d at p. 1209](#)), thus invoking the exception of [Evidence Code section 791](#), subdivision (b).

We addressed this precise question in [People v. Hayes \(1990\) 52 Cal.3d 577 \[276 Cal.Rptr. 874, 802 P.2d 376\]](#). There, the defendant argued that it was error to admit into evidence a prior consistent statement by a prosecution witness offered to rehabilitate his testimony because the witness was on probation at the time of the statement and otherwise had motives to fabricate. We framed the issue presented by these circumstances as being "whether, when a witness's testimony may have been influenced by multiple biases or motives to fabricate, a prior consistent statement is admissible if made before the existence of *any one or more* of the alleged biases or motives to fabricate or only if made before the existence of *all* such biases and motives." ([52 Cal.3d at p. 609](#), italics in original.)

In resolving the issue in [People v. Hayes, supra, 52 Cal.3d 577](#), we cited and relied on [People v. Andrews, supra, 49 Cal.3d 200, 210-211](#), and summarized [Andrews](#) as deciding, "in effect, that a prior consistent statement is admissible if it was made before the existence of any one or more of the biases or motives that, according to the opposing party's express or implied charge, may have influenced the witness's testimony. [Citations.]" ([52 Cal.3d at p. 609](#).) Our statement of the issue and the controlling legal rule in [People v. Hayes, supra](#), focuses on the governing inquiry in administering [Evidence Code section 791](#), namely, that a prior consistent statement is admissible as long as the statement is made before the existence of any one of the motives that the opposing party expressly or impliedly suggests may have influenced the witness's testimony.

Here, the thrust of defense counsel's cross-examination of Ricky Abram sought to explore, in light of his cooperation in testifying against defendant, *630 the existence and nature of any agreements with law enforcement authorities to obtain early parole or assistance in the favorable disposition of multiple criminal charges brought against him *after* the December 1983 interview with Keltner. Although defendant argues that Abram had a motive to minimize his potential penal liability as soon as Keltner told him that he was liable criminally as a coconspirator, as [People v. Hayes, supra, 52 Cal.3d 577](#), makes clear, the focus under [Evidence Code section 791](#) is the specific agreement or other inducement suggested by cross-examination as supporting the witness's improper motive. Indeed, that is the distinction the court seems to have had in mind when we wrote, in [People v. Bunyard, supra, 45 Cal.3d at page 1209](#), that "[t]he mere asking of questions may raise an implied charge of an improper motive...", and thus invoke [Evidence Code section 791](#). (See also [People v. DeSantis \(1992\) 2 Cal.4th 1198, 1229 \[9 Cal.Rptr.2d 628, 831 P.2d 1210\]](#) [[People v. Andrews, supra, 49 Cal.3d 200](#), applied where a defendant's cross-examination of his crime partner concerning possible modification of his sentence in exchange for testimony "yielded a compelling additional incentive to lie."]; [People v. Coleman, supra, 71 Cal.2d 1159](#); [People v. Duvall \(1968\) 262 Cal.App.2d 417 \[68 Cal.Rptr. 708\]](#).)

2. Instructions concerning corroboration of accomplice testimony.

(8a) The trial court gave the jury both CALJIC No. 2.27 (testimony of a single witness is sufficient for the proof of any fact) and CALJIC No. 3.11 (accomplice testimony must be corroborated in order to convict). Defendant contends that the two instructions are contradictory and in combination confused the jury, permitting defendant to be convicted on the basis of Ricky Abram's uncorroborated testimony alone.

We have encountered this claim repeatedly since our initial consideration of it in [People v. Chavez \(1985\) 39 Cal.3d 823, 829-832 \[218 Cal.Rptr. 49, 705 P.2d 372\]](#). In [Chavez](#), we concluded that "we must look to the entire charge, rather than

merely one part, to determine whether error occurred. [Citation.]” (*Id.*, at p. 830.) (9) We have since refined the test formulated in *Chavez* to encompass determinations whether the jury “is instructed on the kind of evidence necessary to constitute corroboration, on the method of determining whether the accomplice’s testimony was corroborated, on viewing the accomplice’s testimony with distrust, and [whether] the parties proceed[ed] on the premise that corroboration is required.” (*People v. Andrews*, *supra*, 49 Cal.3d 200, 217.) Where these criteria are met, there is no error. (*People v. Williams* (1988) 45 Cal.3d 1268, 1313 [248 Cal.Rptr. 834, 756 P.2d 221]; *People v. Adcox* (1988) 47 Cal.3d 207, 241 [253 Cal.Rptr. 55, 763 P.2d 906].) *631

(8b) Applying these criteria to the record in this case leads us to reject defendant’s claim. Although the trial judge read the jury an unmodified version of CALJIC No. 2.27, the “single witness” instruction, together with the accomplice corroboration requirement of CALJIC No. 3.11,^{FN8} he also gave the jurors the full array of accomplice instructions, including the definition of an accomplice (CALJIC No. 3.10), the nature and sufficiency of corroborative evidence (CALJIC No. 3.12), the rule that one accomplice may not be corroborated by another (CALJIC No. 3.13), the necessity of criminal intent (CALJIC No. 3.14), and the requirement that accomplice testimony be viewed with “distrust” (CALJIC No. 3.18). In addition, it is clear from a review of the trial transcript that counsel for both the People and defendant proceeded throughout the trial on the assumption that Abram was an accomplice whose testimony required corroboration.

FN8 In *Chavez*, *supra*, 39 Cal.3d 823, we approved the suggestion of the Court of Appeal in *People v. Stewart* (1983) 145 Cal.App.3d 967 [193 Cal.Rptr. 799] that CALJIC No. 2.27 be modified when given in conjunction with No. 3.11. (*Chavez*, *supra*, at p. 831.) The current version of No. 2.27 includes such a modification (testimony concerning a fact by one witness “whose testimony ... does not require corroboration” is sufficient proof). It was not, however, the version given the jury in this case.

Thus here, as in *People v. Williams*, *supra*, 45 Cal.3d 1268, 1313, and *People v. Adcox*, *supra*, 47 Cal.3d 207, 241, we conclude that nothing in the combined instructions suggested to the jurors that corroboration of Abram’s testimony was not required: “A reasonable juror would have recognized CALJIC No. 2.27 as setting forth the general rule and the charge on accomplice testimony as an exception to it. [Citations.] Nothing before us indicates that the jurors may have acted otherwise.” (*People v. Andrews*, *supra*, 49 Cal.3d at p. 217.)

Given our conclusion that there was no instructional error, defendant’s additional claim under this rubric—that the quality of Abram’s uncorroborated testimony was so unreliable as to offend federal Sixth Amendment jury trial and Fourteenth Amendment due process rights—loses its underpinning. Although Abram’s testimony had its frailties, they were not concealed from exposure and consideration by the jury or from attack by defense counsel. Moreover, because there was no error in giving the jury the combined single witness and accomplice corroboration charges, there is no basis upon which to conclude that the jurors relied solely on the uncorroborated testimony of Abram to convict defendant.

(10a) In a variant on his federal Sixth Amendment claim, defendant contends that Ricky Abram’s credibility was so slender a reed upon which to base the finding of a financial gain special circumstance that it violates the federal Eighth Amendment. He points to Abram’s defects as a witness—the *632 circumstances under which he agreed to testify for the prosecution, the fallibility of his memory, his reference to testifying from a “script,” the trial judge’s remark, in the presence of the jury, that Abram had “difficulty in remembering,” his serious emotional problems, prior felonies, and admission that he had lied to the police in the past. Drawing an analogy between these testimonial defects and the dangers presented by the forecasts of future violence by a psychopharmacologist which we held inadmissible in the penalty phase in *People v. Murtishaw* (1981) 29 Cal.3d 733, 767-774 [175 Cal.Rptr. 738, 631 P.2d 446], defendant concludes that the jury’s finding that the special circumstance was true on the basis of the uncorroborated testimony of Abram cannot be allowed to stand.

(11)(See fn. 9.), (10b) We reject the argument for two reasons. First, its underpinning assumes a predicate that we have just rejected, namely, that the jury was confused by the accomplice and single witness instructions given by the trial court into believing that Abram’s testimony did not require corroboration.^{FN9} Second, although founded in part on the inherent unreliability of psychiatric predictions of future violence, our ruling in *People v. Murtishaw*, *supra*, 29 Cal.3d 733, rested as much on the incurably prejudicial impact on a penalty jury of “ ‘affirmative assertion[s] by an apparently well-qualified professional’ ” (*Id.* at p. 773.) “One can imagine few matters more prejudicial at the penalty trial,” we said, “than testimony from an established and credentialed expert that defendant, if sentenced to life without possibility of parole, would be likely to kill again.” (*Ibid.*) This “ ‘mystic infallibility in the eyes of the jury’ ” (*People v. Kelly* (1976) 17 Cal.3d 24, 32 [130 Cal.Rptr. 144, 549 P.2d 1240]) that often envelopes quasi-scientific testimony was not, of course, present in this instance, where the jury was, we reiterate, fully capable of judging Abram’s credibility.

FN9 We do not, of course, mean to suggest that accomplice testimony admitted to prove the financial gain special circumstance must itself be corroborated. To the contrary, when the special circumstance alleged “requires only proof of the motive for the murder for which defendant has already been convicted, the corroboration requirement of [Penal Code] section 1111 does not apply.” (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1177 [259 Cal.Rptr. 701, 774 P.2d 730], fn. omitted.)

3. Instructions concerning withdrawal from conspiracy.

(12) Defendant raises the related claim that it was error to instruct the jury on the law governing the termination of penal liability by withdrawing from a conspiracy. Specifically, the trial court read the jury both CALJIC No. 3.02 (conditions for aider and abettor withdrawal) and CALJIC No. 6.20 (coconspirator withdrawal). Defendant reasons that because there was no evidence that Abram communicated a desire to withdraw from the conspiracy and because both instructions require the accessory or coconspirator to *633 communicate the fact of withdrawal to the other parties in order to validly terminate penal liability, giving the jury the challenged instructions somehow confused them, permitting the (improper) conclusion that Abram had ceased to be an accomplice. His testimony, in that event, need not have been evaluated with skepticism or corroborated.

We are unpersuaded. Abram's status as a jail inmate at the time of Jovita's murder reasonably raised the issue of the effect of his incarceration on his accomplice liability. In effect, the contested instructions informed the jurors that withdrawal required something more than impossibility, that is, required Abram to communicate his withdrawal to his coconspirators. We see nothing erroneous or prejudicial in such a result, especially since the effect of the challenged instructions was to favor a finding that Abram was an accomplice, and thus to require-as the jury was instructed-that his testimony be evaluated skeptically as well as corroborated.

In any event, the basic thrust of Abram's testimony was corroborated by forensic evidence gathered at the crime scene. Jovita appeared to have been killed in the dead of night by an assailant bent on burglary and rape; her daughter fled screaming from the house to report the murder. In gross outline, the manner in which Jovita's murder was accomplished tracked the plan discussed by the three at Bob's Big Boy as related by Abram in his testimony.

4. Instructions concerning the reasonable doubt standard.

(13) Defendant's final claim of instructional error is that in giving the jury the standard pattern instructions on reasonable doubt and circumstantial evidence, the trial court committed *Cage* error ([Cage v. Louisiana \(1990\) 498 U.S. 39 \[112 L.Ed.2d 339, 111 S.Ct. 328\]](#) (*per curiam*) [hereafter *Cage*]). In *Cage*, the jury was instructed that it must acquit if it had a reasonable doubt as to the guilt of the accused. "Reasonable doubt," however, was defined as a doubt "founded upon a real tangible substantial basis and not upon mere caprice and conjecture." (*Id.*, at p. 40 [112 L.Ed.2d at p. 342].) Concluding that the challenged instruction "equated a reasonable doubt with a 'grave uncertainty' " and thus might have altered the constitutional standard for penal liability to " 'a moral certainty' that the defendant was guilty" (*ibid.*), the high court reversed the conviction.

By parity of reasoning, defendant argues that a like analysis applies to the pattern reasonable doubt instructions given the jury in this case. He points out that CALJIC Nos. 2.01, 2.02, 2.21 and 2.27-standard instructions on the relationship between circumstantial evidence and reasonable doubt, all of *634 which were given in this case-direct the jury to make findings using reasonable factual interpretations over those that require unreasonable interpretations. The asserted error was compounded, defendant argues, by the prosecutor's argument in closing that the jurors should adopt a reasonable interpretation of the evidence. Finally, defendant contends that the directory character of the instructions operated as a mandatory conclusive presumption of guilt.

In [People v. Jennings \(1991\) 53 Cal.3d 334 \[279 Cal.Rptr. 780, 807 P.2d 1009\]](#), we rejected a claim analogous in all respects to the one made here. There we pointed out that the vice of the instruction condemned in [Cage, supra, 498 U.S. 39](#), consisted in the "transformation of true reasonable doubt, as it has been traditionally defined, into a higher degree of doubt [required to acquit]." (53 Cal.3d at p. 386.) No such possibility was presented to the jury in this case, however, where the trial court's use of standardized, pattern instructions included the language of CALJIC No. 2.90. That instruction defines a "reasonable doubt" as one that leaves "the minds of the jurors in that condition that they cannot say that they feel an abiding conviction to a moral certainty of the truth of the charge." Unadorned "moral certainty" of defendant's guilt was thus the measure given the jury in this case; there was no *Cage*-like dilution of the standard required to convict. ([People v. Jennings, supra, 53 Cal.3d at p. 386](#); see also [People v. Johnson \(1992\) 3 Cal.4th 1183, 1235 \[14 Cal.Rptr.2d 702, 842 P.2d 11.\]](#))

Likewise, we reject as we did in [Jennings, supra, 53 Cal.3d at page 386](#), the claim that jurors, charged to choose reasonable interpretations of circumstantial evidence over unreasonable interpretations, would interpret such instructions "to permit a criminal conviction where the evidence shows defendant was 'apparently' guilty, yet not guilty beyond a reasonable doubt." (*Ibid.*) The same is true of defendant's claim that the standard reasonable doubt instructions regarding circumstantial evidence are in effect irrebutable presumptions of guilt. "Read in context, the instructions merely require the jury to reject unreasonable interpretations of the evidence, and to accept the reasonable version of the events which fits the evidence." (*Ibid.*; see also [People v. Wilson \(1992\) 3 Cal.4th 926, 943 \[13 Cal.Rptr.2d 259, 838 P.2d 1212.\]](#))

C. Challenge to special circumstance instruction regarding proof of "financial gain."

Defendant's single claim of error under this rubric has four parts. (14) Fixing on the dual character of the motive alleged by the prosecution for Jovita's murder-eliminating the chief obstacle to the relationship between defendant and Dominique

and acquiring the principal assets of her *635 estate—defendant argues that the failure of the standard CALJIC instruction to require the jury to find that the financial gain motive was (variously) a “dominant,” “substantial,” or “significant” motive for the murder violated the federal Eighth Amendment requirement that capital offenses be narrowly defined to encompass the limited class of crimes that morally justify imposition of the death penalty. (See, e.g., [McCleskey v. Kemp](#) (1987) 481 U.S. 279, 305 [95 L.Ed.2d 262, 286, 107 S.Ct. 1756].)

Second, defendant contends that our opinion in [People v. Green](#) (1980) 27 Cal.3d 1 [164 Cal.Rptr. 1, 609 P.2d 468], striking the special circumstance of murder in the commission of a robbery, requires reversal of the conviction here. In *Green*, the evidence showed that defendant had taken certain items from the murder victim, both immediately before and after killing her, for the purpose of concealing her identity and obstructing his detection. We held that the jury's finding that the robbery special circumstance was true could not stand under such facts, where “the defendant's intent [was] not to steal but to kill and the robbery [was] merely incidental to the murder.” (*Id.* at p. 61.)

Third, defendant claims that under [People v. Howard](#) (1988) 44 Cal.3d 375 [243 Cal.Rptr. 842, 749 P.2d 279], the trial court should have instructed the jury that the financial-gain special circumstance could only be found true if defendant harbored such a motive at the time of the killing. Finally, defendant contends that by giving the standard language of CALJIC No. 2.51 (motive is not an element of the crime and need not be shown) with respect to the murder of Jovita, the trial court confused the jury, misleading it into believing that the financial-gain special circumstance need not be proven.

These arguments are foreclosed by our holdings in [People v. Howard, supra](#), 44 Cal.3d 375, and [People v. Edelbacher](#) (1989) 47 Cal.3d 983 [254 Cal.Rptr. 586, 766 P.2d 1]. In *People v. Howard*, we rejected the claim that the unadorned language of the financial-gain special-circumstance instruction was flawed because it failed to convey to the jury any requirement that financial gain be the “direct” or “motivating cause” of the murder. Instead, we concluded that the drafters intended no such limitation. Although we recognized in *Howard* that we had been led in [People v. Bigelow](#) (1984) 37 Cal.3d 731, 751 [209 Cal.Rptr. 328, 691 P.2d 994, 64 A.L.R.4th 723], to engraft a limiting gloss on the reach of the financial-gain special circumstance “to prevent overlapping special circumstances findings based on the same conduct” (44 Cal.3d at p. 410), we also noted that “*Bigelow* does not expressly require that instructions utilizing the limited construction adopted in that opinion be given in all cases.” (*Ibid.*) Moreover, the risk of multiplicity that impelled the result in *Bigelow* is not present in this case. *636

In context, defendant's overbreadth argument is no different from the one rejected in [People v. Edelbacher, supra](#), 47 Cal.3d 983, that the failure to instruct the jury that the financial-gain special circumstance requires a finding of causal proximity violates the Eighth Amendment. We held in *Edelbacher* that “Proof of actual pecuniary benefit to the defendant from the victim's death is neither necessary nor sufficient to establish the financial-gain special circumstance.” (*Id.* at p. 1025.) Instead, we invoked the formulation in [People v. Howard, supra](#), 44 Cal.3d at page 409, that “ ‘the relevant inquiry is whether the defendant committed the murder in the expectation that he would thereby obtain the desired financial gain.’ ” ([People v. Edelbacher, supra](#), 47 Cal.3d at p. 1025.) “[S]o construed,” we concluded, “the special circumstance provision is not unconstitutionally vague or overbroad.” (*Ibid.*) Nothing in defendant's arguments here persuades us to revisit that conclusion.

(15) Defendant's additional claim, founded on our holding in [People v. Green, supra](#), 27 Cal.3d 1, that we should gloss the financial-gain special circumstance to require a finding that financial gain was the “primary goal” of the killing, is simply a variation on the claims made and rejected in [People v. Howard, supra](#), 44 Cal.3d 375, and [People v. Edelbacher, supra](#), 47 Cal.3d 983. Our holding in *Green* was designed to avoid the risk that a jury might impose the death penalty “on the basis of whether in the course of committing a first degree murder the defendant happens to engage in ancillary conduct that technically constitutes robbery or one of the other listed [special circumstance] felonies” (27 Cal.3d at p. 61.)

That holding has no obvious application to the evidence in this case, where the facts fail to lend support to any claim that the requisite intent to the special circumstance finding was somehow “ancillary” to the commission of the murder or only a “technical” special circumstance. Defendant either had an expectation of financial benefit at the time of the killing or he did not. It was for the jury to make that determination, applying a common sense, nontechnical understanding of “financial gain.”

(16) For closely related reasons, we reject defendant's claim that our holding in [People v. Howard, supra](#), 44 Cal.3d 375, required the trial judge sua sponte to give the jury a pinpoint instruction that before it could find the financial gain special circumstance true, it had to find that defendant possessed the required intent at the time of the killing. Contrary to defendant's reliance on [People v. Howard, supra](#), 44 Cal.3d 375, that case is authority for the opposite proposition.

Indeed, *Howard* stands for the proposition that, except for the limited gloss of [People v. Bigelow, supra](#), 37 Cal.3d 731, the special circumstance of *637 murder for financial gain “is not a technical one” and that the Legislature “intended [it] to cover a broad range of situations.” ([People v. Howard, supra](#), 44 Cal.3d at p. 410.) “It is well settled,” we continued, “that where the terms ‘have no technical meaning peculiar to the law, but are commonly understood by those familiar with the English language, instructions as to their meaning are not required.’ ” (*Id.*, at p. 408.) Here, as in *Howard*, “there is no necessity in this case for further refinement or restrictive interpretation of the [financial-gain] special circumstance in the absence of additional indications that the statutory language itself could have caused confusion.” (*Id.*, at p. 410.)

(17) Last, defendant's claim that giving the jury CALJIC No. 2.51 (motive is not an element of the crime charged and

need not be proven) permitted it to dispense with proof of financial gain also fails. We rejected the identical claim in [People v. Edelbacher, supra, 47 Cal.3d at page 1027](#), on the commonsense ground that here, as there, the “ ‘crime charged’ was murder and any reasonable juror would have understood the instruction as referring to this substantive offense only and not to any special circumstance allegation.”

D. Claim that cumulative guilt phase errors require reversal.

(18) Defendant's final claim of error at the guilt phase of his trial is that, in combination, the multiple errors alleged to have occurred denied him a fair trial and led to a constitutionally unreliable penalty verdict. Again, we are not persuaded. As our review of defendant's guilt phase claims in light of the record in this case indicates, the evidentiary error in admitting, through the testimony of Mindy Jackson and Margaret Garcia, the hearsay declarations of Jovita that she feared and disliked defendant was not prejudicial in light of other evidence of guilt and the limiting instruction given the jury. So, too-and for the same reasons-was the admission of Dominique's statement regarding her nightly makeup habits.

The evidence presented to the jury by the prosecution made out a strong, albeit in many respects circumstantial, case for defendant's guilt. The frailties in Ricky Abram's testimony were exposed to the jury through extensive cross-examination by defense counsel. On this record, we cannot say it is reasonably probable that defendant would have secured a more favorable result had the challenged evidence not been admitted. ([People v. Gordon \(1990\) 50 Cal.3d 1223, 1253-1254 \[270 Cal.Rptr. 451, 792 P.2d 251\]](#); [People v. Watson \(1956\) 46 Cal.2d 818, 836 \[299 P.2d 243\]](#).) Likewise, we conclude that any errors were harmless beyond a reasonable doubt. ([Chapman v. California, supra, 386 U.S. 18.](#)) *638

II. Penalty Phase Issues

A. Alleged prosecutorial misconduct in penalty phase closing argument.

(19a) Defendant asserts that several comments made by the prosecutor during his closing argument at the penalty phase amounted to prejudicial misconduct. Defendant's trial counsel failed to make any objection throughout the course of the prosecutor's closing penalty argument. We are thus met at the outset with the contention of the People that any errors have been waived.

Governing law is straightforward. (20) To preserve for appellate review a claim of prosecutorial misconduct, a defendant must raise a timely objection and, if practicable, request a curative admonition; except where a timely objection would be futile, absent such an opportunity for the trial court to consider the claim of misconduct and to remedy its effect, any error is waived and we will not review it. ([People v. Green, supra, 27 Cal.3d at pp. 27-34 & fn. 19](#); [People v. Miranda \(1987\) 44 Cal.3d 57, 108, fn. 30 \[241 Cal.Rptr. 594, 744 P.2d 1127\]](#); [People v. Benson \(1990\) 52 Cal.3d 754, 794 \[276 Cal.Rptr. 827, 802 P.2d 330\]](#); [People v. Gordon, supra, 50 Cal.3d at p. 1269.](#)) We have repeatedly (and recently) rejected the claim that capital cases require a different rule regarding the effect of a failure to interpose claims of curable prosecutorial misconduct. (See, e.g., [People v. Miranda, supra, 44 Cal.3d at p. 108, fn. 30](#); [People v. Gordon, supra, 50 Cal.3d at p. 1269](#); [People v. Benson, supra, 52 Cal.3d at p. 794.](#))

(19b) Judged against these rules, we conclude that the claims of prosecutorial misconduct in the closing argument of the penalty phase were waived by trial counsel's failure to make any objection. Assuming there was misconduct, all of the claims-encompassing assertions that the prosecutor expressed a personal opinion concerning the gravity of the offense, compared defendant to an imaginary and less culpable defendant, improperly relied on less serious noncapital homicides to claim that defendant's offense could not be mitigated, and attempted to remove sympathy from the jury's penalty consideration-could have been cured by a timely objection, followed by an instruction from the trial court to cease the line of objectionable argument, and a curative admonition to the jury to disregard the prosecutor's improper remarks.

(21) We also reject defendant's alternative claim that trial counsel's failure to object to the alleged misconduct amounted to ineffective assistance of counsel. Having reviewed the record with respect to each of the instances of alleged misconduct, we are persuaded that there is not a reasonable *639 likelihood that any of the challenged comments might have been misconstrued by the jurors. ([People v. Clair \(1992\) 2 Cal.4th 629, 662-663 \[7 Cal.Rptr.2d 564, 828 P.2d 705\]](#).) The prosecutor neither vouched personally for the death penalty as an appropriate sentence (see, e.g., [People v. Benson, supra, 52 Cal.3d at pp. 794-795](#)) nor argued on the basis of facts not in evidence (see, e.g., [People v. Bolton \(1979\) 23 Cal.3d 208, 212 \[152 Cal.Rptr. 141, 589 P.2d 396\]](#)). We do not, in short, think that a reasonable juror would have understood the prosecutor to urge the death sentence based on either a personal opinion or facts not in evidence. ([People v. Benson, supra, at p. 793.](#))

B. Claim of error in penalty determination instructions (Brown error).

At the close of the penalty phase, the trial court instructed the jury concerning the scope of its sentencing function as follows: “After having heard all of the evidence and having heard and considered the argument of counsel, you shall consider and take into account and be guided by the applicable factors of aggravating and mitigating circumstance upon

which you have been instructed. [¶] The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale. You are free to assign whatever weight you deem appropriate to each and all of the various factors upon which you have been instructed. By weighing the totality of various circumstances, you must determine which penalty is appropriate, death, or life without the possibility of parole. [¶] If, in your reasoned judgment, you conclude that the aggravating circumstances outweigh the mitigating circumstances and you personally believe death is the appropriate sentence under all the circumstances, then you shall impose death. In the event that you cannot so find, you shall impose life without the possibility of parole.”

(22) Defendant asserts that this instruction was error under *People v. Brown* (1985) 40 Cal.3d 512 [220 Cal.Rptr. 637, 709 P.2d 440], reversed on other grounds *sub nom. California v. Brown* (1987) 479 U.S. 538 [93 L.Ed.2d 934, 107 S.Ct. 837]. In *Brown*, we considered the claim that the text of the unadorned language of section 190.3 (as embodied in then-CALJIC No. 8.84.2) could be construed to permit unconstitutional capital sentences by misleading penalty juries as to the nature of their function. We concluded that the instruction and the underlying Penal Code provision were not subject to such a construction but that, under some circumstances, the instruction might confuse a penalty jury regarding the fundamental character of the capital sentencing process.

We identified two sources of potential confusion. First, the emphasis in the instruction on the process of weighing aggravating against mitigating *640 circumstances smacked of a mechanical task in which contending factors are quantified, toted up, and balanced, with the resulting sum pointing unerringly to either death or life. Second, we concluded that the use of the word “shall” in the instruction, directing the jury to impose either death or a sentence of life without parole depending upon the outcome of the weighing process, might be misunderstood to “force[] [jurors] to impose death on [a] basis other than their own judgment that such a verdict was appropriate under all the facts and circumstances of the individual case.” (*People v. Brown*, *supra*, 40 Cal.3d at p. 540, fn. omitted.)

The penalty determination instruction given the jury in this case was not the instruction challenged in *People v. Brown*, *supra*, 40 Cal.3d 512. Indeed, the transcript of the chambers conference at which counsel and the trial judge discussed proposed penalty instructions indicates that the instruction challenged by defendant as erroneous under *Brown* was drawn with full knowledge of our opinion in that case. The question before us is whether, as modified, the instruction passes muster in light of the twin concerns we expressed in *Brown*. We conclude that it does.

First, the instruction incorporated language conveying unmistakably to the jury that its sentencing determination was not the result of a mechanical sequence (“... not ... a mere mechanical counting of factors on each side of an imaginary scale”). In addition, the instruction emphasized the discretionary nature of the jurors’ weighing function (“You are free to assign whatever weight you deem appropriate to each and all the various factors upon which you have been instructed.”). Of equal importance, the instruction underlined the requirement that each juror be convinced personally that death was the appropriate judgment (“... If ... you personally believe death is the appropriate sentence under all the circumstances”).

(23) The fact that the challenged instruction included the mandatory “shall” is not per se fatal to its validity. We have rejected claims of *Brown* error in several cases in which the challenged instruction included such language. In *People v. Hayes*, *supra*, 52 Cal.3d at pp. 641-643, we held that the use of an instruction in the form of former CALJIC No. 8.84.2-tracking almost verbatim the language of section 190.3-was not prejudicial in light of an additional instruction “that virtually eliminated any risk that the jury would be misled as to its sentencing discretion or as to the process of penalty determination.” (52 Cal.3d at p. 642.) And in *People v. Hendricks* (1988) 44 Cal.3d 635 [244 Cal.Rptr. 181, 749 P.2d 836], we said that “it is not improper per se to instruct the jury that it ‘shall’ impose death.” (*Id.* at p. 653; see also *People v. Allen* (1986) 42 Cal.3d 1222, 1279, fn. 38 [232 Cal.Rptr. 849, 729 P.2d 115].) *641

Our opinion in *People v. Boyde* (1988) 46 Cal.3d 212 [250 Cal.Rptr. 83, 758 P.2d 25], affirmed *sub nom. Boyde v. California* (1990) 494 U.S. 370 [108 L.Ed.2d 316, 1105 S.Ct. 1190], furnished a rationale for the analytical method behind the results in these cases. In *Boyde*, we held that, despite use of an unadorned section 190.3 instruction, the concerns expressed in *People v. Brown*, *supra*, 40 Cal.3d 512, were satisfied by other emphases on the jurors’ discretion in valuing the weight given to each of the relevant sentencing factors. This emphasis was decisive on the issue of *Brown* error, we said, because “when jurors are informed that they have discretion to assign whatever value they deem appropriate to the factors listed, they necessarily understand that they have discretion to determine the appropriate penalty. The task of assigning weights to factors is not an arid exercise performed in a vacuum; it is the very means by which the jury arrives at its qualitative and normative decision as to the appropriate penalty.” (46 Cal.3d at p. 253; see also *People v. Burton* (1989) 48 Cal.3d 843, 873 [258 Cal.Rptr. 184, 771 P.2d 1270].)

That rationale applies here. Given the modifications in the instruction made in light of the concerns expressed in *Brown*, *supra*, 40 Cal.3d 510, we do not think there is a reasonable likelihood that a juror would have misunderstood the nature of his or her role in the capital sentencing process-either as one involving a mechanical quantification of relevant factors or requiring the imposition of the death penalty. (*People v. Clair*, *supra*, 2 Cal.4th at pp. 662-663.)

(24) Defendant also claims prejudice arising from the failure of the instruction to include language regarding the role of sympathy in the jury’s evaluation of the circumstances relevant to its penalty determination. We disagree. In a supplemental instruction given the jury immediately after the challenged penalty determination instruction, the trial court told the jurors that “[y]ou may consider pity and sympathy for the defendant in deciding the penalty to be imposed on the defendant.” Although defendant points out that this supplemental instruction was not integral to the penalty determination

instruction itself, we find nothing to suggest, given the close proximity of the “sympathy” and penalty determination instructions, that a reasonable juror would have retired to deliberate defendant's fate under the impression that sympathy was not a legitimate component of the sentencing equation.

Defendant contends, however, that a question put to the trial judge by the jury foreman during the course of deliberations demonstrates the confusion engendered among the jurors by the modified instruction. Moreover, the argument continues, the answer to the query given by the trial court—a rereading of the challenged instruction—failed to clarify the point of confusion and led, quickly and inevitably, to a sentence of death. We examine these arguments next.

***642**

C. Claim of error in answering the jury's mid-deliberation inquiry.

As noted, *ante*, at a point in their deliberations, the jurors sought guidance from the trial court in the form of answers to two questions. The second question asked, “[i]f 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?”^{FN10} Before responding, the trial judge heard argument from counsel. The defense position was that the appropriate response was an unqualified “yes”; the prosecution requested that the penalty determination instruction previously given the jury be reread without comment. The trial judge adopted the prosecution's position and reread to the jury the modified penalty determination instruction set out above. (See, *ante*, at p. 639.) Soon after being reread the instruction (within 20 minutes, according to the defense), the jury returned a verdict of death.

FN10 The jury's first question, the answer to which defendant does not challenge, asked “[i]nterpretation [sic] of the 'you' in paragraph four of [CALJIC No.] 8.84.2, 'in the event that you cannot so find, you shall impose life without possibility of parole,' does the 'you' refer to the individual juror [or] to the jury collectively?” In response, the trial judge 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.”

(25) Defendant argues that it was prejudicial error for the trial court to content itself with a rereading of the penalty determination instruction in responding to the jury's question. He contends that the question itself indicated that the jurors were confused as to the scope of their sentencing discretion, that rereading the instruction already given did nothing to dispel that confusion, and that the prompt return of a capital sentence demonstrates the decisive effect of the trial court's failure to inform the jury that the correct answer to the question was, as the defense argued, literally “yes.” We are not persuaded that, under these circumstances, the trial court's decision to reread to the jury the text of the pertinent instruction was error.

We have already concluded, *ante*, at page 640 that it was not error for the trial court to give the jury the penalty determination instruction that it did. Given that conclusion, we cannot say that a repetition of the instruction was error. There is merit in the argument of the People that the unqualified “yes” sought by the defense, without more, would have failed to convey to the jury the guided nature of its sentencing discretion in a capital case. The most that can be said of the trial court's response to the jury's query was that it represented an unwillingness to venture beyond the safety of standardized instructions. After hearing argument of counsel and considering the matter, the trial court exercised its discretion, electing not to risk diverging from the ***643** instruction by additional comment. Given the record, we cannot say that its decision was an abuse of discretion. (*People v. Beardslee* (1991) 53 Cal.3d 68, 97 [279 Cal.Rptr. 276, 806 P.2d 1311].)

Defendant's claim that the prejudicial effect of the instruction is established by the speed with which the jury returned a verdict of death after receiving it, rests on unprovable speculation concerning the course of the jury's deliberations in this case. We must assume that a penalty jury, properly instructed as to its sentencing responsibility in a capital case, will deliberate in accordance with those instructions. Here, we conclude that the jury was properly instructed regarding the nature of the penalty determination not once, but twice.

D. Prosecution's alleged use of nonstatutory aggravating factors in penalty phase argument.

(26a), (27a) Defendant contends that comments made by the prosecutor in his closing penalty argument in effect amounted to the introduction of aggravating penalty evidence not embraced by the factors enumerated in [section 190.3](#). In *People v. Boyd* (1985) 38 Cal.3d 762 [215 Cal.Rptr. 1, 700 P.2d 782], we concluded that 1978 amendments to the penalty determination statute, changing it “from a statute in which the listed aggravating and mitigating factors merely guide the jury's discretion to one in which they limit its discretion,” rendered inadmissible evidence which “is not probative of any specific listed factor,” as being “irrelevant to aggravation.” (*Id.* at pp. 773, 774.) The question here is whether the prosecutor's arguments transgressed this exclusionary line to defendant's prejudice. We conclude that they did not.

Defendant cites three specific arguments by the prosecutor which he contends amounted to *Boyd* error. First, referring to

the incident involving Margaret Noone's recantation of her alibi testimony in favor of defendant, the prosecutor stated that defendant, "by the use of force, the threat of force, he coerces and threatens Majorie [sic] Noone to come in here and to commit perjury." Defendant himself also committed perjury, the prosecutor continued, an apparent reference to his alibi testimony, supported by Noone's (later recanted) testimony. Second, defendant cites the prosecutor's remark concerning the testimony of his mother and the statement that the jury "should have no sympathy for her [i.e., defendant's mother]. That is her child, she's come in here, and she committed perjury during the penalty phase."

Last, defendant attacks as *Boyd* error the prosecutor's remark that defendant did not merit the sympathy of the jury because his offense had caused *644 pain to members of his family: "But the question you have to ask yourself is does the Defendant deserve that sympathy for his family members? Because ... no matter what your verdict is, because whether you say he's going to die or you say he's going to live the rest of his life in San Quentin, they are here because of what he did."

(26b) In each of these instances of alleged prosecutorial misconduct in the penalty argument, as in those discussed, [ante, at page 638](#) and following, defense counsel raised no objection, sought no admonition, requested no curative instruction. It is clear, moreover, that the misconduct alleged to have occurred was amenable to remedial measures by the trial judge, given a timely objection. The claims of error are thus waived. (See [People v. Cooper \(1991\) 53 Cal.3d 771, 843 \[281 Cal.Rptr. 90, 809 P.2d 865\]](#) and cases cited, [ante, at p. 638](#).)

(27b) Moreover, none of the contentions has merit. In the three instances of claimed *Boyd* error, the prosecutor did no more than argue in rebuttal, on the basis of evidence already before the jury, to character evidence offered by defendant under factor (k), the "catch-all" sentencing factor of [section 190.3](#). ([§ 190.3](#), factor (k).) Under factor (k) and its implementing instruction, CALJIC former No. 8.84.1, the penalty jury is directed to consider any circumstance extenuating the offense and any "sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial." (*Ibid.*)

There was nothing improper in such rebuttal argument, as we noted in *People v. Boyd, supra*, itself. "Once the defense has presented evidence of circumstances admissible under factor (k), ... prosecution rebuttal evidence would be admissible as evidence tending to 'disprove any disputed fact that is of consequence to the determination of the action.' [Citation.]" ([38 Cal.3d at p. 776](#).) Thus, "a defendant who introduces good character evidence widens the scope of the bad character evidence that may be introduced in rebuttal." ([People v. Fierro \(1991\) 1 Cal.4th 173, 237 \[3 Cal.Rptr.2d 426, 821 P.2d 1302\]](#).) The scope of rebuttal legitimately embraces argument by the prosecutor "suggesting a more balanced picture of [the accused's] personality." ([People v. Rodriguez \(1986\) 42 Cal.3d 730, 791 \[230 Cal.Rptr. 667, 726 P.2d 113\]](#).)

Here, as in [People v. Fierro, supra, 1 Cal.4th 173](#), the prosecutor "could properly refer in closing argument to prior criminal conduct which had not been admitted as evidence in aggravation under [section 190.3](#)." (*Id.* at p. 237.) The limitation on such rebuttal argument—that it "relate directly to a *645 particular incident or character trait defendant offers in his own behalf" (*id.* at p. 238)—was met here. Defendant's evidence in mitigation at the penalty phase portrayed him as someone of good character, offering as examples his participation in the California Blue Jackets youth organization, high school sports and other school activities, as well as his church activities and school prizes. Similarly, Margaret Noone's recantation undermined the credibility of defendant's mother's testimony, evidence that the prosecution was entitled to rebut by arguing the evidence.

(26c) In any event, any error in the prosecutor's closing penalty argument was harmless. Reviewing the record as a whole, we are not persuaded that, had a timely objection been made to the claimed misconduct and a curative instruction given, it is reasonably possible that defendant would have obtained a more favorable result.^{FN11}

FN11 Because we find that there was no error under [People v. Boyd, supra, 38 Cal.3d 762](#), we reject defendant's claim that trial counsel's failure to make timely objections to the claimed misconduct by the prosecutor amounted to ineffective assistance of counsel within the meaning of the Sixth Amendment guarantee.

E. Claim that improper voir dire and closing penalty argument combined to reduce the jury's sentencing discretion.

In the course of the sequestered voir dire proceedings required for the selection of a "death qualified" jury (see [Hovey v. Superior Court \(1980\) 28 Cal.3d 1, 80-81 \[168 Cal.Rptr. 128, 616 P.2d 1301\]](#)), the trial court permitted the prosecutor to ask each prospective juror whether, in the words of a representative query, the fact that a capital defendant was "18 or 19 at the time of the killing ... [would] automatically cause you to vote for the lesser punishment of life imprisonment without possibility of parole?" In addition, the prosecutor was permitted to ask each juror in the sequestered voir dire whether "you would be able to consider imposing the death penalty ... if we have one victim as opposed to requiring that the defendant kill two or more people?"

(28) Defendant challenges these questions on two grounds. First, he contends they had the impermissible effect of inducing the jurors to "prejudge" the evidence to be offered against him at trial. Second, he argues that, in combination

with certain remarks made by the prosecutor in his closing penalty argument, the questions had the effect of exerting psychological pressure on the jurors, reducing the scope of their sentencing discretion at the penalty phase. Neither claim is persuasive.

At the time of trial, the scope of legitimate inquiry on voir dire embraced both “ ‘matters concerning which either the local community or the population at large is commonly known to harbor strong feelings that may stop *646 short of presumptive bias in law yet significantly skew deliberations in fact’ ” ([People v. Williams \(1981\) 29 Cal.3d 392, 408 \[174 Cal.Rptr. 317, 628 P.2d 869\]](#)) and “reasonable inquiry into specific legal prejudices ... as the basis for a challenge for cause.” ([People v. Balderas \(1985\) 41 Cal.3d 144, 183 \[222 Cal.Rptr. 184, 711 P.2d 480\]](#), italics omitted.) As a result of the passage of Proposition 115 in the June 6, 1989, General Election, however, [Code of Civil Procedure section 223](#) now provides that “Examination of prospective jurors shall be conducted only in aid of the exercise of challenges for cause.” Whether evaluated under the standard prevailing at the time of trial or the current version of [Code of Civil Procedure section 223](#), we conclude that the prosecutor's questions were entirely proper because they were directly relevant to whether a juror would be subject to a challenge for cause.

As noted, the prosecutor's questions at issue simply inquired whether a juror would *consider* imposing the death penalty in a case in which the defendant was only 18 or 19 at the time of the crime and in which only one victim was killed. If a juror would not even consider the death penalty in such a case, he or she properly would be subject to challenge for cause.

Our decision in [People v. Fields \(1983\) 35 Cal.3d 329 \[197 Cal.Rptr. 803, 673 P.2d 680\]](#) speaks directly to the point. In discussing the permissible scope of death penalty voir dire, the *Fields* court stated: “A juror who resolved in advance not to impose the death penalty in the case before him, whatever his views might be in other cases, could not ‘conscientiously apply the law as charged by the court’ (*Adams v. Texas* [(1980)] [448 U.S. 38, 45 \[65 L.Ed.2d 581, 589, 100 S.Ct. 2521\]](#)) because he had already determined the penalty without considering the relevant aggravating and mitigating factors. It follows that such a juror may be dismissed for cause without violating the constitutional doctrine expounded in *Witherspoon* [v. *Illinois* (1968) [391 U.S. 510 \(20 L.Ed.2d 776, 88 S.Ct. 1770\)](#)] and *Adams*.” ([35 Cal.3d at p. 357](#).) The *Fields* court then concluded that although “... a court may properly prohibit voir dire which seeks to ascertain a juror's views on the death penalty in actual or hypothetical cases not before him,” “... a court may properly excuse a prospective juror who would automatically vote against the death penalty in the case before him, regardless of his willingness to consider the death penalty in other cases.” (*Id.* at pp. 357-358, fn. omitted.)

Because the challenged voir dire questions in this case were directly relevant to and “in aid of” the exercise of a challenge for cause, the questions were proper, both under the standards governing voir dire in effect at the time of trial and the narrower standard enacted by Proposition 115. *647

(29) In light of our conclusion that the specific questions posed by the prosecutor on voir dire simply inquired whether a juror would *consider* the death penalty if the defendant were 18 or 19 and only 1 person had been killed and were thus not improper, defendant's related argument—that the prosecutor's reference in his closing penalty phase argument to the voir dire questions and the jurors' answers to them overcame the jurors' natural reluctance to impose the death penalty in this case—loses its force.

In arguing these points to the jurors, the prosecutor was not contending that defendant's relative youth, or the fact that he did not kill more than one victim, could not be taken into consideration by the jury in determining whether the death penalty was appropriate. Rather, he was merely making the entirely proper argument that the circumstances under which the murder of Jovita Navarro occurred were sufficiently aggravating to warrant the death penalty, despite defendant's youth and the fact that there was only one victim. Such an argument did not limit the jury's sentencing discretion.

F. Refusal of the trial court to give pinpoint penalty instructions requested by the defense.

In its instructions to the jury concerning the sentencing function following the close of the penalty phase, the trial court gave CALJIC No. 8.84.1, relevant portions of which are set out below.^{FN12} In addition, the jury was instructed that the mitigating factors enumerated in the instructions were “only examples” of mitigating factors that the jury could consider in assessing the penalty, that they should “pay careful attention” to the factors in mitigation, that they were “not required to limit your consideration of mitigating circumstance [*sic*] to these factors” but could consider “other circumstances as reasons for not imposing the death penalty,” and that “any mitigating circumstances, standing alone, may be sufficient to support a decision that life without the possibility of parole is the appropriate punishment.”

FN12 “In determining which penalty is to be imposed on the defendant, you shall consider all of the evidence which has been received during any part of the trial of this case. You shall consider, take into account and be guided by the following, if applicable: “. . . .”(k) Any other circumstance which extenuates the gravity of the crime even though its [*sic*] not a legal excuse for the crime and any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for [*sic*] sentence less than death, whether or not related to the offense for which he is on trial. You must disregard any jury instruction given to you in the guilt or innocence phase of this trial which conflicts with this principle.”

The trial court refused, however, to give a lengthy special instruction requested by the defense consisting of 15 subparts purporting to guide the *648 jury in reaching its penalty determination.^{FN13} (30) Defendant claims that the trial court was required to give the proffered instruction by *People v. Sears* (1970) 2 Cal.3d 180, 189-90 [84 Cal.Rptr. 711, 465 P.2d 847], and that the failure to do so violated his rights under the Fifth, Eighth, and Fourteenth Amendments to the federal Constitution. We do not agree.

FN13 Defendant's special instruction No. 14 included the following representative subparts: "... (3) That [defendant's] formative years were spent in a closely knit family who generally participated in many activities together;" (4) That [defendant] was extremely close to his father and that this relationship was severely affected when his parents divorced;" (5) That [defendant] was thereafter raised by his mother;" " (12) [defendant's] artistic potential and musical ability". . . . " (15) Any other sympathetic or other aspect of [defendant's] character or record that he offers as a basis for a sentence less than death, whether or not related to the offenses for which he is on trial."

We upheld the trial court's refusal to give a similar, so-called "pinpoint" penalty determination instruction-also urged on the authority of *Sears*-in *People v. Benson*, *supra*, 52 Cal.3d 754. We pointed out that "Under *Sears* [a criminal defendant] ha[s] a 'right to an instruction that " pinpoint [s] the *theory* of the defense." ' ' (*Id.* at p. 806, quoting from *People v. Gordon*, *supra*, 50 Cal.3d at p. 1276, italics in original.) Here, as in *People v. Benson*, *supra*, the proffered special instruction for the most part in effect argued the evidence by "highlight[ing] certain aspects ... without further illuminating the legal standards at issue [citations]." (*People v. Fauber* (1992) 2 Cal.4th 792, 865-866 [248 Cal.Rptr. 600, 755 P.2d 1049].) Other instructions given by the trial court and summarized above adequately covered the defense theory in the penalty phase. Those elements of defendant's special instruction that were not argumentative were thus duplicative, and the trial court did not err in declining to give them. (*People v. Wright* (1988) 45 Cal.3d 1126, 1134-1138 [248 Cal.Rptr. 600, 755 P.2d 1049].) There was no error.

G. Constitutionality of [section 190.3](#), factors (a) and (i).

(31) Defendant mounts a broad constitutional challenge to the capital sentencing scheme embodied in [section 190.3](#). Specifically, he contends that permitting the jury to consider factors (a) (circumstances of the capital crime) and (i) (the age of the defendant at the time the crime was committed) of [section 190.3](#), without more specific instructional guidance, impermissibly enlarges the sentencing discretion of capital juries and thus runs afoul of vagueness limitations imposed by the Eighth Amendment to the federal Constitution.

We have recently rejected such a challenge directed at the use of [section 190.3](#), factor (a). In *People v. Proctor*, *ante*, page 499 [*649 15 Cal.Rptr.2d 340, 842 P.2d 1100], we noted that the "United States Supreme Court itself has established that the circumstances surrounding a capital offense constitute one of the criteria upon which the jury *should* base its penalty determination. [Citations.] The high court has not stated or implied that the factor of the 'circumstances of the offense' [of [section 190.3](#), factor (a)] is unconstitutionally vague." (*Id.*, *supra*, *ante*, at p. 551, italics in original.)

Likewise, we have said that the defendant's "age," as used in factor (i) of [section 190.3](#), "is ... a metonym for any age-related matter suggested by the evidence or by common experience or morality that might reasonably inform the choice of penalty." (*People v. Lucky* (1988) 45 Cal.3d 259, 302 [247 Cal.Rptr. 1, 753 P.2d 1052].) As we have recently stated, both factors direct the attention of the penalty jury to "specific, provable, and commonly understandable facts about the defendant and the capital crime that might bear on his moral culpability. Having met these standards of relevance and specificity, factors (a) ... and (i), are not 'illusory' or otherwise impermissibly 'vague' (*Stringer v. Black* (1992) 503 U.S. ___, ___ [117 L.Ed.2d 367, 382, 112 S.Ct. 1130]) simply because they leave the sentencer free to evaluate the evidence in accordance with his or her own subjective values." (*People v. Tuilaepa*, *ante*, 569, at p. 595 [15 Cal.Rptr.2d 382, 842 P.2d 1142].)

H. Claim that cumulative effect of penalty phase errors requires reversal.

Defendant contends that the cumulative effect of the asserted penalty phase errors requires reversal of the verdict. There were, however, no errors to accumulate.

I. Claim that multiple flaws in the capital sentencing process render the death penalty unconstitutional.

Last, defendant attacks, as constitutionally defective, multiple features of the 1978 death penalty law; we have rejected and continue to reject these claims. *People v. McLain* (1988) 46 Cal.3d 97, 118 [249 Cal.Rptr. 630, 757 P.2d 569]; *People v. Jennings* (1988) 46 Cal.3d 963, 980, 981-982, 987-988 [251 Cal.Rptr. 278, 760 P.2d 475]; *People v. Rodriguez*, *supra*, 42 Cal.3d 730, 777-779; *People v. Frierson* (1979) 25 Cal.3d 142, 172-188 [158 Cal.Rptr. 281, 599 P.2d 587]; *People v. Miranda*, *supra*, 44 Cal.3d 57, 104-105; *People v. Lucky*, *supra*, 45 Cal.3d 259, 302; *People v. Melton* (1988) 44 Cal.3d 713, 757 [244 Cal.Rptr. 867, 750 P.2d 741]; *People v. Johnson* (1989) 47 Cal.3d 1194, 1253 [255 Cal.Rptr. 569, 767 P.2d

Conclusion

The judgment is affirmed.

Lucas, C. J., Panelli, J., Kennard, J., Baxter, J., and George, J., concurred. *650

MOSK, J.

I concur in the judgment. After review, I have found no reversible error or other defect.

I write separately to comment on the majority's treatment of defendant's claim under *Stringer v. Black* (1992) 503 U.S. ____ [117 L.Ed.2d 367, 112 S.Ct. 1130] (*Stringer*). As I stated in my dissenting opinion in *People v. Proctor*, ante, page 499 [15 Cal.Rptr.2d 340, 842 P.2d 1100]:

"In *Stringer*, the United States Supreme Court held that 'if a State uses aggravating factors in deciding who shall be eligible for the death penalty or who shall receive the death penalty, it cannot use factors which as a practical matter fail to guide the sentencer's discretion' in contravention of the Eighth Amendment. [Citation.] It explained: 'Although our precedents do not require the use of aggravating factors, they have not permitted a State in which aggravating factors are decisive to use factors of vague or imprecise content. A vague aggravating factor employed for the purpose of determining whether a defendant is eligible for the death penalty fails to channel the sentencer's discretion. A vague aggravating factor used in the weighing process is in a sense worse, for it creates the risk that the jury will treat the defendant as more deserving of the death penalty than he might otherwise be by relying upon the existence of an illusory circumstance.' [Citation.] Of course, California uses 'aggravating factors'-labeled 'special circumstances' [citation]-to determine death eligibility. It also uses 'aggravating factors'-bearing that very label [citation]-to decide between life and death.

"A narrow *Stringer* challenge could specifically attack any one or more of the factors set out in the standard jury instruction on the determination of penalty as vague and, for that reason, likely to invite an arbitrary and capricious choice of punishment in violation of the Eighth Amendment. ...

"A broader *Stringer* challenge could generally attack the standard jury instruction on the determination of penalty as vague at its very core and, for that reason, highly likely to invite an arbitrary and capricious choice of punishment in violation of the Eighth Amendment." (*People v. Proctor*, supra, ante, at pp. 566-567 (dis. opn. of Mosk, J.); accord, *People v. Tuilaepa*, ante, 569, 596-597 [15 Cal.Rptr.2d 382, 842 P.2d 1142] (conc. opn. of Mosk, J.).)

Defendant's *Stringer* challenge is narrow. He attacks factor (a), the "circumstances of the crime," and factor (i), the "age of the defendant at the time of the crime." *651

The majority reject the claim. They do so because they themselves do not find factors (a) and (i) to be vague. But "[w]hat is dispositive is not what jurists on appellate courts may announce, but what laypersons on juries may understand." (*People v. Proctor*, supra, ante, at p. 567 (dis. opn. of Mosk, J.); accord, *People v. Tuilaepa*, supra, ante, at p. 597 (conc. opn. of Mosk, J.).) In this regard, consider factor (i). "We have held that 'age' can be aggravating or mitigating or neither depending on the peculiar facts of the individual case. (E.g., *People v. Lucky* (1988) 45 Cal.3d 259, 302 [247 Cal.Rptr. 1, 753 P.2d 1052].) Whether a juror would come to the same conclusion, however, is another matter." (*People v. Tuilaepa*, supra, ante, at p. 597 (conc. opn. of Mosk, J.).)

In the course of their analysis, the majority appear to suggest that if a factor is not vague, it necessarily passes muster under the United States Constitution, even if it " 'leave[s] the sentencer free to evaluate the evidence in accordance with his or her own subjective values.' " (Maj. opn., ante, at p. 649, quoting *People v. Tuilaepa*, supra, ante, at p. 595.) Such a proposition would be too broad. "The requirements imposed by the federal charter are substantive as well as formal. Thus, a factor, no matter how clearly defined, is constitutionally invalid if, for example, it authorizes or allows a juror to 'attach[] the "aggravating" label to' matters 'that are constitutionally impermissible or totally irrelevant to the sentencing process, such as ... the race, religion, or political affiliation of the defendant' or 'to conduct that actually should militate in favor of a lesser penalty, such as perhaps the defendant's mental illness.' " (*People v. Tuilaepa*, supra, ante, at pp. 597-598 (conc. opn. of Mosk, J.), quoting *Zant v. Stephens* (1983) 462 U.S. 862, 885 [77 L.Ed.2d 235, 255, 103 S.Ct. 2733].)

A successful *Stringer* challenge, it must be noted, does not automatically result in reversal. "As *Stringer* itself makes plain, an instruction incorporating a vague factor is subject to harmless-error analysis." (*People v. Tuilaepa*, supra, ante, at p. 598 (conc. opn. of Mosk, J.).) On this record, even if one or both of the factors defendant attacks are deemed vague, no prejudice appears.

In conclusion, having found no reversible error or other defect, I concur in the judgment.

Appellant's petition for a rehearing was denied March 10, 1993. *652

4 Cal.4th 599, 842 P.2d 1160, 15 Cal.Rptr.2d 400

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN RE

WILLIAM A. NOGUERA

on Habeas Corpus.

Crim. No.

DECLARATION OF A. LORENZO PEREYDA, JR.

I, Lorenzo A. Pereyda, Jr., declare as follows:

1. I am an attorney licensed to practice law before all courts of the State of California. I have been in private practice in East Los Angeles since shortly after my admission to the Bar in 1966. My practice consists of primarily criminal law and general civil litigation, including family law.

2. I tried approximately 20-30 civil cases and over 60 felonies before representing William Noguera. This was my first capital case.

A. CONFLICT OF INTEREST/PENALTY INVESTIGATION

3. I have known the Noguera family for many years. I have known petitioner since he was twelve or thirteen years old.

4. As part of my general civil practice I was retained by Mrs. Sarita Noguera to represent her in the divorce action she brought against her husband, Guillermo Noguera. I was retained on or about the middle of 1979 and filed the action shortly thereafter in the same year; it was not concluded until January 6, 1983.

5. Child custody was not an issue in the divorce; the primary issues were financial. However, the disputes between Mrs. Noguera and her husband were extremely bitter and acrimonious. My contact with Mrs. Noguera and the family during the divorce left me with the impression that both parents seemed to dislike each other immensely. I had the feeling that Mrs. Noguera believed that she had been cheated by her husband and that he had sent a lot of the community property funds to Columbia. He never accounted to her the extent of the community property holdings, especially in reference to savings that had been accumulated during the course of the marriage.

6. During the course of the divorce proceedings, I was of the impression that Mrs. Noguera thought of her husband as a scoundrel and communicated that fact to her children.

7. During one of the hearings in the divorce proceedings, it became evident that Mr. Noguera had not been telling the truth that he had not secreted any community property funds and had not sent any community property funds to Columbia. He was at a loss to explain the existence of certain documents from which one could infer that he had secreted and sent such funds to Columbia. After giving testimony in that regard, the family law commissioner admonished Mr. Noguera in reference to the question of giving perjured testimony. The commissioner made a finding that he had secreted such funds.

8. Mrs. Noguera told me during the divorce proceedings that her husband was violent and had a bad temper. She also mentioned

that she found some audio tapes in his locker at work which contained details in reference to sexual acts involving animals. Mrs. Noguera informed me that he had threatened her with bodily harm and death on many occasions. On one occasion Mr. Noguera cut her lip, pushed her down on the floor and choked her. She called the police to protect her. Mrs. Noguera informed me many times of her concern that Mr. Noguera's actions were having a very bad effect on her children.

9. After Bill was arrested for the instant offense I was retained to represent him by Mrs. Noguera. At the time I was retained I was not totally familiar with capital litigation, particularly penalty phase strategy and tactics.

10. I never explained to Bill that there was a legal conflict in my representing him because I had previously represented his mother in a divorce action and I never obtained from him a waiver of that conflict.

11. Before trial I realized that I would be unable to properly defend Bill by myself. Because Mrs. Noguera could not afford to hire another attorney and my client was indigent, the defense requested that the court appoint a second counsel. The Court granted this motion and appointed Benjamin Campos. At that time Mr. Campos had very little experience in criminal law. Mr. Campos basically acted as second chair.

12. The vast majority of trial preparation in this case was spent on guilt phase issues. We did not have Bill or any member of his family interviewed by a mental health professional; nor did we

explore family and social background to determine whether the family dynamics could have had a bearing on his culpability.

13. 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.

14. I realize now that our decision to focus the investigation on only the positive aspects of Bill's life was wrong. In order to present a troubled family history, I should have revealed to the jury Mrs. Noguera's emotional problems, her failings as a wife and mother, and exposed the bitterness and humiliation she suffered in her home life.

15. I also realize that I was a potential witness during the penalty phase of the trial. I could have testified about information I obtained about the family's behavior, which I learned during the course of the divorce proceedings.

16. I estimate that I spent approximately between 24 and 30 hours preparing for the penalty phase of this case.

B. RICKY ABRAM

17. I realized that Ricky Abram was a critical witness for the prosecution. His testimony, if believed by the jury, provided evidence of conspiracy, premeditation, deliberation and motive. I

recognized that it was very important for the defense to destroy or at least cast doubt on Abram's credibility.

18. During my cross-examination of Abram, I asked him about his mental health treatment at CYA and attempted to explore his mental state at that time, including the effects of psychotropic medication. Abram could not recall the drugs he was taking or even whether the prescribing physician was a psychiatrist. (R.T. 5071-5075.) My attempt to cross-examine Abram about depression, the medication he was taking and specific acts of suicide was met with an objection from the district attorney.

19. The prosecutor noted that expert opinion testimony was needed to prove that Abram's mental state could have impaired his ability to accurately recall events before such evidence was relevant. (R.T. 5071-5072.) The court sustained the objection. (R.T. 5072.) The court left the door open for further testimony on this subject, stating that defense counsel "could prove it by any other means." (R.T. 5073.)

20. I was aware from Abram's CYA records that he had a history of severe mental illness. Before cross-examining Abram, I reviewed reports written by Drs. Minkowsky, Weisberg, Blakeley and Pecci documenting Abram's mental disorders and describing their adverse effect on his memory, cognitive ability and behavior. I do not recall contacting any of these doctors to obtain their testimony or directing any member of the defense team to do so.

21. Upon reflection, I realize that the reports and/or testimony from these doctors would have been very useful in undermining Abram's credibility and should have been presented to

the jury. In addition, I could have retained a psychiatrist to evaluate the reports and Abram's medical records, and if appropriate, offer testimony. I have reviewed the declaration of Dr. Pecci that Bill's appellate counsel has obtained. This is the type of testimony that should have been offered at trial.

22. I believe that such evidence was not presented due to an oversight. There was no tactical reason for failing to retain a psychiatrist, or to contact the doctors who treated Abram or to offer their testimony or reports into evidence.

C. MOTIVE

23. The prosecution's theory was that Bill and Dominique conspired to kill Jovita in order to end her interference with their relationship and to obtain the proceeds of her estate. The prosecution argued that Bill was the primary force behind the killing; Dominique was presented as the innocent young girl who reluctantly went along with her domineering boyfriend.

24. The 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. We did not investigate Dominique or her family to determine whether she had any other motives for killing her mother. There was no strategic reason for not doing so.

25. I was quite surprised to receive information from petitioner's appellate counsel that as a child Dominique had been physically abused by her father, and sexually abused and exploited by her mother. This startling information puts the case in a

completely new light. If I had known this before the trial our defense would probably have been very different.

26. This evidence is consistent with other facts about the case. First, I understood that Dominique was not the innocent young girl portrayed by the prosecutor. I was aware that she had been sexually active with other boys before she met Bill. Second, I never believed that Bill was in control or was the leader in the relationship. Third, Bill was relatively sexually and emotionally inexperienced before he met Dominique and was susceptible to manipulation. Fourth, the motives alleged by the prosecution did not seem sufficient to result in parricide.

27. Dominique's sexual and physical abuse provide a more plausible motive and one which I believe would reduce Bill's culpability to the jury. This powerful evidence would have made the special circumstance of murder for financial gain much more vulnerable to attack.

28. I also believe that the defense could have made a plausible argument to the jury for second degree murder. Although there was evidence from Ricky Abram's testimony of premeditation and deliberation, it was weak. The jury could have been persuaded that the two teenagers were caught up in an emotional frenzy with Bill acting not as the older villain, but rather as the protector of his abused fiancée.

29. This new evidence at the guilt phase would require a reassessment of the entire defense strategy. I would have seriously considered presenting evidence of Dominique's abuse along with expert testimony on parricide. I would have reevaluated our

decision to have Bill testify. Finally, I would have determined in light of this evidence whether we should have aimed for a compromise verdict on a lesser included offense rather than an all or nothing acquittal.

30. At the penalty phase there would have been very little reason not to present this evidence since the jury already believed that Bill was guilty. The defense would have had a very strong argument to defeat the prosecution's theory that Bill was the motivating force behind the killing. This mitigating evidence would also have been valuable as a means of reducing the jury's perception of the seriousness of the offense and the offender.

31. During the penalty phase we proposed an instruction informing the jury that they may consider the disparity of treatment between Dominique and Bill. (C.T. 1275.) We were prepared to introduce evidence of her sentence to the Youth Authority. (R.T. 8590.) The prosecutor did not object to the instruction, but he requested that the court give his proposed instruction. That instruction told the jury that as a juvenile Dominique was not eligible for the death penalty or LWOP, and it permitted the jury to consider the relative participation of both parties when deciding the sentence. (C.T. 1279.) The trial court agreed with the district attorney and conditioned the admission of this evidence on giving the prosecutor's instruction. (R.T. 8597.) We declined to introduce this evidence because of our concern about the harm to the defense that would a comparison of the co-defendant's respective roles. (R.T. 8622.) In fact, we gained

nothing by withdrawing this evidence because the prosecutor argued that Bill was primarily responsible for the killing. (R.T. 8656.)

32. Had we been aware of this evidence, we would certainly have introduced evidence of Dominique's sentence. We would have welcomed the opportunity to argue about the relative culpability of the two defendants.

33. In short, had I been aware of this information before trial it would have had a profound effect on the conduct of the trial, and I believe most probably on its outcome.

D. EXPERT QUALIFICATIONS

34. We investigated the qualifications of the prosecution's experts as part of the defense. One of the prosecution's experts was Dr. Sperber, an expert in identifying bite marks. Dr. Sperber testified at trial that he was employed as the Chief Forensic Dentist for the FBI. (R.T. 6206.) We learned, albeit after the guilt phase verdict, that Dr. Sperber had misrepresented his qualifications in that he was never employed by the FBI. Had I had this information during Sperber's testimony I would have used it to impeach him.

E. PENALTY PHASE CLOSING ARGUMENT

35. I have reviewed the five legal arguments on appeal relating to the prosecutor's penalty phase closing argument. (See AOB, pp. 136-164, 191-204.) I agree that the arguments were improper and should have been subject to an objection at trial. There was no strategic reason for not making the objection either during the prosecutor's argument or by approaching the bench after the argument and asking for a special instruction.

I am competent to testify and would testify to the above if called to do so.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 25th day of September, 1992, in Los Angeles, California.



LORENZO A. PEREYDA JR.

DECLARATION OF SARITA SALINAS

I, SARITA SALINAS, hereby declare the following under penalty of perjury:

1. I am the mother of William A. Noguera, who is on death row at San Quentin Prison.

2. My other child is Sarita Perez, who lives in Los Angeles. Formerly I was married to Guillermo Noguera. We are now divorced.

3. I raised my children as devout Catholics. They strongly believed in the church, including its position that abortion is wrong. I taught my son Bill that to abort a child is to murder a child.

4. As Billy was growing up, I set some bad examples for him. I would do some things which were illegal. Mr. Pereyda, the attorney for me and Billy, was aware of this.

Drugs

5. When he was in martial arts, Billy was the best. The first time that he lost, his father, Guillermo, told him that he was good and that he was going to be the best. Billy started practicing more and more. His father would go with him to class and would kick him real bad to make him understand that he has to defend himself. Billy after that became more hyper than usual.

6. One time before a tournament he was taking some pills and I asked him what they were. Billy was around 14 at the time. He said they were vitamins, but they were called steroids. Billy said his father had given them to him, which Guillermo also mentioned.

7. Billy was continually disqualified because he was too aggressive. The teacher told him he was good and could get the black belt, but he was just too aggressive.

8. Since his early teens, Billy took steroids. I thought they were like vitamins. Guillermo introduced him to them, to make him bigger, stronger, better, and just more aggressive. He took them regularly, not just before tournaments.

9. After getting on the steroids, Billy also took other drugs. He would get really messed up.

Killing

10. I learned that Billy had killed Jovita Navarro that same night. He came home after his date. My father opened the door to let him in. It was around 2:00 a.m.

11. I asked why he was coming in so late, because he had a curfew of 1:30 a.m.. Billy said something terrible had happened, and started crying, got really crazy. He said he had an awful fight with Dominique's mother, and mumbling something about believing he had really hurt her. I tried to calm him, to find out what happened. He kept crying, shaking, mumbling, and not making a lot of sense. I told him to shut up, not to say those things. He said they had argued about the baby he and Dominique had wanted to have. Jovita was hollering that she was glad she had the baby killed, because it would have turned out like Billy. He said "she murdered our baby!" I asked Billy how it happened, but he could not remember details. He said the argument got worse and worse, and that everything went black and he went crazy. He said she made him think she would kill again. At that time we all believed

Dominique was again pregnant. In his mind she threatened to kill the next baby.

12. I told Billy he was crazy, and did not believe him about the killing. It was not a long conversation. I did not want to hear that non-sense, so I went to bed. I thought Billy was just going through one of those crazy periods, when he loses his mind and makes no sense.

13. Around 5:00 a.m. Dominique called my house. It was about Jovita being killed. Then I knew it was true. Billy started crying again and saying a lot of crazy things. It was confusing. He would say he was sorry, then talked about the mother killing babies.

14. I grabbed Billy and told him that he did not kill Jovita, that he was my son, that he did nothing, and to keep quiet about it, just shut up.

15. Later I went to Mass with my mother, and prayed.
Lorenzo Pereyda, Esq.

16. I first met Mr. Pereyda probably around 1970 , when I was having trouble with my husband. I met him because one of my friends told me about him and that he was good on divorces. So I called and told Mr. Pereyda I wanted a divorce, and hired him. When I told my husband I wanted a divorce he asked me not to do it that he loved me and to give him another chance. I finally decided to give him another chance.

17. So for awhile my husband was good to me. But he again started drinking beer and kicked me and ripped my clothes and tried to rape me. My daughter told me to go to the police right away.

I went there and told them to look at what he had done. They took a picture and they told me to go ahead and get the divorce.

18. Through representing me and dealing with my husband and children, Mr. Pereyda knew all about our troubles. He was fully aware that we had many problems, that our family situation was awful. He knew we all had serious problems.

19. Mr. Pereyda knew my husband was crazy, that Billy also had emotional and mental problems because of all he had lived through with us at home. He was aware that even I had mental problems. I told him my husband would show the kids pornographic movies and gave him a couple of them.

20. When I hired Mr. Pereyda to represent Billy, I still considered him my attorney and obligated first to me. I sold my house to pay him. It was a lot of money.

21. I told Mr. Pereyda that in defending Billy, he was not to bring out any of our family problems or anything about Billy which would embarrass me. I did not want people to know. It was not anyone's business. Mr. Pereyda agreed. It was a condition of accepting the case that Bill was to be proven innocent.

22. Mr. Pereyda said for me not to worry. Billy is going to get out.

23. As my attorney, Mr. Pereyda had witnessed through the years how crazy our family was. He knew we were not normal, and that Billy had mental problems.

24. From the moment I retained Mr. Pereyda, he understood that all he knew about Billy and the family through witnessing us as my attorney, was not to be used in my son's defense. So from

the outset he never asked or discussed Billy's mental problems and the hell my son experienced in growing up in our family.

25. Mr. Pereyda also knew that there were serious problems between Billy and Jovita.

Jovita Navarro

26. Jovita Navarro treated her daughter Dominique very badly. I recall a time when Dominique had to live at our house for a month to get away from her mom. It was really bad between them.

27. There were a lot of times that Dominique came to our home crying, and when I asked her about it she would say she had a fight with her mother. She said Jovita hit her, and that her father hit her too.

28. Dominique said there was a lot of fighting in her house. She said she hated it, and would say things like "I wish I had a mother like you."

29. I mentioned in my testimony at trial that there were blue marks on Dominique's thighs and back. This did not seem important to my/Billy's lawyers. They did not spend a lot of time on this, and they were aware I knew a lot more about how Dominique was mistreated by her mother.

30. Jovita did a lot of bad things with Dominique which I told the lawyers. For example, her mother forced her young daughter to have a double date and I asked her why she had to do that. She told me "I had to do it, I hate to do that, but she forced me."

31. When I testified at trial, I was asked if Jovita ever told me she hated Billy, and I answered no. That was not a truthful answer. Mr. Pereyda and his associate, Benjamin Campos, told me and my daughter that we must not let the jury know about the problems between Jovita and Billy. I felt that my lawyer knew best. Billy had no choice. So I and my lawyer tried to give the jury a false picture of how it was. He argued that everything was fine between Billy and Jovita, but knew the truth because we talked about it and he had represented me for years in the divorce.

32. The truth is that Jovita hated Billy. All the time when Billy went to her house, she would call me and ask me why my son was there. She said she did not want him to come there. Jovita said Billy was a "son of a bitch." I told her "that the bitch in here is you." I told Jovita "you have a lot of men, you never take Dominique to church, and Dominique lost her virginity when she was 10 years old."

33. Dominique told me that she had lost her virginity at 10. She said when her father found out he wanted to kill her. After that he blamed the mother saying that she does not take care of Dominique. So I told Jovita that she was the worst mother in the whole world.

34. I never told the jury any of this about Jovita. My attorney, Mr. Pereyda, said it was not important. I asked him why not? He said that we do not have to go into Dominique's family life. He said that I am going to say only what he wants me to, that I had a good relationship with her.

35. I talked with Dominique's father and asked him to pick her up one day when she ran away from the mother, Jovita. He told me that he had hit Dominique because of the fact she lost her virginity.

Baby and abortion

36. Jovita called me when Dominique and Billy were going to have their child. Jovita said she was going to make Dominique have an abortion. I said no, that would be murder. I also told her that Dominique and Billy were excited over having the baby, and would get married since it was the right thing to do. Jovita said Dominique had abortions before she met Billy, and it was no big deal. So Jovita and I argued. I told her that to abort the child would be murder, and was against God and the church.

37. I told Jovita that we even had a family celebration in a restaurant about Dominique having the baby, that the kids wanted to get married. Jovita said no, there would be no marriage and that the baby must die.

38. Jovita said Dominique was going to have an abortion, and that I have to pay for half of it because she doesn't want any baby from Billy. I told her I was sorry but I did not have any money. She said you have to pay \$400 because it cost \$800. I told her I do not have money. She kept calling and she said she knew that Billy was working.

39. I told Mr. Pereyda about it when he was preparing for trial, and he said it was better that I say that I paid and that way the jury would think that Billy, Dominique and Jovita had agreed to have the abortion. The attorneys did not want the jury

to know that things were so bad between Billy and Dominique's mother.

40. Jovita called me many times and asked for the money. I told her I do not have the money. But Billy told me to tell her that I was going to pay next week, just to get her off my back. He said there would be no abortion. Billy said that he was not going to pay for an abortion. Later Jovita had the baby killed anyway. Billy said "she murdered my baby."

41. She forced Dominique to have the abortion and called me many times asking for money. She said you have to pay for the abortion. The abortion is all done and you have to pay.

42. Billy did not agree with what Jovita wanted to do. He did not want Dominique to have the abortion. He said "you do not do that. Tell your mother no." Billy was upset when Dominique told him that her mother wanted to take her to the doctor.

43. After he learned that the baby had been killed, Billy's mental condition got worse than it already was. He would cry about it. Nothing had ever upset him so much.

44. I talked to Billy a lot about Jovita making Dominique have the abortion. I told Billy what she had done was against God and the Catholic Church. I said it was murder in the eyes of God.

45. One day Billy said he thought Dominique might be again pregnant. But he was afraid Jovita would kill that baby too. I said Jovita was a murderer.

Special Circumstances

46. I knew Billy did not kill Jovita Navarro for money. I told this to my lawyer, Mr. Pereyda. I told him I had two insurance policies, one is for \$40,000 and one for \$250,000. I know that he is innocent of killing for money.

47. I did not want the charge of killing for money against Billy, because that was not what happened. I knew that morning after Jovita was killed, that Billy did not do it for money.

48. Dominique said she went to one attorney and told him that her mother was killed and the family wanted to take away the house, and that they shouldn't because the house belonged to her mother and now it belonged to her. I told her to get an attorney and what to say. I told her that I would help her look for an attorney.

49. There was no reason why Billy would have wanted to kill Jovita for money, because he had plenty of it himself. Money had nothing to do with why he and Jovita fought and she died. Jovita had murdered the baby of Billy and Dominique. Billy thought Dominique was again pregnant, and the mother said she was glad she had aborted the baby and would do it again. Billy just went into one of his blind rages.

Son's mental problems

50. The birth of Billy was very difficult. He was born premature, and placed in an incubator. They gave him oxygen. I remember his skin color did not become normal until days later.

51. My obstetrician warned me that the lack of oxygen could cause Billy to have brain damage.

52. In school Billy had learning problems. He had problems with things like reading and spelling.

53. He cried a lot at night and often wet his bed. Billy was nervous and hyperactive.

54. I would not permit Billy to play with other kids, because I just did not think they were good enough for him.

55. My former husband Guillermo used to punish Billy as a small child by hitting him on the head. This happened a lot.

56. I too was physically rough on Billy. Discipline was important. I would hit him with a belt or stick. Sometimes I would really beat him. As he grew up, he knew better than to ever hit me back.

57. At times when I would get really upset, I would do things to control the children and punish them. I would threaten to kill myself. I would tell Billy and my daughter that it was their fault, to make them feel badly. Another thing I would do was to refuse to bless them when they left the house, which really scared them.

58. I had a bad temper. When the children would misbehave, I would get very upset. That is when I would beat Billy.

59. When Billy was around six, he suffered a terrible head injury while playing. It was bad. After that he had more problems. Then when my husband got Billy started on the steroids, things got a lot worst.

60. As Billy got into his teens, sometimes he would go out of his mind for no reason. He would go crazy.

61. He was taking the steroids and other drugs regularly even when Jovita was killed. They just made Billy crazy.

62. After Billy was arrested and charged with murder, he asked me if I would get doctors to examine him. He said he wanted to know why he did the things he did. He asked why he had killed Jovita. Billy said he thought he was crazy. He asked for help.

63. Billy also talked about all the drugs he was taking at the time of the killing, including of course the steroids. He asked if they had something to do with what he did and his mental problems. He said a psychiatrist could find out.

64. I knew that Billy had a serious drug problem. He was even getting drugs in the Orange County Jail.

65. I was also aware that Billy had serious mental problems.

66. But I told Billy that there would be no psychiatric examination, that my son was not crazy. Billy said I knew he did it, so why all the games. I told him just to listen to my attorney, who would get him out.

67. I was paying the bills for Billy's defense. I told him I was not about to put out any money on a mental examination, and that Mr. Pereyda knew the only defense was proving his innocence.

68. Even during the trial, Billy talked about wanting to be examined, so he could understand why he would go out of his mind. I blamed Francesca Mozqueda for that. She was in college and seeing Billy a lot in the jail. She was putting these ideas in his head. He would even mention some type of mental defense. I said
listen to my attorney, not Francesca.

69. Billy told me that Francesca knew the truth, and suggested a mental defense. She said the jury should know the truth about him. This upset me.

70. Well before he was convicted, Billy told me he had told his defense team that he killed Jovita. They knew he killed her. I told him it did not matter, that my attorney was going with the innocence defense.

Irma Soto

71. I knew Irma Soto well. She worked for Billy's attorneys as a secretary and legal worker.

72. Before and during the trial, she called me a lot and also often came to my home. She was like a member of my family.

73. I knew she was important to my son's defense, because Irma told me and the family about how she investigated the case and worked with the witnesses. During the trial the lawyers even had her testifying about her work with a witness. Irma said that with her work, Billy would be coming home. She kept me up on all the defense secrets, and how they knew they would win the case. She kept saying Billy would get out.

74. Irma was in love with Billy. She said she was going to win the case and marry him. Like I said, she was almost a member of our family. Her little girl called Billy her dad. Irma even referred to my daughter Sarita as her sister-in-law.

75. Irma was seeing Billy a lot in the Orange County Jail. She said she was always taking things to him. She even had someone take sexy pictures of her, which she took to him in the jail. Irma asked me if I thought he would like them.

76. I knew that Irma was getting drugs to Billy in the jail. Even though it made his mental condition worse and crazier, at least he was happier. It did seem strange that an employee of Billy's attorneys was supplying him drugs and making his mind worse, but I once did it too.

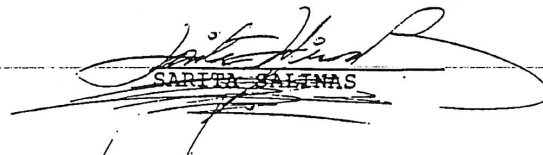
77. Francesca Mozqueda was also visiting Billy in jail, but she was not at all close to me and my family. Irma was jealous of Francesca, and was always saying terrible things about her.

78. During the trial Irma got very angry about Francesca. She said Francesca had to stop seeing Billy. Otherwise, Irma said she would see that Billy was convicted and got the death penalty. Irma said my son's life was in her hands. Irma was a member of my son's legal team, so I knew she was in a position to destroy him. I was very scared over this, and told my daughter that she had to make Francesca go away.

79. Sarita called Francesca and told her that she must leave Billy, or he would die. I too tried to keep them apart, but it did not work. So Irma got her way, and Billy is on death row.

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

Executed on this the 7th day of May, 1996, in Los Angeles, California.


SARITA SALINAS

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN RE	)	Crim. No.
	)	
WILLIAM A. NOGUERA	)	
	)	
on Habeas Corpus.	)	
	)	
_____	)	

DECLARATION OF BENJAMIN CAMPOS

I, Benjamin Campos declare:

1. I am an attorney licensed to practice law before all courts of the State of California. I was admitted to the Bar in 1980. Before and during my representation of Mr. Noguera, my practice consisted of mostly misdemeanor criminal cases and juvenile cases.

2. I tried two felony cases before being trying this case. Both of these cases were very short jury trials.

3. I was appointed by the court as second counsel for William Noguera. My role during the pre-trial phase of the investigation was to conduct discovery, work with the dental experts, conduct the factual investigation and supervise the defense investigators. During the trial I took responsibility for examining and cross-examining the dental experts. Mr. Pereyda was responsible for the direct and cross-examination of the other witnesses.

4. Because of my relative inexperience and Mr. Pereyda's greater experience I deferred to him on most questions of trial

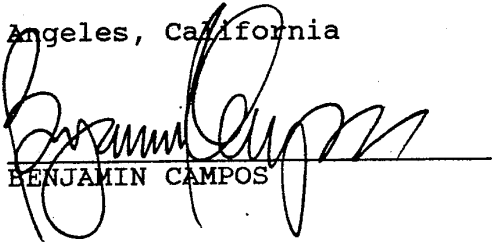
tactics and strategy. I did, however, discuss all crucial issues with Mr. Pereyda and was part of the decision-making process.

5. I have read the declaration of Lorenzo Pereyda and agree that the statements made therein concerning the trial are true.

6. I billed the court for 4.5 hours between the guilt verdict and the beginning of the penalty phase. I billed the court for 3 hours of out-of-court time during the penalty phase (May 18 to May 22, 1987). This accurately reflects the amount of out-of-court time I spent on the penalty phase.

I am competent to testify in this matter and would testify to the above if called to do so.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on this 25th day of September, 1992 in Los Angeles, California



BENJAMIN CAMPOS

DECLARATION OF FRANCESCA MOZQUEDAIn re: *NOGUERA vs. CALDERON*

I, FRANCESCA MOZQUEDA, declare the following:

1. I am a resident of Orange County, California.
2. In 1994, I received a Masters of Social Work Degree from California State University, Long Beach. My area of specialization was children, youth and families. In 1989, I obtained a Bachelor of Arts in Social Work from California State University, Long Beach.
3. I am married to William A. Noguera. We were married on January 28, 1988, the day before he was sentenced to death. We started dating in 1983, after the homicide and before his arrest.
4. Prior to Bill's arrest sometime in early November 1983, Bill picked me up one day from school. This was several days after we first had met. He did not appear to be the same boy I had just met. Bill was irrational and not making very much sense. He became upset over a trivial issue. I told him that I did not want to see him again.
5. The following Sunday I ran into Bill. We discussed his recent strange behavior. He told me that he sometimes became so upset that he did not know what he was doing, that he would get confused. He stated he was sorry, that he would sometimes "blackout" and had not meant to upset me. Around that time Bill and I started to informally date. I would meet him anywhere I could. I really liked him in spite of, or maybe because of his problems. My girlfriend also commented on how crazy Bill was and would question why I was with him. I was aware that he was crazy and out there, but I still liked him.
6. Throughout our brief relationship, I experienced Bill's mood swings. He would sometimes snap for no reason, get upset for no apparent reason. It was like a side of him was really not connected with reality. He would go insane.
7. Bill was very open about himself.
8. He told me he took steroids regularly. I was around him on occasions when he was under the influence of steroids. He would not think clearly and there was a break with reality. He became aggressive, rude, on the edge and crazy. However, at the time I did not know that steroids were actually drugs because he said the pills were to help him "train" for his Hapkido tournaments. He would say that they gave him energy.

Exhibit GG

ER-973

9. Our last night together at the drive-in before his arrest, we had an argument because he left me in the car to go buy drugs. In the course of our discussion, I thought I had seen a former boyfriend drive by and I hid. Bill went into an insane rage. He was crazy. Because his attitude angered me, I got out of the car and went to the concession stand. Some minutes later he came looking for me and asked that I go back to the car, again, that he was sorry, that he did not know why he would blackout and lose control when he became upset. He had taken some steroids earlier that evening. It was interesting that he did not really remember what he had said moments before. He just knew he had done something bad.

10. We started talking about his behavior. He told me that on that occasion and others when he blacked out, he was unable to remember what happened, he was out of touch with what was going on at the time. I had experienced situations while with him in which he really appeared to black out, as if he were a different person.

11. I found out that Bill had been arrested in early January 1984 because my parents would intercept his collect calls from the jail. I would call his house but his family would not tell me anything. I thought he did not want to see me anymore because of our last night at the drive-in. Sometime in January 1984, I answered Bill's phone call. He asked that I visit him at the jail, which I did some weeks later.

12. During our first visit, I asked Bill why he was in jail and he stated, "I was busted for killing a woman." He essentially said he did it, but I did not believe him. Around April 1984, I began to become antsy with Bill's incarceration and again asked him why he was in jail. He stated he was in jail for killing his ex-girlfriend's mother, and said "if you don't believe me look at the newspapers." It was clear that he believed that he had killed his former girlfriend's mother, but had trouble remembering a lot of what happened. I do remember him saying something about her murdering a baby. He had a hard time understanding why it happened. He just said that when she started yelling at him about killing the baby he exploded and went into a rage.

13. Since I was under age and could not visit Bill without my parents, I would meet Bill's mother, Sarita Salinas, at the jail. She would sneak me in as her daughter, and, consequently, I spent a lot of time with Ms. Salinas. I thought Ms. Salinas was very strange; crazy.

14. While waiting to visit Bill, Ms. Salinas would talk loudly, stand and pose for the other visitors and officers and state that her son was innocent and had not killed anyone. She stated that she would prove it and then sue everyone. She stated on several occasions that no one was going to say that her Billy killed anyone, that she would not allow anyone to say anything bad

about Bill or the family. With her ranting and ravings, I was not about to tell her that Bill told me he did it.

15. Ms. Salinas made it very clear to me that she was in charge of the case i.e., the defense attorneys, because she was paying the attorneys to do whatever she said. Ms. Salinas said Mr. Lorenzo Pereyda was her lawyer who represented her in the divorce.

16. I 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 Mr. Pereyda had represented her on two occasions when she was going through divorce proceedings with Mr. Guillermo Noguera, Bill's father and that she only trusted him because he would protect the family. She stated on several occasions that Mr. Pereyda would do whatever she wanted.

17. I was often embarrassed and would become angry because Ms. Salinas was more concerned about her reputation than her son's life. I would try to tell her not to talk about the case or make statements so loudly and she would just get louder and state, "my son is not guilty." She would always make inappropriate comments and her actions were bizarre.

18. During that period Ms. Salinas would not allow Bill and me to have private conversations. She and I would sit on the one person stool and share the telephone. Bill would ask her to let us speak privately and she would refuse and become loud.

19. She also constantly competed with me for Bill's attention. It was very strange. For example, if Bill would compliment me, Ms. Salinas would say "how do I look Billy? Don't I look good?" During one visit, Bill made a comment about my rear. His mother literally stood up, put her rear up against the glass and asked Bill what he thought of her rear. I felt that her behavior with Bill was inappropriate and sexual.

20. Ms. Salinas often told me about her marriage with Mr. Noguera. She said he should be in jail because he probably killed Jovita Navarro. She stated that he and Jovita had a sexual relationship and that he was an abusive drunk. She also stated that Mr. Noguera's family was crazy and some had been in mental institutions. She said that he and his brother had tried raping her. Ms. Salinas said insanity was passed from one generation to the next in the Noguera family.

21. When Bill and I started visiting without his mother's presence, we developed a close friendship. This was during the early stages of his incarceration. He would tell me about his childhood, his mother, his father and his upbringing. He also told me about the case. He told me of his relationship with Dominique and that they were going to have a baby but Dominique's mother forced her to get an abortion. He was always upset when he spoke

about this saying that Dominique's mother had murdered the baby. As I explained earlier, Bill told me he killed her when she started yelling something about her being glad she had killed the baby because it would have turned out just like him. Dominique had told Bill that she was pregnant again, and he believed her. He stated that he feared at that moment Jovita would also have this baby killed. He said he went crazy.

22. While incarcerated at the Orange County jail, I thought Bill's behavior was unusual because he did not understand the seriousness of his situation. It was as if he were being held for traffic violations instead of a murder charge with special circumstances. It just did not register that he could be executed over what had happened. Because I was so young at the time, and unable to clearly identify Bill's problems, I characterized him as dumb, sometimes stupid and often crazy. I thought that he was probably not developmentally delayed, but rather saw him as someone who was not able to understand what was happening around him; like a child who is unable to make certain connections or is too immature to process information correctly.

23. Through Bill's actions, he demonstrated that he did not understand what was happening. He did not appear to have the mental capacity to stand trial. I cannot explain just how out of touch he was with what was happening. How could he stand trial for murder when he did not even understand things? He just did not get it.

24. Bill often called me from jail while he was drunk and/or on drugs. I would sometimes refuse to speak to him and hang up. The simplest way I can explain his behavior is that he was crazy.

25. When Bill told me what the attorneys' defense was going to be, I could not understand why the attorneys were using a defensive tactic that was not true. It did not make any sense to falsely present Bill as a boy who could not commit a murder because he was mentally stable and came from a good family. That was simply not true. It was obvious to me that if the jury realized they were being lied to and discovered the truth that Bill did kill the woman, they would become angry and not only convict him but sentence him to death. That is exactly what happened.

26. By 1985 I was taking college criminal justice courses and often shared what I learned from class lectures with Bill. I would go see him after school, take my books and notes and discuss what I had just learned. Because I believed that Bill did not understand what was happening, I tried to help and present information in different angles to help him understand. I told Bill that some people who are charged with murder are found insane, that others that committed the act are found guilty of a lesser degree of homicide, e.g., second-degree murder or manslaughter, through a diminished mental capacity defense. Recently, I pulled

out my school transcripts and for that period I was receiving average grades in everything but the course I was discussing with Bill. I received an A. .

27. Bill and I spent a lot of time talking about the possibility of pleading insane and raising the issue of his diminished capacity. Bill was very receptive to this, but said he had to follow the advice of his attorneys who knew more. We used to argue about this and Bill would become frustrated and state, "who do I believe, you, an 18 year old or my attorneys. My mother has paid them a lot of money, they are educated and good lawyers."

28. Bill told me at length about his family's history of mental disorders, that his paternal uncle was in fact schizophrenic, that his mother was crazy, that his father was an alcoholic abusive man and that he too believed he was crazy. About family members even having been placed in mental institutions. He wanted to know why he was the way he was and would often ask me questions, like, "do you think I'm crazy? What do you see in me? What do you really think of my mother?"

29. Bill also told me that his father first gave him steroids, introduced him to marijuana during their hunting trips and that they often drank alcohol together.

30. Bill and I also discussed the attorneys' because I told him that they were not dealing with the facts, specifically, that Bill was not mentally stable, had serious emotional problems, was insane, at times lost contact with reality, had drug problems and came from a very dysfunctional home.

31. I also knew that the District Attorney was painting Dominique Navarro, Bill's ex-girlfriend, as his victim of manipulation. In fact Bill told me that Dominique was very manipulative and controlled many of his actions by continually taunting him. She had many problems including even an abortion before she ever met Bill. Yet, Bill's attorneys failed to establish this. Also, the prosecution had to know it was giving the jury a false impression about Dominique.

32. Bill and I had become very close and I told him that I would stand by his side no matter what. Bill was amenable to take any psychological tests. He wanted to understand why he had so many problems, and why he killed the woman. I told Bill he should talk to his attorneys about his mental problems, and insanity and diminished capacity.

33. Bill told me that he tried to tell his attorneys what I suggested about proving that he was crazy. He said they would tell him to concentrate on looking for people who could say that he was a great guy, not crazy. The attorneys said there was no evidence or eye witnesses against Bill.

34. The prosecution found witnesses who were able to testify that Bill was not mentally stable and would just go off on people. I could never understand why the defense attorneys would not probe into Bill's serious mental problems with regard to his state-of-mind at the time of the homicide.

35. I could not understand why Mr. Pereyda who had first hand knowledge of his mother's psychological and emotionally problems, and how crazy and dysfunctional the family was, because he was her attorney, would not present these facts to the jury. I also could not understand how Mr. Benjamin Campos, co-counsel, could ignore Ms. Salinas' multitude mental disorders and erratic behavior throughout the trial.

36. I was a kid, yet able to tell that Bill was not normal. I felt badly for him. I saw him constantly struggle with his mental and emotional problems which I believed stemmed at least in part from his dysfunctional family. I saw how his mother constantly tormented him to keep his mouth shut or she would not pay for the defense. I did not understand why Bill's attorneys ignored his mental and emotional problems both in the guilt and penalty phases. As it was, they presented a false picture of him to the jury. Because of them and the mother, the jury never knew the truth.

37. When I met Mr. Noguera, Bill's father, I first thought he was more sensible and could tell him what I knew since my attempts with Bill's mother had failed. He stated he would try to speak with the attorneys about Bill's state-of-mind and about exposing the family, but later told me he did not feel comfortable speaking with the attorneys since they were his ex-wife's attorneys. Mr. Noguera said he did not trust them, that they had made his life hell for years and had even put him in jail. Mr. Noguera said whatever he told the attorneys would go to his ex-wife, and that she and the lawyers would use it against him. He said he could not understand how Mr. Pereyda could represent Bill in the murder case because it seemed that he was torn between two masters, i.e., what was best for the mother and what was best for the son.

38. I also saw how easily Bill could be manipulated. His mother and his attorneys made him believe that everything was going to be okay and not to worry. Bill was losing even more control while in jail. I confronted Bill about the case issues and his behavior, but he did not appear to have the ability to take charge of his own life.

39. Bill took drugs before and during the trial. There were two occasions in which two of Bill's friends were caught trying to smuggle drugs into the jail. One involved a girl who mailed marijuana and another a boy. Bill's mother told me she had split open the soles of Bill's shoes and inserted drugs inside. She then had one of Bill's friends take clothing and the shoes to the jail

for court the following day. At the time I could not understand why the defense attorneys did nothing with the information they had regarding Bill's active drug use. This was even in the trial record.

40. I tried to break down facts for Bill to help him understand that he was hurting himself but he did not appear to have the capacity to understand. For example, I explained to Bill that his behavior in jail would hurt him in the courtroom because the jury would only see the surface issue; that he was getting into trouble while in jail, but the jury would not know all the facts. Also, that his drug use would continue to hurt his ability to understand what was happening. He just did not have the mental ability to cope with the situation.

41. There was something clearly wrong mentally with Bill but instead of looking into Bill's state-of-mind, the attorneys would become upset at Bill because he was messing up their plan to show him as a good kid. He was not a boy scout from an Ozzie and Harriet family, but rather a mentally disturbed young man from a highly dysfunctional family. Bill's behavior prior to the homicide and throughout the trial were more clear indications of his serious mental and emotional problems.

42. I often tried explaining to Bill that there were serious problems with his attorneys' defense. I was trying to break Bill away from his mother's control and dominance, his drug use and help him understand what was happening. Bill told me he was afraid of his mother because she told him she would not continue paying the attorneys if he did not follow her instructions. His mother also told me that I should stop meddling in her family's business.

43. During the trial Bill would cry and express how desperate and helpless he felt.

44. I understand that the District Attorney invited Mr. Pereyda to a special circumstance/penalty conference on the case. It was to decide if the prosecution would seek the death penalty. Neither Mr. Pereyda nor Mr. Campos attended. Bill was upset because other capitally charged inmates' lawyers who went to these types of conferences on their cases got the death penalty dropped. Sometime earlier Bill stated there had been talk of settling his case.

45. According to Bill he was not consulted but rather instructed by his mother and his attorneys to refuse any type of settlement since there were no eye witnesses or physical evidence. By 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.

46. My mother began to hear gossip from her best friend, Annie Uribe, because her son Miguel Uribe was married at the time to Irma Soto. Irma was Mr. Pereyda's secretary and was working on Bill's case.

47. Miguel, Irma's ex-husband, told me after Bill was convicted that Irma often commented about Bill's case with his family.

48. Sometime during Bill's trial, Irma separated from her husband. According to her husband, Miguel, she was having an affair with Ben Campos, one of Bill's defense attorneys. However, during this time she was also pursuing her love interest in Bill and trying to establish a relationship with him. Through deceiving her employers and the court, she was able to obtain a court order allowing her to visit Bill in the attorneys' visiting room as a legal runner.

49. According to Bill, Irma would tell him information with regard to the case that the attorneys were not telling him, purchased a typewriter for him and smuggled in drugs. I do not know how Mr. Campos found out about Bill and Irma but Bill stated that after he found out, their relationship soured and Mr. Campos began refusing his calls and visited him less.

50. Because Irma was creating a lot of problems for me with my parents (embarrassing my mother with her best friend, telling her family about Bill's case and telling Bill lies about me), I finally told Mr. Campos what Irma was doing. I went to his office to pick up some papers and used the opportunity to tell him of Irma's behavior and how damaging it was to Bill's defense. Mr. Campos simply said, "okay."

51. Again, I knew that Irma was visiting Bill. One day, I received a call from Sarita Perez, Bill's sister, pleading me to "leave Bill." My mother, Francesca Perez Mozqueda, was in the dining room with me and when Sarita and I began arguing my mother went to her bedroom to listen to our conversation on an extension. Sarita told me that Irma was in love with Bill and that she knew that Bill was still seeing me. Sarita was frantic and stated that Irma had threatened to hurt Bill's case. That she would see that he was convicted and executed. Irma told Sarita that she was the only person that could get Bill out because she was in charge of all the witnesses. I agreed to leave Bill. I told Sarita to call Irma and tell her that I would leave Bill on the condition that she would not do anything to hurt him, that he must not die.

52. I told Bill that same night over the telephone that I would no longer see him. I took Irma's threat seriously and believed that Bill and I would never get back together again. I had saved mementoes from our brief relationship, letters and

pictures but threw them all away. I did not want Irma to hurt Bill because of me. I did not want him to be executed.

53. Our break up was brief, about a week, and after that the situation with Irma became worse. Bill's mother became involved and she continually called me telling me that Bill was with Irma, that Irma loved Bill, that Irma was better for Bill and that if I did not leave Bill, "it would be my fault." Bill's mother said her son must not be convicted and executed. Ms. Salinas also told me that Irma frequently visited her and referred to her as "suegra" (mother-in-law in Spanish) and Bill's sister as "cuni" (short in Spanish for sister-in-law). The situation with Irma continued throughout his trial and up until 1988.

54. On one occasion, Ms. Salinas called me telling me lies that Irma had told her about my family. I had never confronted Irma in the past because I was not going to fight over Bill and did not want to do anything which would encourage her to sabotage his case, thereby placing him on death row. But this time she was lying about my family. So my mother and I called Irma. I told Irma that I knew about her sleeping with Mr. Campos which created problems between Bill and him and thus a conflict of interest because she also wanted a relationship with Bill. She was very upset and stated Bill was trash and that we were both "going to hell." She also said, "Bill's gotten his. No one plays with me." She made it very clear that she had gotten her revenge on Bill, that she had seen to it that he was convicted. The entire situation was so odd. Someone from his own attorneys' office had sabotaged the case.

55. After Bill was convicted, his attorneys simply wanted to keep him content and quiet by allowing me to be his legal runner. They were trying to keep Bill happy and thus, keep the lid tight on the Irma situation. They did not want it exposed in the courts. I say this because one day I went to Mr. Pereyda's office to pick up some law literature that Bill had requested in preparation for a new trial motion and Mr. Campos stated in a condescending voice, "they're in these boxes. I don't know why he wants them. Just take them to him to keep him happy." I just picked up the boxes and left. It is hard to explain in writing, but they were clearly trying to satisfy the client in order to get rid of an embarrassing situation.

56. During the time I became Bill's legal runner, Bill told me that he had learned that Irma was also having an affair with an Orange County jail officer, who worked at the attorney visiting area. It was an officer who hated Bill. This was while Irma was working on Bill's case for his attorneys.

~~57. First, some officers (one was named Officer Elliot) began teasing Bill asking if all his legal runners "sleep around."~~ Another legal runner later told Bill that she had witnessed Irma and an officer kissing outside the building. It was Officer

McAnnay. He gave Bill an especially hard-time when in the attorney visiting area. I too was harassed by Officer McAnnay through constant searches prior to going into the attorneys' visiting room. He was much more harsh with me than many of the others who had legal visits.

58. During the trial, the court installed a high security system which I believe highly prejudiced Bill. There were two bailiffs inside the courtroom and two outside the door, and anyone entering the court room had to go through a metal detector and sign-in.

59. Bill was shackled during the entire trial and there were bailiffs at his side at all times. I was once sitting outside the court room, the jurors and some court spectators were also sitting outside awaiting for the doors to be opened. Someone walked by and asked a court spectator why there was such high security. The older woman stated that it was because it was a murder trial of a "very violent dangerous man." I remember this clearly because it made my stomach turn. There were several jurors who were watching and listening and heard her comment.

60. I also saw this same court spectator sit on the District Attorney's side which appeared as if she had personal knowledge of Bill. However, Bill did not have previous convictions for violent crimes.

61. During the penalty phase, I transported Bill's father to court for his testimony and on this day the court security was beefed-up. There was a helicopter circling the court building, mainly on the side where the case was being heard and there were bailiffs staring at us through plants. Again, we were sitting outside with jurors when one juror made a reference to the helicopter and Bill's trial, and turned to look at us, then quickly moved away. The jurors believed that not only Bill was highly dangerous, but his father as well.

62. During the course of the trial I had one interview with the attorneys. I told them that I believed that Bill had serious mental problems. However, they brushed-off my concerns, reverted the conversation and made me believe that Bill would not be found guilty. My decision to stay with Bill was partly based on the fact that the attorneys had me believing that Bill would not be convicted.

63. During this same interview, I explained to the attorneys that I never meant to stay with Bill, that my intentions were to help him but in the process I had grown to love him for many reasons, one of which was because I felt he needed me since he was "stupid." The attorneys' expressions went blank. I stated that Bill had serious mental and emotional problems because he was emotionally and physically abused as a child. I explained that

because of Bill's mental and emotional problems he tries very hard to give the impression of being smart but he is quite the opposite and that he had a lot of problems. I told them that I often felt I had to protect Bill.

64. Bill's attorneys did not want me present at any of the court proceedings. Bill would ask that I go to court and I would end up being escorted out by Mr. Campos. I tried to make myself visible and offer my assistance, but the attorneys wanted me out of the picture and would brush me off. It is difficult to capture in words all that occurred, but Bill's attorneys treated us if we were stupid kids who did not know what we were talking about.

65. Regarding the penalty phase, I offered and Bill requested that I testify since I knew so much about him and his problems. I even went to the court room prepared to testify, however, both his attorneys took me to the side of the hall and asked what I was doing there. I told them I was there to testify. They asked me two superficial questions, stood up and said "no we are not putting you on the stand." I was so shocked I even remember to this day what I was wearing: a long yellow dress. I even remember Mr. Pereyda was wearing a gray suit.

66. As Bill's legal runner, I was able to visit Bill in the attorney visiting room, and therefore, he was able to openly tell me more about the case. I was still trying to get information to hopefully bring new issues to light for the new trial motion. I, therefore, continually questioned Bill. I learned more about his childhood, his drug use, his family's mental problems, his relationship with Dominique Navarro and the crime itself. As I have explained, Bill was very open about himself and his problems.

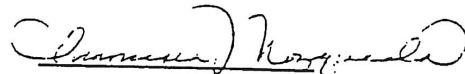
67. During our brief relationship in 1983, Bill and I talked about children and a family. We were not intimate prior to his arrest and despite our desires, Bill respected the fact that I wanted to be married before we made love. Bill had very strong and deep-rooted Catholic beliefs. We once had a conversation about abortions and he asked if I would ever have one. My response was absolutely not, since I did not believe in abortions, would be married if ever pregnant and I was Catholic. He told me that he respected my beliefs and was glad to have found someone like me who was Catholic and also against abortions.

68. Since I have known him, Bill has held very strong beliefs in Catholicism. He has told me he felt terrible that Ms. Navarro had died. Even though he seemed to realize, as we talked after being in jail, that he had gone into a crazy rage when she hollered at him about murdering the baby, he wished it had never happened. He feels badly about it. He told me he wished we would have met me when he was 15, that so many bad things would not have happened, that the baby would not have been conceived and killed and Ms. Navarro would still be alive.

69. On several occasions, Bill asked me to marry him but I refused. However, after his conviction, shortly before his death sentencing, I asked him to marry me. A Christian Pastor married us the day before he was sentenced to death because we could not find a priest to marry us. Bill and I have been married for eight years.

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

Executed on this the 18th of May, 1996, in San Francisco, California.


Francesca Mozqueda

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN RE	)	
	)	
WILLIAM A. NOGUERA	)	Crim. No.
	)	26428/S005170
	)	(Orange County
	)	Superior Court
	)	No. C-53691)
on Habeas Corpus.	)	
_____	)	

DECLARATION OF SARITA PEREZ

I, Sarita Noguera Perez, declare as follows:

1. I am William Noguera's (hereinafter "Bill") sister.

I am two years younger than Bill. Sarita Salinas and Guillermo Noguera are our parents.

2. My brother and I grew up in Southern California. Growing up, we spent a lot of time together and were very close. We always played together as kids, in part because my mother was very over-protective and did not permit us to leave our front yard to play with other children.

BILL DID NOT FIT IN WITH PEERS

3. Bill was hyperactive as a little boy. He was always getting into things. When he started school, he found it difficult to sit still and pay attention. Although he was bright and did well on standardized tests, he did not like school or keep up with his school work.

4. Although our family is Catholic, our parents sent us to a Lutheran junior high and high school. Besides Bill and I,

there were very few Latino kids at the school. Sometimes we felt isolated because of our different ethnic and religious background. Bill did not get into trouble when we attended public elementary school, but when we started at Emmanuel First Lutheran Junior High School, Bill started acting out.

MOTHER WAS ABUSIVE AND MANIPULATIVE

5. My mother was physically abusive. When I was about five years old, she held my hands over the stove's gas burner. This terrified me. I did not remember this incident until a few weeks ago. Although I have a good memory in general, there are also periods in my life of which I have no memory.

6. I recently asked my mother about the gas stove incident. She told me that she held my hands over the flame to punish me. She said she had to do it because I would climb onto the stove to reach a cookie jar, and she wanted me to stay away from the stove. In our kitchen, however, there were no shelves above the stove, so there could not have been a cookie jar there. I believe she lied in explaining the incident to me.

7. My mother was extremely controlling and over-protective of me and my brother. She would not let us go to other people's houses until we were in high school. Other children were not permitted to play with our toys. She told us that since she had paid for them, she could decide who could decide who had access to them.

8. Throughout my childhood, my mother would periodically throw tantrums, announcing that no one appreciated her and threatening to leave the house and never return. On occasion,

she would threaten to kill herself, and then she would leave the house. Bill and I would become very upset, because we never knew whether she was serious.

9. When she felt that Bill or I failed to give her enough respect, she would throw herself on the bed, crying and wailing that we did not love her. This behavior made me feel very guilty, even if I felt that I was right. As a young child, I wanted to do anything to make her feel better.

10. I argued often with my mother, as she had a very quick temper. She refused to allow me to go on dates, and my boyfriends always had to come to my house to see me. While my boyfriend was visiting, she would sometimes go through my purse which would infuriate me. Our fights became so intense that on one occasion, she tried to choke me on my bed. I had to kick her off to keep her from causing serious injury.

11. On another occasion, my date and I were talking in our front yard. My mother decided that I was doing something wrong, and she sent Bill out to force me to go in the house. Once inside, my mother dragged me through the house by my hair, and screamed that I was a "back-stabbing scorpion".

12. My mother wanted to accompany me on my dates, as her mother had done with her. When I refused to allow her to do that, she would estimate how long each portion of our date would take. When I came home late, she would demand a detailed account of my evening and an explanation for being late.

13. As Bill and I grew older, my mother would try to control us by listening in on our telephone conversations. When we

confronted her about the intrusion, she would indignantly ask what we have to hide from her.

14. She was and continues to be very materialistic. When I was younger, my mother would switch price tags at stores so that she could buy nicer things.

15. My mother was superstitious, and convinced us as little children that we could not leave the house unless she gave us a blessing. For punishment, she would sometimes withhold her blessing to make us feel bad. I was so well-programmed that I would not leave the house when she withheld her blessing.

16. My mother was always jealous that Bill and I had a close friendship. She would try to turn us against each other by lying to us about what the other one said.

PARENTS WERE VIOLENTLY ABUSIVE

17. Growing up in our household was difficult because my parents were always fighting with each other.

18. When I was seven years old, our family went to Colombia, where I met my aunt and all my cousins. I remember that during the visit, my paternal grandfather asked my father why he gave all his money to Sarita. I did not understand what was happening, but I remember that I cried often because everyone was very upset. I remember my father started drinking more heavily when we returned from Colombia.

19. My mother and father would fight constantly. When I was nine years old, I remember Bill and I watched my father start hitting my mother. I ran between them to try to stop the fight,

and he hit me instead. I believe my mother had to go to the hospital after that fight.

20. My father drank a lot of beer, especially on the weekends. The more he drank, the meaner he got. On one occasion, when he was very drunk, I saw him spit in my mother's face when she reached over to kiss him.

21. I often saw my father hit and throw beer at my mother.

22. My mother countered my father's abuse with more violence. One evening, while she and my father were fighting at dinner, she stabbed his hand with a long fork when he lunged to hit her.

23. My parents used us to get back at each other. They would do this primarily by undermining each other's efforts to discipline us. For example, if my father told me not to do something, my mother would order me to do it, and vice versa. They would do the same with Bill.

24. My father would always tell us, the children, what a terrible woman she was.

25. It is hard to say who started the fights between my parents because they were both so hot-tempered. Both my mother and father would provoke fights, seemingly over nothing.

26. My father would hit me and Bill with his open hand and with a belt, for arbitrary reasons. For example, one morning, he struck my head because he did not like how I had made pancakes.

27. Sometimes, my father would be deliberately cruel, and then would deny it. I had a puppy when I was young, and my

father would deliberately kick and step on it. When I became angry at him, he denied that he had hurt my dog.

28. Bill adored and feared our father. Even though our father hit both of us brutally, Bill always protected and stood up for him. After my father moved out years later, Bill always blamed my mother for the marriage break-up.

29. Shortly after we returned from Colombia, my father's brother, Uncle Ralph, moved in with our family and stayed for about a year. During that time, my father and Ralph shared my parents' bed, and my mother slept on a couch in the living room.

30. While I was sleeping one night, I heard my mother scream. Bill and I ran to the living room and saw my father and Ralph standing over my mother. I thought that they planned to hurt her, but were interrupted when we ran in.

31. Some time in 1976, my father raped my mother. She tried to file rape charges against him, but was told she could not because he was her husband.

32. My mother filed for divorce around that time. My father begged her not to, and promised to be good if she gave him six months. For six months, he was nice, but when it was over, he started physically and verbally abusing her again.

33. My father has continued to be a bully in our family. He returned from Colombia in time to come to my wedding, and he almost ruined it for me. He told all my husband's relatives that my mother had stolen all his money. I finally had to throw him out of the wedding. I have not spoken to him since, and he has never met my children.

DOMINIQUE INFLUENCED BILL

34. I was concerned when Bill started dating Dominique, because I thought she was very wild. I saw that she lied to her mother, and she dressed very provocatively. I told Bill to stay away from her.

35. On one occasion, Dominique and I wanted to go to a party, but I could not get there because I did not have a driver's license. Dominique lied to my mother, saying that she had a license so we could have her car. We went to the party, and Dominique wore a very skimpy outfit. I thought she was too reckless for my brother, and I told him so.

36. Bill liked to think of himself as a leader, but he was really a follower. Because Bill had a poor self-image, he would often go along with the crowd. I could see that Dominique was very attractive and exerted a lot of control over my brother. Bill was insecure about the possibility of losing her.

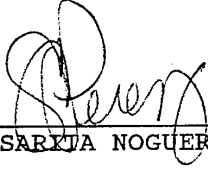
37. When Bill and Dominique started dating, my relationship with Bill became strained, and we did less and less together.

38. Dominique lived with our family in 1972⁸² for about a month, and she would sleep in my room. Her mother had thrown her out of the house. She could not go to her father's house because he had beaten her when he found out she lost her virginity. My mother asked her to leave after a month, so she moved in with Danette England's family.

39. Dominique stayed with us at least one other time. My mother called Jovita to tell her that her daughter was at our

house. Jovita said that Dominique ran away all the time, and refused to pick her up. She said that Dominique could return home, but that she would have to get home on her own.

I declare under penalty of perjury that the foregoing is true and correct and was executed this 11th day of September , 1992, in Diamond Bar, California.


SARKA NOGUERA PEREZ