

No. \_\_\_\_\_  
**CAPITAL CASE**

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In the  
**Supreme Court of the United States**

PAUL C. BOLIN,  
*Petitioner,*

v.

RON BROOMFIELD,  
Warden of San Quentin State Prison,  
*Respondent.*

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

**APPENDIX TO PETITION FOR A WRIT OF CERTIORARI  
VOLUME 1 OF 2**

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DATED: May 4, 2022.

Respectfully submitted,

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13 F.4th 797  
United States Court of Appeals, Ninth Circuit.

Paul C. BOLIN, Petitioner-Appellant,  
v.  
Ronald DAVIS, Warden, San Quentin State Prison, Respondent-Appellee.

No. 16-99009

|  
Argued and Submitted June 2, 2021 Pasadena, California

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**\*800** Appeal from the United States District Court for the Eastern District of California, Lawrence J. O'Neill, District Judge, Presiding, D.C. No. 1:99-cv-05279-LJO-SAB

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Before: M. Margaret McKeown, Jacqueline H. Nguyen, and Daniel A. Bress, Circuit Judges.

### **OPINION**

**BRESS**, Circuit Judge:

**\*801** A California jury convicted Paul Bolin of two counts of first-degree murder and he was sentenced to death. Bolin now seeks federal habeas relief, arguing that his trial counsel was ineffective in not renewing a motion to change venue and in failing to develop additional mitigating evidence. Applying the deferential standards of review in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), we hold that Bolin is not entitled to relief.

# I

## A

On Labor Day weekend in 1989, Paul Bolin shot three men, killing two of them. Bolin killed one man as he pleaded for his life in the fetal position. He shot the other man's motionless body with a second firearm and staged the scene to make the murders look like a drug deal gone bad. When his third victim escaped, Bolin disabled the man's truck and left him to die in a secluded area of the Sierra Nevada foothills. Given the testimony of two eyewitnesses, the events were not in significant dispute. We now summarize the facts based on the record before us and the California Supreme Court's decision on Bolin's direct appeal. See *People v. Bolin*, 18 Cal.4th 297, 75 Cal.Rptr.2d 412, 956 P.2d 374 (1998).

In 1989, Bolin was living in a cabin in a remote, mountainous part of Walker Basin in Kern County, California. Vance Huffstuttler lived on the property in a trailer and assisted Bolin in growing marijuana there. Steve Mincy and Jim Wilson were spending their Labor Day weekend with family and friends at a campsite that Mincy's father owned in the vicinity. On the Saturday, Mincy and Wilson went to a local bar and were drinking there with a group of people that included Huffstuttler and Bolin. Sometime after Bolin returned to his cabin, Wilson agreed to drive Huffstuttler back to his trailer. Mincy went along for the ride. Tragically, that decision would prove fateful.

When the trio arrived at the cabin, they saw Bolin there with his friend Eloy Ramirez. Huffstuttler took Wilson and Mincy across a creek bed by the cabin to show them a patch of marijuana plants he and Bolin were cultivating. Bolin then became agitated. He followed the three men across the creek bed and confronted Huffstuttler about bringing outsiders to see the marijuana grow operation.

According to Wilson, who testified at Bolin's trial, Bolin and Huffstuttler crossed back over to the other side of the creek bed, heading toward the cabin and leaving Wilson's view. Then Wilson heard a gunshot from that direction. A moment later, Bolin "came out from behind the tree line with a gun [a revolver] in his hand." He "started apologizing to" Wilson and Mincy, and said, "I have got nothing against you guys, ... but." When Bolin said "but," Wilson turned and ran. As he turned, Bolin shot him in the shoulder. Wilson ducked behind a tree.

From behind the tree, Wilson heard Bolin shoot Mincy. Wilson could hear Mincy pleading with Bolin, saying, "no, please don't. You don't have to do this. Please don't." Wilson then heard several more gunshots ring out. Staying hidden behind trees, Wilson ran away up and over a hill.

Ramirez confirmed Wilson's testimony and provided additional details for the jury. Ramirez testified that once Wilson had fled, Bolin retrieved a rifle he kept by his bed. Using the rifle, Bolin shot Huffstuttler's inert body several times as he lay collapsed on the ground. Then, Bolin \*802 searched for Wilson after he escaped wounded into the forest; when he could not find him, Bolin commented to Ramirez that Wilson "would bleed to death" before he got off the hill.

After shooting Huffstuttler and Mincy, Bolin told Ramirez that he was going to make the scene "look like a bad dope deal." Bolin broke bottles and poured both marijuana and what Ramirez thought was chili on the dead bodies. Bolin placed the revolver in Huffstuttler's dead hand. Bolin also disabled Wilson's truck by removing wires and throwing them in a gully. Bolin and Ramirez then fled for southern California.

Later analysis revealed that Mincy was shot four times, once while he was upright and three more times while he was in the fetal position lying in the creek bed. Huffstuttler was also shot four times. Wilson, who had traveled all night through the remote, mountainous area, managed to survive after finding refuge in a nearby ranch.

Law enforcement found Ramirez at his girlfriend's house in southern California shortly after the killings. But they were unable to find Bolin for several months. Finally, after the television program *America's Most Wanted* featured a reenactment of Bolin's murders, one of Bolin's family members alerted the police that Bolin was staying in Chicago. That led to Bolin's arrest.

As discussed further below, Bolin had a history of violent crime. In addition to domestic violence incidents during the 1970s, in 1983 a California jury convicted Bolin of attempted voluntary manslaughter for shooting his goddaughter's then-boyfriend, Kenneth Ross, in the chest. Bolin was sent to state prison and paroled in May 1985. In January 1986, Bolin was arrested in Oklahoma for stabbing Jack Baxter. A jury acquitted Bolin based on Bolin's claim of self-defense, but California still revoked his parole. Bolin was released from prison in March 1987.

Then, on September 2, 1989, Bolin murdered Huffstuttler and Mincy. Since shooting Ross in 1981, up until the day he murdered Huffstuttler and Mincy in 1989, Bolin was out of custody for less than forty months.

## B

Bolin was charged in Kern County Superior Court with two counts of first-degree murder, one count of attempted murder, and cultivation of marijuana. Bolin was eligible for the

death penalty because the state tried him for multiple murders. See [Cal. Penal Code § 190.2\(a\)\(3\)](#).

The state trial court appointed Charles Soria as Bolin's lead counsel and William Cater as second chair. Soria and Cater were both experienced attorneys. Soria had worked as a criminal defense lawyer in Kern County for almost a decade, and in that time he served as counsel in approximately fifteen murder cases, three of which were capital cases. Cater had served in the local public defender's office and defended "lots of cases" before entering private practice. He had also tried two other capital cases. Cater was familiar with the California Death Penalty Defense Manual, and he had attended the Capital Case Defense Seminar at least twice.

Defense counsel initially filed a motion to change venue due to allegedly prejudicial pretrial publicity. This motion was largely based on the *America's Most Wanted* reenactment. The trial court reserved judgment on the motion to see how this issue came up in voir dire of potential jurors. Following jury selection, defense counsel did not renew the change of venue motion. This issue is the basis for one of Bolin's claims of ineffective assistance of counsel, and we provide more background on it below.

**\*803** On December 12, 1990, the jury found Bolin guilty on all charges. The following day, after the guilt phase closed, Bolin expressed unhappiness with his lead counsel, Soria. The trial judge granted Bolin's request to remove Soria under [People v. Marsden, 2 Cal.3d 118, 84 Cal.Rptr. 156, 465 P.2d 44 \(1970\)](#), based on a breakdown in the attorney-client relationship. With Bolin's agreement and at his request, the trial judge appointed Cater to handle the penalty phase.

On December 14, 1990, the judge granted a continuance until January 7, 1991 to give Cater more time to prepare Bolin's penalty phase defense. On January 7, 1991, Cater requested and received another two-week extension. The penalty phase began on January 22, 1991. The jury in the penalty phase was the same jury that had convicted Bolin during the guilt phase.

The jury returned a death verdict on January 24, 1991. We discuss at greater length below Cater's investigation into Bolin's mitigating circumstances and his presentation of mitigating evidence, which forms the basis for Bolin's other ineffective assistance of counsel claim.

The California Supreme Court affirmed Bolin's convictions and sentence on direct appeal. *Bolin*, 75 Cal.Rptr.2d 412, 956 P.2d at 348. The United States Supreme Court then denied certiorari. [Bolin v. California, 526 U.S. 1006, 119 S.Ct. 1146, 143 L.Ed.2d 213 \(1999\)](#) (mem.).

## C

Bolin filed state and federal habeas petitions on August 8, 2000. His federal habeas petition was held in abeyance through completion of his state habeas proceedings. In his state habeas petition, Bolin asserted numerous claims, including the two ineffective assistance claims now before us.

In his state habeas proceedings, Bolin did not submit declarations from trial counsel, nor did he submit a declaration on his own behalf. But he did come forward with some additional evidence, including: a declaration from Dr. Zakee Matthews, M.D., a psychiatrist who evaluated Bolin in 1999 and 2000; a declaration from Dr. Natasha Khazanov, Ph.D., a clinical psychologist who evaluated Bolin in 2000; the pretrial report of Dr. Ronald Markman, M.D., a forensic psychiatrist who evaluated Bolin in 1990; reports from Roger Ruby, Bolin's investigator for the penalty phase; declarations from family members and a friend; and a letter Bolin sent to Jerry Halfacre, Bolin's daughter's former boyfriend. The California Supreme Court summarily denied Bolin's state habeas petition "on the merits."

Bolin then filed an amended federal habeas petition. In support, Bolin included 51 exhibits that he had used to support his state habeas petition. Bolin also requested an evidentiary hearing on numerous claims. On April 27, 2012, the district court granted a hearing on Claim C2, regarding Bolin's counsel not renewing the change of venue motion based on pretrial publicity. The district court held the evidentiary hearing on May 14, 2013.

On June 9, 2016, the district court denied all of Bolin's claims, most of which are not at issue here, in a 305-page ruling. The district court issued a certificate of appealability on four claims:

Claim C2: whether trial counsel was ineffective for failing to renew the change of venue motion following voir dire of the jury.

Claim I13: whether trial counsel was ineffective because of irregularities and improprieties that occurred during the jury's view of the crime scene and related locations.

Claim L (L1–L4): whether the jury view of the crime scene violated [Bolin's] state and federal rights.

**\*804** Claim W2: whether trial counsel was ineffective by failing to move for a further continuance at the penalty phase.



In this court, Bolin presses only two of the four certified claims—Claims C2 and W2.<sup>1</sup> He does not argue Claims I13 and L, thus abandoning them. *See, e.g., Styers v. Schriro*, 547 F.3d 1026, 1028 n.3 (9th Cir. 2008) (per curiam). Bolin also seeks a certificate of appealability on two additional claims.

## II

We review a district court’s denial of a 28 U.S.C. § 2254 petition de novo. *Cain v. Chappell*, 870 F.3d 1003, 1012 (9th Cir. 2017).

Bolin claims that his counsel violated his Sixth Amendment rights by providing ineffective assistance. The Supreme Court’s decision in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), provides the established federal law governing ineffective assistance of counsel claims. To prevail on such a claim, a petitioner needs to “show both that his counsel provided deficient assistance and that there was prejudice as a result.” *Harrington v. Richter*, 562 U.S. 86, 104, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011).

Under *Strickland*’s performance prong, “[a] convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment.” *Strickland*, 466 U.S. at 690, 104 S.Ct. 2052. We “must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance.” *Id.* We evaluate whether “counsel’s representation fell below an objective standard of reasonableness.” *Richter*, 562 U.S. at 104, 131 S.Ct. 770 (quoting *Strickland*, 466 U.S. at 688, 104 S.Ct. 2052). “Representation is constitutionally ineffective only if it ‘so undermined the proper functioning of the adversarial process’ that the defendant was denied a fair trial.” *Id.* at 110, 131 S.Ct. 770 (quoting *Strickland*, 466 U.S. at 686, 104 S.Ct. 2052).

In evaluating counsel’s performance after the fact, we must also be careful to “apply the strong presumption of competence that *Strickland* mandates,” *Cullen v. Pinholster*, 563 U.S. 170, 196, 131 S.Ct. 1388, 179 L.Ed.2d 557 (2011), namely, that “counsel’s conduct falls within the wide range of reasonable professional assistance,” *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052. We are required not only to give Bolin’s attorneys the benefit of the doubt, but to consider the possible reasons they may have had for their decisions. *See Pinholster*, 563 U.S. at 196, 131 S.Ct. 1388. *Strickland* applies to counsel’s decisions in the penalty phase of a capital case. “Under *Strickland*, ‘counsel has a duty to make reasonable investigations *or* to make a reasonable decision that makes particular investigations unnecessary’ during the penalty phase of a trial.” *Carter v. Davis*, 946 F.3d 489, 513 (9th Cir. 2019) (per curiam) (emphasis in original) (quoting

*Strickland*, 466 U.S. at 691, 104 S.Ct. 2052).

Bolin also bears the burden of showing that counsel’s ineffective performance prejudiced him. To make that showing, Bolin must first demonstrate that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” \*805 *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052. “In the capital sentencing context, the prejudice inquiry asks ‘whether there is a reasonable probability that, absent the errors, the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.’ ” *Shinn v. Kayer*, — U.S. —, 141 S. Ct. 517, 522–23, 208 L.Ed.2d 353 (2020) (per curiam) (quoting *Strickland*, 466 U.S. at 695, 104 S.Ct. 2052). This standard is “highly demanding.” *Id.* at 523 (quoting *Kimmelman v. Morrison*, 477 U.S. 365, 382, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986)). It requires showing a “ ‘substantial,’ not just ‘conceivable,’ likelihood of a different result.” *Id.* (quoting *Pinholster*, 563 U.S. at 189, 131 S.Ct. 1388).

Moreover, Bolin’s *Strickland* claims must be evaluated under AEDPA’s additionally deferential standard of review because he filed his § 2254 petition after AEDPA’s effective date. *See, e.g., Woodford v. Garceau*, 538 U.S. 202, 207, 123 S.Ct. 1398, 155 L.Ed.2d 363 (2003). Although the California Supreme Court’s denial of state habeas relief consisted of a summary denial on the merits, that decision must still be reviewed under AEDPA. *See Richter*, 562 U.S. at 98, 131 S.Ct. 770 (“[D]etermining whether a state court’s decision resulted from an unreasonable legal or factual conclusion does not require that there be an opinion from the state court explaining the state court’s reasoning.”).

AEDPA substantially constrains our review of Bolin’s claims. Under AEDPA,

[a]n application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

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

28 U.S.C. § 2254(d).

This is a challenging standard to meet. To satisfy AEDPA’s “unreasonable application of” prong, a petitioner “must show far more than that the state court’s decision was ‘merely

wrong’ or ‘even clear error.’ ” *Kayer*, 141 S. Ct. at 523 (quoting *Virginia v. LeBlanc*, — U.S. —, 137 S. Ct. 1726, 1728, 198 L.Ed.2d 186 (2017) (per curiam)). Instead, “[t]he prisoner must show that the state court’s decision is so obviously wrong that its error lies ‘beyond any possibility for fairminded disagreement.’ ” *Id.* (quoting *Richter*, 562 U.S. at 103, 131 S.Ct. 770). That is, the state court’s application of clearly established federal law “must be objectively unreasonable.” *Lockyer v. Andrade*, 538 U.S. 63, 75, 123 S.Ct. 1166, 155 L.Ed.2d 144 (2003).

When, as here, the California Supreme Court did not offer reasoning when denying Bolin’s state habeas petition on the merits, “the habeas petitioner’s burden still must be met by showing there was no reasonable basis for the state court to deny relief.” *Richter*, 562 U.S. at 98, 131 S.Ct. 770. In that circumstance, we “must determine what arguments or theories ... could have supported[ ] the state court’s decision; and then [we] must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior \*806 decision of [the Supreme] Court.” *Id.* at 102, 131 S.Ct. 770.<sup>2</sup>

We will address Bolin’s claims in the order in which they arose in the guilt and penalty phases. We thus begin with the motion to change venue. We then turn to Bolin’s claim that his counsel failed to develop and present mitigating evidence.

### III

In Claim C2, Bolin argues that his trial counsel was ineffective in failing to renew a change of venue motion after jury selection. We hold that under AEDPA, Bolin has not shown that the state court’s rejection of this claim was an unreasonable application of *Strickland*. We first set forth the relevant factual background for this claim. We then explain why under AEDPA, Bolin is not entitled to relief.

#### A

Before voir dire of prospective jurors, Bolin moved for a change of venue based on pretrial publicity that, in Bolin’s view, unfairly prejudiced the jury pool in Kern County. Besides his crime being featured on an episode of *America’s Most Wanted* and his later arrest being mentioned in a second episode, the local print and television media also had covered the murders. In connection with his venue motion, Bolin submitted videotapes of the *America’s Most Wanted* episodes and newspaper clippings. *Bolin*, 75 Cal.Rptr.2d 412, 956 P.2d at 385. In particular, Bolin argued that the first episode of *America’s Most Wanted* included an inflammatory and misleading reenactment of his crimes.

Bolin also submitted in connection with his motion results from a public opinion survey specific to Kern County that his counsel commissioned. *Id.* His counsel “represented that 45 percent of the people responding indicated they had some knowledge of the case due to the media attention,” while approximately 20 percent of those respondents said they had seen the *America’s Most Wanted* reenactment. *Id.*

The trial judge initially said he was “very, very concerned” about the *America’s Most Wanted* program. But the court also stated: “I’m not inclined to grant the motion to change venue.” The judge instead “reserve[d] ruling on” the venue motion, indicating that he wanted to see the responses given by potential jurors during voir dire. The court also “ma[d]e it perfectly clear, but for this reenactment on America’s Most Wanted, I do not think there are grounds to change the venue.” The trial court allowed, however, that it might consider granting requests to strike jurors for cause based on their reactions to the television program.

In conducting voir dire, Bolin’s counsel asked jurors a variety of questions to get a sense of how they may react to the evidence, including prospective jurors’ likely perspectives on the death penalty and their exposure to the *America’s Most Wanted* episodes. Bolin’s counsel challenged for cause every juror who had seen the *America’s Most Wanted* program. The trial court denied these requests. Bolin’s counsel did not use peremptory challenges on every juror who acknowledged having \*807 seen the show. Bolin’s counsel also did not renew the motion to change venue at the close of voir dire. The trial thus took place in Kern County, where the murders occurred.

On direct appeal, Bolin asserted that counsel was incompetent for failing to renew the change of venue motion. The California Supreme Court rejected this argument because counsel’s decision “did not result from ignorance or inadvertence and reflected a reasonable trial strategy.” *Bolin*, 75 Cal.Rptr.2d 412, 956 P.2d at 386. The pretrial publicity, especially from *America’s Most Wanted*, “was a critical focus of the voir dire.”

*Id.* And “[a]lthough many prospective jurors had been exposed to some pretrial publicity, including the segment reenacting the killings, for the most part few recalled the specifics or had formed a resolute impression of defendant’s guilt.” *Id.* The court also found it relevant that the impaneled jurors “all gave assurances they would decide the case based solely on the courtroom evidence.” *Id.*

The California Supreme Court on direct appeal thus concluded that “counsel could well have recognized the effect of the publicity had not been as substantial as feared, especially after an 11-month interim.” *Id.*, 75 Cal.Rptr.2d 412, 956 P.2d at 386–87. This made renewing the venue motion “futile” because the trial court had indicated a willingness to reconsider its tentative denial of the motion only on a showing that an impartial jury could not be seated. *Id.*, 75 Cal.Rptr.2d 412, 956 P.2d at 387. Bolin then reasserted this

ineffective assistance claim again in his state and federal habeas petitions.<sup>3</sup>

## B

The California Supreme Court's rejection of Bolin's ineffective assistance Claim C2 was not objectively unreasonable. Instead, fairminded jurists could conclude that Bolin's counsel was not deficient.

Under *Strickland*'s performance prong, "counsel should be 'strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.'" *Pinholster*, 563 U.S. at 189, 131 S.Ct. 1388 (quoting *Strickland*, 466 U.S. at 690, 104 S.Ct. 2052). This means that "[e]ven under *de novo* review, the standard for judging counsel's representation is a most deferential one."

*Richter*, 562 U.S. at 105, 131 S.Ct. 770. But with AEDPA's overlay, our review is even more forgiving: "[t]he standards created by *Strickland* and § 2254(d) are both 'highly deferential,' and when the two apply in tandem, review is 'doubly' so." *Id.* (citations omitted) (first quoting *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052; and then quoting *Knowles v. Mirzayance*, 556 U.S. 111, 123, 129 S.Ct. 1411, 173 L.Ed.2d 251 (2009)).

In this case, reasonable jurists could conclude that Bolin cannot overcome the strong presumption that his counsel acted reasonably and appropriately in not \*808 renewing the change of venue motion. That is because counsel could have concluded that the motion stood little chance of success and that using peremptory strikes on jurors only to support this likely futile motion would result in striking jurors potentially favorable to Bolin.

In evaluating change of venue motions, California courts consider "the gravity and nature of the crime or crimes, the extent and nature of the pretrial publicity, the size and nature of the community, the status of the victim, the status of the accused, and any indication from the voir dire of prospective and actual jurors that the publicity did in fact have a prejudicial effect." *People v. Coleman*, 48 Cal.3d 112, 255 Cal.Rptr. 813, 768 P.2d 32, 41–42 (1989). Even before the trial court's skeptical comments on the motion to change venue, Bolin faced an uphill battle under the governing legal standards.

Although the crimes were sensational, there is no indication Bolin or the victims were well-known in the community. Kern County's size, perhaps the most important factor in California's change of venue cases, also weighed heavily against Bolin. See *People v. Balderas*, 41 Cal.3d 144, 222 Cal.Rptr. 184, 711 P.2d 480, 497–98 (1985) ("Kern County, with a 1981 population of 405,600, ranked 14th among California's 58 counties in that respect. Cases in which venue changes were granted or ordered on review have usually involved counties with much smaller populations." (citation omitted)). In addition, the



*America's Most Wanted* broadcast was some time in the past by the time of jury selection. See [Coleman](#), 255 Cal.Rptr. 813, 768 P.2d at 43 (“The publicity did not pervade the proceedings so as to give rise to any inference or presumption of prejudice.”).

Bolin’s counsel also could have taken cues from the trial court when it initially reserved ruling on the change of venue motion. Although the trial court had expressed concern about the *America's Most Wanted* episodes, it also indicated it was not inclined to grant the motion. The court wanted to see how potential jurors responded to the issue in voir dire, while making clear that the television show was the only possible basis for changing venue.

But voir dire all but confirmed that any renewed venue motion would fail. Compared to the survey results counsel had commissioned, a similar percentage of jurors at voir dire indicated they had seen or believed they may have seen the *America's Most Wanted* program. But voir dire revealed that those respondents did not necessarily remember much, if anything, of the program a year later. Jurors also gave credible assurances that they would decide the case based only on the evidence presented in court, not based on the reenactment. Having observed the voir dire, the trial court denied defense counsel’s for-cause challenges to jurors that were based solely on jurors having acknowledged seeing the *America's Most Wanted* episode. As the district court reasoned, “it is unlikely that a trial judge who may have just denied a challenge to a juror for cause based on prejudice stemming from publicity will grant a motion to change venue a short time later.” (quoting Jeffrey G. Adachi et al., *California Criminal Law Procedure and Practice* § 15.17 (2013)).

Renewing the change of venue motion also carried considerable risks as well. Under California law, counsel’s failure to exhaust all their peremptory challenges is at the very least a “significant” factor supporting the denial of a renewed motion to change venue. [Coleman](#), 255 Cal.Rptr. 813, 768 P.2d at 43–44; see also [People v. Sommerhalder](#), 9 Cal.3d 290, 107 Cal.Rptr. 289, 508 P.2d 289, 297–98 (1973). Without having exercised all available peremptory challenges, the change of venue motion, if renewed, would have had a limited prospect of success. But using all of \*809 Bolin’s peremptory challenges would have meant striking jurors that counsel thought could be favorable to Bolin, including jurors perceived as less likely to vote for the death penalty. Especially when the venue motion was unlikely to succeed, Bolin’s experienced counsel could have decided that knocking out potentially favorable jurors was not a wise strategy. Under AEDPA, Bolin’s defense lawyers were not required to pursue a change of venue motion at all costs.

Much of Bolin’s briefing has less to do with whether his counsel were constitutionally ineffective by not renewing the motion for a change of venue. Instead, Bolin’s opening brief primarily argues that “at the time voir dire began, no meaningful investigation had been undertaken. As a result, trial counsel had no knowledge of Mr. Bolin’s life experience and social history upon which to base strategic decisions regarding jurors.” Although this

argument relates to voir dire, Bolin does not explain how it relates to the change of venue motion or the *America's Most Wanted* episodes. We explain below why, under AEDPA, Bolin has not shown that counsel's investigation and presentation of mitigating circumstances prejudiced him. To the extent Bolin repackages that argument as support for Claim C2 regarding the change of venue motion, it fails for the reasons we explain below.

In short, Bolin has not shown that it would be objectively unreasonable for the state court to conclude that counsel could, as a matter of strategy, forego a likely quixotic change of venue motion in exchange for trying to secure a jury that would be more favorable to Bolin.

#### IV

We turn next to Claim W2, that Cater acted ineffectively in not seeking a further continuance to develop additional mitigating evidence for the penalty phase. Within this certified claim, the parties have briefed the broader question of whether trial counsel conducted an inadequate investigation into mitigating circumstances.

In connection with Claim W2, Bolin also asks us to expand the certificate of appealability to include the entirety of Claim W. *See* 28 U.S.C. § 2253(c)(2); Ninth Cir. R. 22-1(d), (e). Claim W consists of counsel's alleged "wholesale failure to investigate and prepare for" the penalty phase. Because of the nature of Claim W2, Bolin's arguments under Claims W and W2 largely overlap. And the State's briefing of Claim W2 is already responsive to Bolin's request for an expanded certificate of appealability on Claim W. We grant Bolin's request to expand the certificate of appealability to include Claim W, to the extent of Bolin addressing Claim W in his opening brief. *See White v. Ryan*, 895 F.3d 641, 645 n.1 (9th Cir. 2018) (citing *Browning v. Baker*, 875 F.3d 444, 471 (9th Cir. 2017)).<sup>4</sup>

**\*810** We hold that under AEDPA's deferential standard of review, Bolin has not shown he is entitled to relief under *Strickland* for counsel's investigation and presentation of mitigating evidence at the penalty phase or for counsel's related determination not to seek a further continuance. Although we question whether Bolin could make the required showing given Cater's substantial efforts to develop mitigating evidence, we will assume without deciding that Cater's performance was constitutionally deficient (and that under AEDPA, no reasonable jurist could conclude otherwise). Even so, Bolin cannot show prejudice under AEDPA's deferential standard of review. That is, a fairminded jurist could reasonably conclude that the further investigation and presentation of mitigating evidence Bolin claims should have occurred was not substantially likely to change the outcome. *See, e.g., Kayer*, 141 S. Ct. at 522–23; *Pinholster*, 563 U.S. at 197–98, 131 S.Ct. 1388.

To explain this holding, it is necessary first to recount Cater's investigation of mitigating

evidence. Next, we discuss the penalty phase presentations that both sides made to the jury. We then examine the additional mitigating evidence that Bolin claims his counsel should have discovered and presented. As we will explain, that mitigating evidence either is cumulative of other evidence that counsel did present, or it is inconclusive and insufficiently compelling. A reasonable jurist could also conclude that the new mitigating evidence does not overcome the serious aggravating factors associated with Bolin’s crimes and his history of violent criminal conduct.

Considered as a whole, the record thus shows that at the very least, under AEDPA, Bolin cannot establish *Strickland* prejudice based on Cater’s alleged failure to develop additional mitigating evidence and to seek a further continuance for that purpose.

## A

### 1

We start with Cater’s investigation of mitigating evidence. When the trial judge on December 14, 1990 granted Bolin’s motion to have Soria removed as counsel, Cater was appointed lead counsel for the penalty phase. At that hearing, Cater said that he was “quite familiar with the case, obviously, and somewhat prepared and very much acquainted with the theory of the death penalty presentation,” so he thought he could be ready by January 7, 1991. Thus, the judge granted Cater a continuance of three and a half weeks. On January 7, 1991, after Cater expressed dissatisfaction with the investigatory work done by Soria and Soria’s investigator, Bruce Binns, Cater requested and received another two-week continuance.

Among the more significant documents that Cater received from Soria was a report from Dr. Ronald Markman, who had conducted a psychiatric evaluation of Bolin at Soria’s direction. Dr. Markman had conducted that evaluation on September 22, 1990, and he sent a written report to Soria on November 12, 1990.

Dr. Markman diagnosed Bolin with *polysubstance dependence* and a personality disorder with paranoid, explosive, and antisocial features. But Dr. Markman’s “examination revealed [Bolin] to be fully oriented in all spheres, alert, cooperative and of above normal intelligence with an excellent fund of knowledge.” Dr. Markman also wrote that “[t]here was no evidence of a major mental diso[r]der, thought disorder or *psychosis*, judgment was not impaired and insight into his status was adequate.” The report contains some background life history on Bolin while noting that Bolin was unwilling to provide much information.



Dr. Markman reported that Bolin had “no history of previous psychiatric treatment \*811 or hospitalization.” Bolin “admit[ted] to poly-drug abuse ‘years ago—you name it,’ to include intravenous heroin and cocaine.” He also had “an extended history of daily alcohol use.” Bolin reported to Dr. Markman that he had “consumed a substantial amount of alcohol, both beer and bourbon ‘to calm my nerves’ and smoked cocaine prior” to killing Huffstutler and Mincy. Dr. Markman’s report also discusses Bolin’s “extensive and repeated history of aggressive behavior,” including Bolin’s prior convictions.

When he spoke with Dr. Markman, Bolin claimed he was injured in Vietnam when his boat was hit by a “rocket.” Dr. Markman noted that this claim had “not been corroborated” and that Bolin’s claims about his injury and subsequent discharge were “highly unusual.” (In a much more detailed account of Bolin’s time in Vietnam prepared for the state habeas proceedings, Dr. Matthews did not mention that Bolin was injured in the conflict. Dr. Matthews did report, however, that when Bolin was later stationed in San Diego, he seriously injured his back while working on a ship.)

When it came to other investigative reports and work product, however, Cater determined that the record was lacking. Cater thus undertook substantial efforts to investigate mitigating circumstances that he could raise on Bolin’s behalf. Within two days of Cater being appointed as sole counsel, he and Ruby went to interview Bolin in jail. Bolin told them that he had behaved well when he had been incarcerated previously and had received several commendations from the prison for maintenance work he had done.

When Cater requested a two-week continuance at the January 7, 1991 hearing, Cater told the judge that he had made good progress on the investigation. Ruby had “practically closed down his office” and was “working full time” investigating Bolin’s life history. By that time, Ruby had already traveled to Oklahoma, Chicago, Arizona, and several places in California to meet with potential witnesses.

Among others, Ruby spoke to Mary and Paula (Bolin’s daughters), Pamela Castillo (Bolin’s stepdaughter), Fran and Rosemary (Bolin’s sisters), and various other relatives, including Gary Monto (cousin), Marilyn Perez (cousin), Trina Perez (Marilyn’s daughter), Florence Monto (Gary’s wife), Betty Monto (aunt), Jeremiah Monto (Gary and Florence’s son), Sylvester Monto (uncle), and David Alexander (Bolin’s probation officer in Oklahoma). After the hearing, Ruby (with Cater) went to southern California as part of the investigation. These various meetings yielded considerable information about Bolin’s background and upbringing.

In Chicago in particular, Bolin’s sisters and other relatives “gave [Ruby] a wealth of information on [Bolin’s] background,” and Ruby determined that several relatives would be appropriate witnesses. Ruby learned of the family’s claims that Bolin’s childhood

included physical abuse at the hands of his father William Bolin, and that Bolin spent time bouncing from place to place, including time living on the streets when he was nine or ten years old.

According to Ruby's notes, Bolin's sister Fran told Ruby that when they were growing up, their "father would beat them for nothing." After their parents divorced, Bolin tried living with his father and stepmother. This did not work out because the stepsiblings would blame Bolin for anything they did wrong, and Bolin's father "would then beat Paul until the dad could no longer raise his arms."

Fran did not remember Bolin ever needing to go to a hospital but relayed that one time their father had "hit him and knocked him into the wall," and that Bolin "was out for over an hour from the blow." Bolin "never tried to fight back, he finally just \*812 left home and lived from place to place [wherever] he could. Most of the time the grandmother raised him or at least tried to." According to Ruby's notes, Fran said that Bolin "became an orphan on the streets at age 10 and his first ten years were a living hell."

Rosemary, Bolin's other sister, also told Ruby that her father had physically abused the children and their mother. Rosemary claimed that her father once tried to stab her mother in front of the children. She also recalled that her father beat her with a leather strap, and, as a result, she had trouble with her legs as an adult. Rosemary recalled that Bolin "went to the streets at about age 9." He moved from place to place but mostly lived with his grandmother. When he would try to return home, it ended with Bolin being beaten by his father. Ruby concluded, however, that Rosemary likely would not make a good witness because she would "come across to the jury as one that is better than the rest of the family." Rosemary also expressed some unwillingness to attend the proceedings due to her family obligations.

Ruby further learned that Bolin's living situation became more stable when he was fourteen and his mother married his stepfather, Jim. According to Fran, Jim wanted to "put the family back together." The family moved around with some frequency. The family had been living in Salt Lake City for about a year when Bolin joined the military. Fran did not see Bolin much, if at all, until he came to Chicago after the murders.

Other family members in Chicago conveyed to Ruby their positive recollections of Bolin. For example, Marilyn Perez, Bolin's cousin, told Ruby that Bolin loved his family, and that Bolin had helped perform home renovations for her when he was in Chicago (after the murders). Marilyn's daughter Trina discussed Vietnam with Bolin, and he told her that it was a "horr[i]d place and was not a place for any man to have to be."

From Pamela Castillo, Bolin's stepdaughter, and Mary Bolin, Bolin's daughter, Ruby

obtained information about Bolin's role as a protective parent figure. When Mary was five and Bolin was serving in the Navy, Mary's mother began a relationship with another man. She abandoned her two daughters, leaving it to friends and neighbors to care for them. Bolin eventually obtained custody of Mary and Paula. Ruby's notes indicate that he also spoke with Paula as well. Ruby also learned how Bolin allowed Pamela to come and live with him after Pamela's mother left the country for a new relationship.

In southern California, Cater and Ruby talked to more than twice as many people as Binns, Soria's investigator. They found "several important witnesses," and they were evaluating whether to use them.

## 2

The penalty phase began on January 22, 1991. In addition to emphasizing the murders for which the jury had already convicted Bolin, the State presented evidence of other incidents when Bolin engaged in violent and threatening conduct.

The State first called Kenneth Ross, Bolin's victim on his conviction for attempted voluntary manslaughter, for which Bolin was sentenced to five years in prison. Ross told the jury that in 1981, Bolin shot him in the chest while Ross was having an argument with Bolin's goddaughter, Nyla Olson (now Nyla Ross, Kenneth's wife). Ross testified that the shot Bolin fired "tore up my liver, punctured my diaphra[g]m, front and rear, went through my lung, broke my rib," and that pieces of the bullet were still inside him. Bolin also beat Ross with his rifle after he shot him. As a result of this incident, Ross was hospitalized \*813 for several weeks. Nyla Ross also testified, and she confirmed that Kenneth was unarmed when Bolin shot him.

The State then put on Matthew Spencer. Spencer testified that in 1979, he and his friend Brian Martinez went over to Bolin's house at the invitation of "Becky," who was renting a room from Bolin. Bolin became upset at Spencer's presence in the home and assaulted Spencer with help from a friend, Ricky Balsamico. Balsamico beat Spencer with a stick, and Bolin beat him with a pipe. Bolin was not charged for this conduct.

The State also presented evidence that Bolin sent a threatening letter to his daughter Paula's former boyfriend, Jerry Halfacre. In the letter, which Bolin sent while he was awaiting his double-murder trial, Bolin warned Halfacre that if he saw Bolin's daughter again, Bolin would have him "permanently removed from the face of this Earth."

In her closing argument, the prosecutor emphasized Bolin's callousness for his victims, his failure to take responsibility, and his gravitation toward violence. The prosecutor also

reminded the jury of the crimes for which Bolin was convicted, reiterating Bolin's heartlessness in the killings, including how he left Wilson to die in the mountains.

3

For the defense presentation at the penalty phase, Cater put on eight witnesses: Mary Bolin (Bolin's daughter), Paula Halfacre (Bolin's other daughter), Pamela Castillo (Bolin's former stepdaughter), Nancy Belden (a correctional officer who had observed Bolin's earlier behavior in prison), Fran Bolin (Bolin's sister), Marilyn Perez (Bolin's cousin), Trina Perez (Marilyn's daughter), and Jeremiah Monto (Bolin's first cousin once removed). Through these witnesses, Cater largely focused on eliciting Bolin's positive attributes and redeeming qualities and how Bolin had helped his family. But Cater also had witnesses touch on Bolin's difficult upbringing and military service, albeit briefly, and the incidents of other violent crimes that the State had raised in aggravation.

Bolin's daughters, Mary and Paula, testified that Bolin took them in and cared for them as a single father after his first wife abandoned the girls while Bolin was serving in the Navy. Pamela Castillo, Bolin's stepdaughter, similarly told the jury how Bolin had allowed her to live with him after her mother left the country, even though Bolin and Pamela's mother were no longer married by that point. Pamela recalled how Bolin provided food, shelter, and money for the household, and how he also allowed Pamela's friend, Nyla Olson (later Nyla Ross), to live at the home too. Paula and Pamela both noted Bolin's positive relationships with their own children.

Bolin's daughters filled in other details about Bolin's life. Paula explained the circumstances of Bolin coming to live in his remote mountain cabin, testifying that Bolin had relocated there after Bolin's fiancée, Rhonda, died in a car accident. Mary testified about her father's service in the Navy, including in Vietnam.

Mary Bolin was the only defense witness to testify about the Spencer and Ross incidents. She claimed that Bolin was not the one to strike Spencer and that Bolin was trying to protect her because Spencer was trying to touch her inappropriately and was using drugs in the house. As to the Ross shooting, Mary testified that Kenneth Ross was acting violently toward Nyla and was carrying a stick as a weapon. (The prosecution later cross-examined Mary based on inconsistencies between her accounts of the incidents and the police reports.)

**\*814** Bolin's sister Fran, who is four years younger than Bolin, testified as well. Cater did not ask Fran about the physical abuse she had recounted to Ruby. Fran did, however, tell the jury some of Bolin's life story. When their parents divorced (Fran was then four or five

years old, and Bolin eight or nine), Fran went to live with their grandmother, but Bolin stayed with their father, William Bolin. Fran testified about the difficult relationships Bolin had with both William and Bolin's first stepfather. She also spoke about the general hardship Bolin endured during his childhood, recalling that Bolin sometimes "lived with his friends on the street, in cars."

Fran and other Chicago relatives also emphasized Bolin's good character, telling the jury how, after Bolin returned to Chicago following the murders, he tried to get family members to spend time together, took the lead on home renovation projects, and served as a mentor figure to younger family members. Nancy Belden, a correctional officer assigned to Bolin's housing unit while he was incarcerated for shooting Kenneth Ross, recalled Bolin as a "cooperative inmate" and was unaware of him having caused problems in prison.

In his closing argument, Cater argued that Bolin should be sentenced to life in prison. Cater focused on Bolin's positive attributes, including his military service and how he provided for Mary, Paula, and Pamela after their mothers abandoned them: "This is not a man whose life is not without redemption. He provided a shelter, he provided food, he provided a home and a father to these children, and this is not a man that has sought out and gone and done things that you have [to] execute[ ] him for."

## B

Bolin's principal claim on appeal is that Cater should have sought more time to develop mitigating evidence and that had he done so, Cater would have discovered new evidence that would have led the jury to sentence Bolin to life in prison instead of death. Under AEDPA, we are constrained to disagree. We hold that a reasonable jurist could conclude that a further continuance of the penalty phase, and Cater's discovery and presentation of the additional mitigating evidence Bolin now identifies, was not reasonably likely to have changed the result in Bolin's case.

The reason lies in the "balance of aggravating and mitigating circumstances" that Bolin's case presents. *Strickland*, 466 U.S. at 695, 104 S.Ct. 2052; see also *Pinholster*, 563 U.S. at 198, 131 S.Ct. 1388 (explaining that courts evaluating *Strickland* prejudice must "reweigh the evidence in aggravation against the totality of available mitigating evidence" (quoting *Wiggins v. Smith*, 539 U.S. 510, 534, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003))). The new mitigating evidence that Bolin has developed in connection with his habeas petition is "hardly overwhelming." *Kayer*, 141 S. Ct. at 525 (quoting *Kayer v. Ryan*, 923 F.3d 692, 727 (9th Cir. 2019) (Owens, J., dissenting)). Although that evidence presents Bolin in a more sympathetic light in some respects, it also suffers from a variety of shortcomings. At times, it is variously speculative, double-edged, ambiguous, or otherwise

unpersuasive. In other instances, it is cumulative of evidence and mitigation themes that Cater had presented. Especially when compared to the “undisputedly strong aggravating factor[s],” *id.* (quoting *Kayer*, 923 F.3d at 727 (Owens, J., dissenting)), a reasonable jurist could conclude that the claimed ineffective assistance of counsel during the penalty phase did not prejudice Bolin.

We first address the several areas of allegedly undeveloped mitigating evidence that Bolin identifies. We explain why, taken as a whole, they are insufficiently compelling. \*815 We then turn to the aggravating factors that the State presented.

1

Bolin argues that his counsel should have investigated and presented evidence that primarily consists of the following: (1) Bolin’s possible neurological deficits; (2) his substance abuse prior to the murders; (3) his traumatic childhood; (4) his military service, including his time in Vietnam; (5) his good character, based on Bolin’s role as a protective parent and his good behavior in prison; and (6) expert testimony to synthesize his life history. While we must necessarily address each of these areas individually, our ultimate conclusion turns not only on deficiencies within each category of mitigation evidence, but in all the mitigation theories when considered as a collective whole.

*Neurological deficits.* Bolin claims that his counsel failed to inform the jury that Bolin had “neuropsychological dysfunction localized to the frontal lobes” of his brain, which Bolin attributes to “[h]is numerous [head injuries](#), alcohol abuse, and exposure to neurotoxins on a daily basis for fifteen years, including solvents, petroleum products and lead particles.” According to Bolin, “[b]ecause his frontal lobes have been damaged, [he] has profound impairments in flexibility (the ability to shift or adapt thinking or behavior to changed circumstances) and the ability to inhibit unwanted responses.”

The basis for this theory is the expert declarations of Drs. Khazanov and Matthews. Dr. Khazanov performed a neurological assessment on Bolin and concluded that Bolin exhibited evidence of brain damage, which Dr. Khazanov attributed to potential [head trauma](#) from Bolin’s childhood, exposure to neurotoxins from his time in the Navy and his work as a pipefitter and welder, and his excessive consumption of alcohol. Dr. Khazanov opined that because of his brain damage, Bolin is “prone to confabulate and fill in the large gaps in his memory with incorrect information,” and is further “unable to adequately plan complex actions, learn from his mistakes, or ... shift his thinking or behaviors in response to environmental or verbal cues.”

In his separate report, Dr. Matthews relied on both Bolin’s life history, including childhood

trauma and alleged neurotoxin exposure, and Dr. Khazanov's conclusions, to opine that Bolin "is psychiatrically and neuropsychologically impaired," and that "such deficits were causally related to his behavior at the time of the offenses for which he has been sentenced to death." Dr. Matthews echoed Dr. Khazanov's determination that Bolin "has a tendency to confabulate" and that because of his brain damage, "he unintentionally fills in the gaps with misinformation." Dr. Matthews concluded that based on Bolin's impairments, "at the time of the crime [Bolin] became frightened and suddenly perceived great danger to himself in the actions of Vance Huffstutler, which caused him to believe that he had to defend himself against that danger."

Drs. Khazanov and Matthews conducted their analyses approximately ten years after the murders. And their assessment of Bolin is largely at odds with the conclusions of Dr. Ronald Markman, who evaluated Bolin prior to trial and whose report (which Cater received) concluded that "[t]here was no evidence of a major mental disorder." Even setting these points aside, there are a number of significant shortcomings in Bolin's neurological deficits theory. We need identify only some of them to show that a reasonable jurist could conclude that this theory lacks support and is thus unlikely to have affected the jury's decision.

As an initial matter, while Dr. Khazanov concluded that Bolin's test results were \*816 consistent with [brain injury](#), she acknowledged that Bolin's medications, "underlying depression and anxiety," and possible malingering could affect the results. More importantly, while Drs. Khazanov and Matthews tried to connect Bolin's claimed neurological deficits to childhood trauma and neurotoxin exposure, that connection was speculative, or at least a reasonable jurist could so conclude. *Cf. Leavitt v. Arave*, 646 F.3d 605, 614 (9th Cir. 2011) ("[S]peculative mitigation evidence is not entitled to significant weight.").

Dr. Khazanov suggested that Bolin may have developed [brain injuries](#) from his father's abuse. But she based this on several scars on Bolin's head, a "definite indentation" she identified near a scar site, and one incident in which Bolin's father allegedly threw Bolin against a wall. Dr. Matthews similarly asserted that based on "reports that Paul was knocked unconscious by his father's blows on more than one occasion, it is quite likely that [Bolin's] brain was damaged by his injuries." Dr. Matthews further suggested that Bolin "may have experienced neuropsychological damage in utero before he was born." A reasonable jurist could conclude that opinions such as these fail to draw a sufficient causal connection between Bolin's childhood and his later claimed brain damage. *See Bible v. Ryan*, 571 F.3d 860, 871 (9th Cir. 2009).

The same is true of his alleged neurotoxin exposure. Dr. Khazanov opined that Bolin had been exposed to neurotoxins, such as lead paints, solvents, and fuels, which "may result in



organic brain damage.” Dr. Matthews similarly tried to connect Bolin’s alleged psychological impairments to neurotoxins, including based on his parents working in a Chicago factory where they “were exposed to noxious fumes and vapors.” But as was true with possible brain damage from childhood injuries, a reasonable jurist could conclude that the relationship between Bolin’s alleged mental deficiencies and his (or his family’s) neurotoxin exposure is insufficient—and that it is inconsistent with the lack of any other medical records bearing on this issue.

Finally, a reasonable jurist could conclude that Bolin’s neurological deficits theory is of uncertain relevance to the offenses for which he was convicted. Drs. Khazanov and Matthews linked Bolin’s [brain injuries](#) to his confabulating. But it is unclear how Bolin’s confabulation explains his murdering Huffstuttler and Mincy. Similarly, a reasonable jurist (and jury) could well find the opinions of Bolin’s medical experts unpersuasive given Bolin’s deliberate shooting of three people and his strategic thinking after the murders, when Bolin recreated the scene as a failed drug deal and disabled Wilson’s vehicle to prevent his escape. Although Bolin’s experts have pointed to possible neurological deficiencies attributable to childhood trauma and environmental exposures, “reasonable jurists could debate the extent to which these factors significantly impaired his ability to appreciate the wrongfulness of his conduct or to conform his conduct to the law at the time of the murder.” *Kayer*, 141 S. Ct. at 525.

*Substance abuse at time of murders.* Bolin maintains his counsel should have also argued to the jury that Bolin’s “ingestion of alcohol and cocaine before the crime, along with the many stressors in his life, exacerbated the effects of his deficits and made it even more likely that he would act in response to perceived danger.” Once again, Bolin does not demonstrate prejudice under AEDPA.

As an initial matter, it is not self-evident that under the circumstances of this case, the jury would necessarily regard Bolin’s alleged contemporaneous substance abuse as mitigating. *See, e.g., Pinholster*, 563 U.S. at 201, 131 S.Ct. 1388 (explaining that \*817 some mitigating evidence, such as “more serious substance abuse,” can be a “two-edged sword” because it might cause the jury to conclude the petitioner is “simply beyond rehabilitation” (quoting *Atkins v. Virginia*, 536 U.S. 304, 321, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002))); *Wackerly v. Workman*, 580 F.3d 1171, 1178 & n.1 (10th Cir. 2009) (discussing case law “demonstrat[ing] that substance abuse evidence often can have more aggravating than mitigating effect”); *Clisby v. Alabama*, 26 F.3d 1054, 1056 (11th Cir. 1994) (“[M]any lawyers justifiably fear introducing evidence of alcohol and drug use.”).

Nor is it apparent that a jury would regard an intoxication theory as mitigating alongside Cater’s dominant theory that Bolin was a loving and protective father who cared for others. As the Supreme Court has explained, the prejudicial impact of not presenting certain



potentially mitigating evidence is lessened if that evidence would “undercut” a mitigation theory that counsel did present. *Pinholster*, 563 U.S. at 202, 131 S.Ct. 1388.

Regardless, the evidence that Bolin was under the influence of drugs and alcohol when he killed Huffstutler and Mincy is seemingly based only on Bolin’s own statements to Drs. Markman and Matthews, the latter some ten years after the fact. A reasonable jurist could thus conclude not only that Bolin’s theory of drug and alcohol inducement was not mitigating, but also that it was unsupported.

*Childhood trauma.* We turn next to Bolin’s claim that Cater failed to develop and present evidence about Bolin’s traumatic childhood. The evidence of Bolin’s childhood is set forth most comprehensively in Dr. Matthews’s expert declaration, which describes, among other things, how Bolin’s father William was prone to violent outbursts, including screaming, beating his wife and children, and on one occasion throwing Bolin down the stairs and knocking him unconscious.

We note at the outset that Bolin’s arguments notwithstanding, Cater did investigate Bolin’s childhood by having Roger Ruby, his investigator, speak with Bolin’s sisters, Fran and Rosemary, and other members of Bolin’s extended family. As we discussed above, these interviews yielded information about Bolin’s difficult upbringing, including the physical abuse at the hands of his father. It is thus not clear that a further continuance would have made a material difference in the information Cater was able to obtain.

We also note that though Bolin claims the jury was not told about his childhood, Bolin’s sister Fran did shed some light on it in her testimony. While it was not a dominant theme of Cater’s overall presentation, Fran told the jury about how their parents divorced when the children were young and how neither Bolin’s father nor his first stepfather wanted him in their homes. Fran recalled for jurors how Bolin was “thrown out” of the house and how he lived “on the streets.”

It is true, of course, that Fran did not testify about her father’s physical abuse, which she had disclosed to Ruby during her meeting with him. We acknowledge that the accounts of Bolin’s difficult upbringing are disturbing. And we do not deny their potential value as a mitigation theory. It is possible, of course, that Cater may have had a reasonable strategic judgment in avoiding this topic or not dwelling on Bolin’s childhood further—an issue we do not decide. Regardless, under AEDPA, we cannot conclude that the state court would be objectively unreasonable in determining that further development of this issue was unlikely to have changed the result.

Based on Ruby’s investigation, Bolin’s sister Fran offered the most extensive account \*818 of Bolin’s father’s abuse. But Bolin’s parents divorced when Bolin was eight or nine years

old, and Fran was four years younger than Bolin. The impact of her testimony would thus need to be considered alongside the fact that Fran was only four or five years old when she last lived with Bolin on a regular basis. And while Fran provided Ruby with information about Bolin’s father beating Bolin following their parents’ divorce, it is not apparent Fran and Bolin lived in the same home at this time. In evaluating the prejudice from Fran not testifying about Bolin’s childhood abuse, a reasonable jurist could thus consider that Fran’s base of knowledge may have been limited.

And while Bolin’s other sister, Rosemary, corroborated some of Fran’s account, Rosemary lacked knowledge of the full timeframe, and Ruby otherwise questioned whether she would make a good witness. The prejudice to Bolin of Rosemary not testifying therefore must include the possibility that the jury may have viewed Rosemary unfavorably, as Ruby feared.

Further affecting the potential mitigation value of Bolin’s abusive childhood is the fact that William’s violent conduct, while deplorable, was not so severe that it resulted in Bolin receiving medical attention. The extent of harm that Bolin experienced as a child makes this case analogous to other cases involving either comparable or far more egregious childhood abuse where § 2254 relief was nonetheless denied. *See, e.g., Pinholster*, 563 U.S. at 201, 131 S.Ct. 1388 (denying relief even though petitioner came forward with additional evidence that he was “beaten with fists, belts, and even wooden boards”); *Apelt v. Ryan*, 878 F.3d 800, 815–16 (9th Cir. 2017) (denying relief despite counsel’s failure to present evidence that “Apelt ‘came from a family background of gross poverty, alcoholism and violence which included emotional, physical and sexual abuse’ ”; that Apelt’s “abusive,” “alcoholic” father “beat his wife and children, including Apelt, with an iron rod”; and that Apelt was sexually assaulted as a child); *Cain v. Chappell*, 870 F.3d 1003, 1021 (9th Cir. 2017) (denying relief even though petitioner endured “severe beatings and punishment” during his childhood, including an “untreated head injury”).

William’s violent conduct toward Bolin, we also must note, does not rise nearly to the level of Bolin’s own depraved and lethal conduct. That as well makes Bolin’s difficult upbringing a more uncertain basis for mitigation. *See, e.g., Wong v. Belmontes*, 558 U.S. 15, 21, 27–28, 130 S.Ct. 383, 175 L.Ed.2d 328 (2009) (per curiam) (explaining that while petitioner endured a “ ‘terrible’ childhood” with an “extremely abusive” father, “[i]t is hard to imagine expert testimony and additional facts about [petitioner’s] difficult childhood outweighing the facts of [the] murder” for which he received a death sentence (emphasis omitted)); *Benson v. Chappell*, 958 F.3d 801, 833 (9th Cir. 2020) (explaining that evidence of petitioner’s childhood sexual abuse “does not explain or justify [his] murder of Laura and her three children”); *Samayoa v. Ayers*, 649 F.3d 919, 929 (9th Cir. 2011) (similar).

Further, a reasonable jurist could also discount the prejudicial value of Bolin’s childhood experience based on the amount of time that had elapsed between Bolin’s childhood and his much later murders of Huffstuttler and Mincy. Dr. Matthews, who provided the most extensive account of Bolin’s abuse, focuses largely on the period before Bolin’s parents divorced, when Bolin was eight or nine years old. And while Bolin allegedly continued to experience beatings after that (even though he was evidently spending less time with his father at this point), by the time Bolin \*819 was fourteen he had moved in with his mother and her new husband, James Amsbury (Bolin’s second stepfather). Thereafter, according to Dr. Matthews, Bolin’s “life changed dramatically” because Amsbury “took both Fran and [Bolin] in as though they were his own” and “did his best to be a father to [Bolin].” Meanwhile, Bolin would not murder Huffstuttler and Mincy until he was 42 years old.

A reasonable jurist could conclude that the substantial gap in time between Bolin’s worst childhood experiences and his murders of Huffstuttler and Mincy is another feature of the record that weakens the mitigatory effect of William’s abusive conduct. *See, e.g., Callahan v. Campbell*, 427 F.3d 897, 937 (11th Cir. 2005) (holding that when evidence of physical abuse predated crimes by “several decades,” its mitigation value was “minimal”).

Finally, if Cater had introduced evidence of Bolin’s own childhood abuse, it risked opening the door to rebuttal evidence of Bolin’s domestic abuse of his wife and children. *See Belmontes*, 558 U.S. at 18–19, 24–26, 130 S.Ct. 383 (recognizing counsel’s “grave concerns” that, under “California evidentiary rules,” if his mitigation argument “swept too broadly,” evidence counsel had succeeded in having excluded “would come in for rebuttal”).

The record indicates that Bolin had been arrested for battery of his second wife and for assault with a deadly weapon and child cruelty toward one of his stepdaughters. When asked about the latter, he told his probation officer, “I whipped my stepdaughter’s ass with a belt.” Bolin had also been arrested for assault with a deadly weapon involving one of his stepdaughter’s teenage friends. As Bolin explained, a boy came at him, so he “kicked the shit out of him.” These incidents would have at least provided a counterpoint to Bolin’s own history of abuse as a child. And they would have likely dampened the mitigation impact of Cater’s central theory that Bolin was unworthy of the death penalty because of how he cared for his family. *See Pinholster*, 563 U.S. at 202, 131 S.Ct. 1388.

In short, while Bolin’s violent upbringing may be the most compelling mitigation evidence that Cater did not present, a reasonable jurist could conclude that it is not so compelling, in combination with the other mitigating and aggravating factors, to indicate that it could have changed the result in Bolin’s case.

*Military service.* Bolin also argues that Cater should have developed and presented more

evidence about Bolin's military service. But contrary to the suggestion that the jury was unaware of this aspect of Bolin's life, Cater during the penalty phase peppered his witness questioning with references to Bolin's service in the Navy and Vietnam. The jury heard from Mary and Frances that Bolin had served in the Navy in Vietnam when Mary was a young child. And Cater repeatedly reminded the jury in his closing argument about Bolin's military service in Vietnam and how Bolin had "served his country."

Although Cater could have presented more detail about the specifics of Bolin's experience in the Navy, it is not apparent that this additional information creates a materially different portrait in mitigation. Although Bolin now suggests that his service in Vietnam caused him to develop unidentified mental health problems, including through possible neurotoxin exposure, Bolin's time in Vietnam was short (approximately 6 months).

Bolin does point to some positive reviews from military superiors, his stay in a military hospital for an "anxiety reaction" (prior to going to Vietnam), and the back injury he sustained on a ship after returning from Vietnam. But this further background information does not change our conclusion. We can agree that, like \*820 Bolin's military service generally, these additional details may have additional value in mitigation. Nonetheless, a reasonable jurist could conclude that Bolin identifies nothing in his military service that presents a supported and compelling basis from which the jury would have reached a different conclusion in the penalty phase.

That is especially so considering that the more favorable or sympathetic aspects of Bolin's time in the Navy must be considered alongside other more negative aspects, which the State might have used in rebuttal had Cater dwelled on the issue more. See *Belmontes*, 558 U.S. at 26, 130 S.Ct. 383 (courts must consider evidence "that would have been presented had [the petitioner] submitted the additional mitigation evidence"). Among other things, Dr. Matthew's report discusses how Bolin's stepfather pushed Bolin to join the service, hoping the Navy would straighten Bolin out after he was arrested and put on probation for burglary. Once in the Navy, Bolin had further disciplinary problems, including a court martial, for offenses that included intoxication on duty from "chemicals" and alcohol, unauthorized absence, and use of an "unissued identification card." Bolin also had told a Navy psychiatrist that he wanted to "beat up someone" and reportedly showed hostility to others. That Bolin's military career does not tell a consistently positive story—or even a consistent one—means that a reasonable jurist could determine that more information on Bolin's military service would not have likely changed the jury's decision.

*Good character.* Bolin argues that Cater should have developed and presented additional evidence of his good character, based on Bolin's role as a protective parent and his positive prison adjustment. We need not dwell on this point for long. As we described above, the jury heard considerable testimony about Bolin's role as a protective parent to his daughters

and stepdaughters. Indeed, this was the primary theme of Cater’s presentation to the jury. Additional evidence on this point would have been cumulative, and thus unlikely to affect the result. *See, e.g., Pinholster*, 563 U.S. at 200, 131 S.Ct. 1388 (rejecting *Strickland* claim under AEDPA when “[t]he ‘new’ evidence largely duplicated the mitigation evidence at trial”).

A similar point answers Bolin’s argument that Cater should have said more about Bolin’s ability to adjust to prison life. Cater had already called as a witness Nancy Belden, a correctional officer, and she told the jury that Bolin was cooperative and did not cause problems in custody, agreeing that he was a “model inmate” while he was incarcerated in 1985. Cater used that testimony in his closing to argue that Bolin functioned well in a structured environment, lumping in his time in the Navy. Once again, Bolin has not demonstrated that additional information on his behavior in prison would have altered the result in his case. *See, e.g., id.*

*Expert testimony.* Finally, we consider Bolin’s argument that Cater should have put on expert testimony to support Bolin’s penalty phase defense. Contrary to Bolin’s premise, Cater was not without expert opinion: he had Dr. Markman’s evaluation, which was largely unfavorable. But once again, even assuming Cater was deficient in not consulting further experts and bringing forward expert testimony to synthesize Bolin’s life history, we cannot conclude Bolin has shown prejudice under AEDPA on the facts of this case.

Bolin cites no authority suggesting that a defense lawyer’s determination not to use an expert witness during the penalty phase constitutes *per se* prejudice under *Strickland*. And we are aware of no such authority either, especially in the AEDPA context. Such a rule would be contrary to counsel’s well-established discretion, \*821 within the bounds of reasonable professional judgment, as to whether to use experts. *See Richter*, 562 U.S. at 106–07, 131 S.Ct. 770 (“Rare are the situations in which the ‘wide latitude counsel must have in making tactical decisions’ will be limited to any one technique or approach. ... Here it would be well within the bounds of a reasonable judicial determination for the state court to conclude that defense counsel could follow a strategy that did not require the use of experts ...” (quoting *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052)); *Bonin v. Calderon*, 59 F.3d 815, 834 (9th Cir. 1995) (“[T]he presentation of expert testimony is not necessarily an essential ingredient of a reasonably competent defense.”).

Instead, we must evaluate Bolin’s charge that Cater should have used an expert based on the expert testimony Bolin now proffers and the overall record in this case. For the reasons we have discussed above, the expert testimony that Bolin advanced to the state habeas court—from Drs. Khazanov and Matthews—has limited mitigation value.

Further weakening Bolin’s focus on the lack of expert testimony is that if Bolin had offered



such testimony, the State could have offered its own expert in rebuttal. See *Pinholster*, 563 U.S. at 201, 131 S.Ct. 1388 (psychiatric evidence could have “opened the door to rebuttal by a state expert”); *Belmontes*, 558 U.S. at 25, 130 S.Ct. 383 (explaining that the “ ‘more-evidence-is-better’ approach” “might seem appealing” but carried significant risks of rebuttal evidence in response to “heavyhanded” attempts to “portray [the defendant] in a positive light, with or without experts”).

We need look no further than Dr. Markman, the expert Bolin’s own counsel had retained prior to trial. Dr. Markman evaluated Bolin in 1990, not long after the murders. And his conclusions were not helpful to Bolin’s current theory of [mental impairment](#). In particular, and among other things, Dr. Markman opined that Bolin was “fully oriented in all spheres,” of “above normal intelligence with an excellent fund of knowledge,” with “no evidence of a major mental disorder, thought disorder[,] or [psychosis](#).” Dr. Markman also cited Bolin’s “repeated history of aggressive behavior” while noting that if Bolin had “fabricated” information he provided to Markman, Bolin was “fully aware that he is doing so.”

While Bolin now maintains that Dr. Markman’s evaluation was not translatable for penalty phase purposes and that Markman based his opinions on insufficient information, those arguments misunderstand the relevance of Dr. Markman’s report for purposes of our present analysis. Dr. Markman’s opinions could themselves have had some shortcomings. But they reflect the type of expert opinions that the State could have put on, had Cater put on an expert like Drs. Matthews or Khazanov. That Dr. Markman had evaluated Bolin more contemporaneously with the murders, and was an expert that Bolin’s own counsel had retained, only further underscore the State’s ability to offer its own expert in rebuttal. It would be objectively reasonable for the state habeas court to conclude that under the facts of this case, Bolin was not prejudiced by the lack of expert testimony because the prosecution could have presented an opinion similar to Dr. Markman’s, which was unhelpful to Bolin.

2

Viewed as a collective whole, the additional mitigating evidence Bolin has brought forward in habeas is not inevitably compelling under AEDPA. This on its own would be sufficient to deny relief under [§ 2254](#). \*822 *Pinholster*, 563 U.S. at 202, 131 S.Ct. 1388. But that conclusion is bolstered when the new mitigating evidence is considered alongside the aggravating circumstances that the State presented.

As the Supreme Court has explained, even before the AEDPA overlay, “to establish prejudice” Bolin “must show a reasonable probability that the jury would have rejected a capital sentence after it weighed the entire body of mitigating evidence ... against the entire

body of aggravating evidence.” *Belmontes*, 558 U.S. at 20, 130 S.Ct. 383; *see also Mickey v. Ayers*, 606 F.3d 1223, 1245 (9th Cir. 2010) (explaining that the Supreme Court has “reaffirmed that the facts of the crime play an important role in the prejudice inquiry”). And under AEDPA, Bolin must show even more: that the state habeas court’s reweighing of the aggravating and mitigating circumstances was not merely unpersuasive, but “objectively unreasonable.” *Andrade*, 538 U.S. at 75, 123 S.Ct. 1166. Bolin cannot make this showing.

The crimes that lead to capital convictions often present highly aggravated circumstances. This case is no exception. But if anything, it involves uniquely cruel and unjustified conduct that reflected an appreciable indifference to human life. In an apparent effort to maintain the secrecy of his marijuana grow operation, Bolin shot two men four times each. Mincy implored Bolin to spare him, but Bolin killed him anyway. Bolin took the effort to get a second weapon to use on Huffstuttler’s motionless body after he had already shot him once. And Bolin then elaborately dressed the scene with broken glass, marijuana, and chili, placing a gun in Huffstuttler’s dead hand. Bolin also shot Wilson in the shoulder, hunted for him in the forest, and, when he failed to find him, immobilized Wilson’s vehicle and left Wilson to perish in an unforgiving mountainous terrain. And this is to say nothing of the other past incidents of violent conduct that the State presented involving Kenneth Ross and Matthew Spencer—conduct that resulted in serious injury and, in the case of Ross, could have resulted in death.

Taken as a whole, “[t]he State presented extensive aggravating evidence.” *Pinholster*, 563 U.S. at 198, 131 S.Ct. 1388. A reasonable jurist could easily conclude that the additional mitigating evidence Bolin now proffers was unlikely to have led the jury to choose a different sentence. We thus hold that even if Cater acted deficiently in failing to develop and present more mitigating evidence and in failing to seek additional time for that endeavor, under AEDPA Bolin cannot show he was prejudiced.

## V

Lastly, we address Bolin’s request for new counsel. On two earlier occasions, Bolin filed pro se requests for alternative counsel, and both times we ordered his appointed counsel to respond. Both times, we concluded that his counsel’s response was satisfactory under *Martel v. Clair*, 565 U.S. 648, 132 S.Ct. 1276, 182 L.Ed.2d 135 (2012). Thus, we denied Bolin’s requests.

Since then, Bolin has filed several additional pro se motions requesting alternative counsel and related relief. We have carefully reviewed those filings as well. We deny Bolin’s latest requests. Although Bolin has not prevailed in this appeal, his appointed counsel ably

discharged their duties in representing him before this Court.

\* \* \*

The judgment of the district court is **AFFIRMED**.

**All Citations:** 13 F.4th 797, 2021 Daily Journal D.A.R. 9626

### Footnotes

- <sup>1</sup> For ease of reference, we will use the claim numbering and lettering conventions used in the district court.
- <sup>2</sup> Bolin insists that the California Supreme Court as a matter of state law accepted his allegations as true. But Bolin’s reliance on California pleading rules is inapposite, and his description of California law is in any event incomplete. See *Pinholster*, 563 U.S. at 188 n.12, 131 S.Ct. 1388 (explaining that while the California Supreme Court “generally assumes the allegations in the petition to be true,” it “does not accept wholly conclusory allegations” and “will also ‘review the record of the trial ... to assess the merits of the petitioner’s claims’ ” (quoting *In re Clark*, 5 Cal.4th 750, 21 Cal.Rptr.2d 509, 855 P.2d 729, 742 (1993))).
- <sup>3</sup> The district court held an evidentiary hearing on Claim C2, which included testimony from Cater and Soria. In *Pinholster*, however, the Supreme Court clarified that “review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits.” 563 U.S. at 181, 131 S.Ct. 1388. In other words, “evidence later introduced in federal court is irrelevant to § 2254(d)(1) review.” *Id.* at 184, 131 S.Ct. 1388; see also *id.* at 203, 131 S.Ct. 1388 n.20 (“We are barred from considering the evidence Pinholster submitted in the District Court that he contends additionally supports his claim.”). We thus limit our discussion to the record before the state habeas court. We note, however, that the result would be the same even if we were to consider the additional evidence developed in connection with the federal evidentiary hearing.
- <sup>4</sup> Claim W also includes subparts that Bolin has not briefed. For example, Claim W8 relates to alleged ineffectiveness in not objecting to certain penalty phase jury instructions. By not raising these arguments in his opening brief, Bolin has forfeited them. See *Floyd v. Filson*, 949 F.3d 1128, 1138 n.2 (9th Cir.), cert. denied, — U.S. —, 141 S. Ct. 660, 208 L.Ed.2d 271 (2020); Ninth Cir. R. 22-1(e). We also deny Bolin’s request to expand the certificate of appealability to include whether we should remand under *Martinez v. Ryan*, 566 U.S. 1, 132 S.Ct. 1309,



182 L.Ed.2d 272 (2012). *Martinez* held that “[i]nadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner’s procedural default of a claim of ineffective assistance at trial.” *Id.* at 9, 132 S.Ct. 1309. Bolin has not demonstrated that *Martinez* is relevant here or that he would be entitled to relief under it. Thus, Bolin has not made a “substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003).

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UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

**FILED**

DEC 6 2021

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

PAUL C. BOLIN,

No. 16-99009

Petitioner-Appellant,

D.C. No.

v.

1:99-cv-05279-LJO-SAB

Eastern District of California,

Fresno

RONALD DAVIS, Warden, San Quentin  
State Prison,

ORDER

Respondent-Appellee.

Before: McKEOWN, NGUYEN, and BRESS, Circuit Judges.

The panel unanimously voted to deny the petition for panel rehearing and 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 rehearing en banc (Dkt. No. 113) is

**DENIED.**

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

PAUL C. BOLIN,

Petitioner,

v.

KEVIN CHAPPELL, Warden of San Quentin State Prison,

Respondent.

Case No. 1:99-cv-05279-LJO-SAB

**DEATH PENALTY CASE**

MEMORANDUM AND ORDER (1) DISMISSING WITHOUT PREJUDICE UNEXHAUSTED ALLEGATIONS, (2) DENYING CLAIM "C2" FOLLOWING LIMITED EVIDENTIARY HEARING, (3) DENYING FURTHER RECORD EXPANSION AND EVIDENTIARY HEARING, (4) DENYING RECORD BASED CLAIMS A, B, and D THROUGH FF, (5) DENYING AMENDED PETITION FOR WRIT OF HABEAS CORPUS, and (6) ISSUING CERTIFICATE OF APPEALABILITY FOR CLAIMS C2, I13, L (L1-L4) & W2

CLERK TO VACATE ANY AND ALL SCHEDULED DATES AND SUBSTITUTE RON DAVIS AS RESPONDENT WARDEN AND ENTER JUDGMENT

Petitioner is a state prisoner, sentenced to death, proceeding with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. He is represented in this action by appointed counsel Robert Bacon, Esq. and Brian Abington, Esq. of the Office of the Federal Defender.

Respondent Kevin Chappell<sup>1</sup> is named as Warden of San Quentin State Prison. He is

<sup>1</sup> Pursuant to Fed. R. Civ. P. 25(d), Ron Davis, warden of San Quentin State Prison, is substituted as Respondent in place of his predecessor wardens.

1 represented in this action by Rachele Newcomb, Esq., and Ryan McCarroll, Esq. of the Office of the  
2 California Attorney General.

3 John Lee Holt, a state prisoner, sentenced to death, is a limited purpose intervener at the  
4 evidentiary hearing. He is represented by Jennifer Mann, Esq., of the Office of the Federal Defender.

5 Before the Court for a decision are (1) claim C2, taken under submission following May 14,  
6 2013 limited evidentiary hearing (ECF No. 339), (2) matters reserved for ruling raised in Petitioner’s  
7 motion for evidentiary hearing and expansion of the record (ECF No. 214), and (3) the amended  
8 petition (ECF No. 113), record based claims A, B, and D through FF.<sup>2</sup>

9 **I. BACKGROUND**

10 Petitioner is currently in the custody of the California Department of Corrections and  
11 Rehabilitation pursuant to judgment of the Superior Court of California, County of Kern imposing the  
12 death sentence, following his conviction by jury trial of two counts of first degree murder for which the  
13 multiple murder special-circumstance allegation as to the murders of Vance Huffstuttler and Steve  
14 Mincy was found true. The jury also found Petitioner guilty of one count of attempted first degree  
15 murder of Mr. Jim Wilson, and one count of marijuana cultivation. (CT at 399-400.)<sup>3</sup>

16 On September 19, 1989, Petitioner was charged with the following offenses: the murder of  
17 Steve Mincy, pursuant to California Penal Code § 187 (Count I), the murder of Vance Huffstuttler,  
18 pursuant to California Penal Code § 187 (Count II), the attempted murder of James Wilson, pursuant to  
19 California Penal Code § 664/187 (Count III), and the cultivation of marijuana, in violation of Health  
20 and Safety Code § 11358 (Count IV). (CT at 125-29.) Counts I-III included alleged use of a firearm.  
21 Counts I and II included alleged multiple murder, a special circumstance pursuant to California Penal  
22 Code § 190.2(a)(3). All counts alleged that Petitioner had suffered a prior conviction for a serious  
23 felony.

24

25 <sup>2</sup> The Court previously denied claim C1. (ECF No. 276, at 40:27-28.)

26 <sup>3</sup> Unless otherwise indicated, throughout this order, “CT” refers to the Clerk’s Transcript on Appeal, “RT” to the Reporter’s  
27 Transcript on Appeal, “EH” refers to evidentiary hearing held May 14, 2013, “EH Ex” refers to joint final exhibit at the  
28 evidentiary hearing, “Supp. RT” refers to the Supplemental Reporter’s Transcript on Appeal, “CSC” refers to the California  
Supreme Court, and “SHCP” refers to state habeas corpus petition. Other transcripts are referenced by date. Reference to  
page numbering is to the page numbering in the original document except Bates numbering is used for the CT. Any  
reference to state law is to California law unless otherwise noted.

1 At Petitioner's arraignment on January 16, 1990, defense counsel Charles Soria and George  
2 Peterson were appointed to represent him. (CT at 4.)

3 On March 16, 1990, Petitioner pled not guilty to the charges. (CT at 130.) Trial was set to  
4 begin on October 22, 1990. (CT at 131.)

5 Several months later, Mr. Peterson suffered health issues and became unavailable to work on  
6 the case. (CT at 133-134.)

7 Defense counsel Soria moved to withdraw shortly thereafter (CT at 137-39), citing Mr.  
8 Peterson's departure and Soria's desire for new and different employment. (7/18/90 RT at 3-4.) Mr.  
9 Soria agreed to stay on the case with the appointment of William Cater as second counsel on July 30,  
10 1990. (CT at 203; 7/30/90 RT at 9-10.)

11 Petitioner, on October 12, 1990, moved to change venue because of the airing of two segments  
12 of the television program *America's Most Wanted* re-enacting Petitioner's alleged involvement in the  
13 crime and profiling his subsequent arrest, as well as local broadcast and print media reporting of the  
14 case.<sup>4</sup> (CT at 238-46.) The Court heard argument on November 1, 1990 and reserved the motion until  
15 the conclusion of voir dire. (11/1/90 RT at 2-50.) There was no subsequent ruling on the change of  
16 venue motion. (RT at 1640:28-45:13.)

17 The jury was sworn on December 3, 1990. (CT at 372.)

18 On December 12, 1990, the jury found Petitioner guilty on all counts and enhancements and  
19 found the special circumstance to be true. (CT at 400-09.)

20 On December 13, 1990, prior to a bifurcated trial on Petitioner's prior conviction for attempted  
21 voluntary manslaughter, the Court granted the prosecutor's motion to strike the prior-prison-term  
22 allegation in count IV. (CT at 519-21, 524.) After the bifurcated trial, the jury found true the  
23 allegation of a prior conviction. (Id.)

24 On December 14, 1990, following the guilt phase verdict, the Court granted Petitioner's request  
25 for substitute defense counsel pursuant to People v. Marsden, 2 Cal. 3d 118 (1970), finding a complete  
26 breakdown in the relationship between Mr. Soria and Petitioner (RT at 2297-98), and appointed co-

27  
28 <sup>4</sup> There were two *America's Most Wanted* broadcasts aired on the FOX television network: one on January 7, 1990, and the  
other on January 14, 1990. (See ECF No. 194 at 5 n.5.)

1 counsel Cater to represent Petitioner at the penalty phase. (RT at 2297-2301.)

2 The penalty phase began in January 22, 1991. (CT at 584-89.) The jury returned a verdict of  
3 death on January 24, 1991. (CT at 626.)

4 On February 25, 1991, defense counsel Cater's motion for appointment of independent counsel  
5 to prepare a motion for new trial was denied. (CT at 668; Supp. RT 2/25/91 at 1-8, 15-17; RT 2/25/91  
6 at 9-14.) Mr. Cater did not then move for a new trial. (Supp. RT 2/25/91 at 18-27.) Later that day, the  
7 trial court heard and denied Petitioner's motion to modify the verdict pursuant to Pen. Code § 190.4  
8 and sentenced Petitioner to death on the capital charges. (RT 2/25/91 at 18-27.) The trial court also  
9 sentenced Petitioner to the upper term of nine years for attempted premeditated murder (Count III),  
10 three years with a stayed one-year enhancement for marijuana cultivation (Count IV), two years for the  
11 firearm enhancement pursuant to Pen. Code § 12022.5 and five years for the serious felony  
12 enhancement pursuant to Pen. Code § 667(a). (CT at 668-70; RT 2/25/91 at 24-27.)

13 On June 18, 1998, the California Supreme Court affirmed the judgment and sentence on direct  
14 appeal, as modified on August 12, 1998 upon denial of rehearing. People v. Bolin, 18 Cal. 4th 297  
15 (1998), as modified on denial of reh'g (Aug. 12, 1998).

16 Petition for writ of certiorari was denied by the United States Supreme Court on March 8, 1999.  
17 Bolin v. California, 526 U.S. 1006 (1999).

18 On August 8, 2000, Petitioner filed his federal petition for writ of habeas corpus. On that same  
19 day, Petitioner filed a petition for writ of habeas corpus in the California Supreme Court.

20 The state petition was summarily denied on January 19, 2005, each claim was denied on the  
21 merits, claims E1, E2, I3 (with respect to defense-requested penalty phase instruction No. 9) and L  
22 were denied on procedural grounds as raised and rejected on appeal, see In re Harris, 5 Cal. 4th 813,  
23 824-29 (1993), and (except to the extent of claimed ineffective assistance of appellate counsel) claims  
24 A, B1 (to the extent of alleged trial court error), C, E3, E4, F, H, I1, I2, I3 (except as to defense  
25 requested penalty phase instruction No. 9), and J were also denied on procedural grounds because these  
26 claims could have been but were not raised on appeal, see In re Dixon, 41 Cal. 2d 756, 759 (1953). In  
27 re Bolin, S090684. On that same day, Petitioner filed an amended federal petition alleging violations of  
28 the First, Fifth, Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution, (ECF No. 113),

1 which is the operative pleading.<sup>5</sup>

2 Respondent filed an answer to the amended petition on June 17, 2005, admitting certain  
3 jurisdictional and procedural allegations, asserting procedural defenses, and denying all claims A  
4 through FF. (ECF No. 120.)

5 On September 30, 2005, the Court found all claims in the amended petition to be fully  
6 exhausted. (ECF No. 142 at 4:2-4.)

7 On September 7, 2006, the Court granted Petitioner limited pre-briefing discovery as to  
8 prosecution files including background materials regarding potential jurors; witness Eloy Ramirez;  
9 victim/witness Jim Wilson; and notes of prosecution expert, criminologist Greg Laskowski. (ECF No.  
10 174.)

11 On March 1, 2007, Petitioner filed a memorandum of points and authorities in support of the  
12 petition. (ECF No. 178.)

13 On December 17, 2007, Respondent filed a memorandum of points and authorities in support of  
14 his answer to the amended petition. (ECF No. 194.)

15 On April 15, 2008, Petitioner filed a reply to Respondent's memorandum. (ECF No. 205.)

16 On December 22, 2008, Petitioner requested an evidentiary hearing with respect to claims A,  
17 B2, C, D, F, G, I, J, K, W, Y, BB, CC, DD, and EE. (ECF No. 214.) Therein Petitioner also sought  
18 expansion of the record to include exhibits 52 through 94 not previously submitted, which supplement  
19 the exhibits that were before the state court.

20 On March 19, 2009, Respondent filed his opposition to the request for evidentiary development  
21 and hearing. (ECF No. 232.)

22 On August 7, 2009, Petitioner filed a reply to Respondent's opposition, (ECF No. 235); therein  
23 withdrawing claim CC and the request for evidentiary hearing on claim CC, alleging that lethal  
24 injection is cruel and unusual punishment. (ECF No. 235 at 39:15-16; ECF No. 236.)

25 On April 27, 2012, the Court granted an evidentiary hearing as to claim C2, ineffective  
26 assistance of defense counsel regarding "his trial attorneys' failure to renew their request for a change  
27 of venue on the basis of presumed prejudice occasioned by pretrial publicity." (ECF No. 261 at 54:12-

28 \_\_\_\_\_  
<sup>5</sup> The Court takes judicial notice of the certified state record on appeal.

1 15; ECF No. 276, at 53:4-7.) The Court denied on the merits the request for evidentiary hearing for  
2 “[t]he trial error component of [c]laim C as well as the argument that juror impartiality (*sic*) followed  
3 from *actual* prejudice . . . .” (*Id.*) The Court reserved ruling on the balance of claims requested for  
4 evidentiary hearing. (ECF No. 271 at 2:18-19.)

5 On November 29, 2012, the Court granted Respondent pre-hearing discovery of claim C2 by  
6 authorizing deposition subpoenas duces tecum for attorneys Soria and Cater. (ECF No. 303.)

7 On February 27, 2013, the Court granted the motion to intervene by third party intervenor John  
8 Lee Holt, for the limited purpose of asserting his attorney-client privilege and work product protection  
9 during the testimony of Soria, Howard Varinsky and Bruce Binns at the evidentiary hearing and in any  
10 other proceeding in this case in which such assertion may be necessary. (ECF No. 325.) Mr. Holt was  
11 represented by Messrs. Soria and Peterson when they were appointed to represent Petitioner. (EH RT  
12 at 30:14-31:14, 91:16-17.)

13 The evidentiary hearing took place on May 14, 2013. Claim C2 was taken under submission  
14 following the evidentiary hearing. (ECF No. 339.) Petitioner, at the hearing, requested an evidentiary  
15 hearing on other claims of ineffective assistance. (ECF No. 343 at 16, n.10.)

16 On July 8, 2013, Petitioner filed a post-hearing brief. (ECF No. 343.)

17 On September 3, 2013, Respondent filed a post-hearing brief. (ECF No. 344.)

## 18 **II. STATEMENT OF FACTS**

19 This factual summary is taken from the California Supreme Court’s summary of the facts in its  
20 June 18, 1998 opinion. Pursuant to 28 U.S.C. §§ 2254(d)(2), (e)(1), the state supreme court’s summary  
21 of facts is presumed correct. Petitioner does not present clear and convincing evidence to the contrary;  
22 thus, the Court adopts the factual recitations set forth by the state supreme court. Vasquez v. Kirkland,  
23 572 F.3d 1029, 1031 n.1 (9th Cir. 2009) (“We rely on the state appellate court’s decision for our  
24 summary of the facts of the crime.”).

### 25 **A. Guilt Phase**

26 The crimes occurred Labor Day weekend of 1989, when defendant was living in a small  
27 cabin located in a secluded mountainous area of Walker Basin in rural Kern County.  
28 Vance Huffstutler also lived on the property in a trailer. Together they cultivated  
marijuana defendant had planted nearby. Defendant had taken on Huffstutler as an  
assistant in the marijuana venture and intended to give him a portion of the profits when



1 they sold the crop.

2 On Friday, September 1, Steve Mincy and Jim Wilson drove from Garden Grove to a  
3 campsite owned by Mincy's father, Robert, near Twin Oaks, also in Kern County.  
4 Robert and several other family members and friends had already arrived and were  
5 planning to spend the weekend. The next day, Wilson went for a bicycle ride and then  
6 met Steve Mincy at a bar in Twin Oaks. Mincy was there drinking with several others,  
7 including Vance Huffstuttler; defendant was also among the group. Later, Wilson  
8 returned to the campsite, where he agreed to drive Huffstuttler back to his trailer; Mincy  
9 accompanied them.

10 According to Wilson's trial testimony, the trip to Walker Basin took about 45 minutes in  
11 his truck, including 30 minutes on rough dirt roads leading into defendant's property.  
12 Defendant had already returned to his cabin. Upon arriving, Mincy, Wilson, and  
13 Huffstuttler saw him there with Eloy Ramirez, a friend of defendant's who was blind in  
14 one eye. When they got out of the truck, Huffstuttler took Mincy and Wilson across a  
15 creek bed and showed them numerous marijuana plants under cultivation. Defendant  
16 followed shortly thereafter and confronted Huffstuttler about bringing strangers to the  
17 location. Wilson testified defendant became "pretty agitated" and began arguing with  
18 Huffstuttler. The two returned to the other side of the creek bed toward the cabin, out of  
19 Wilson's view, still arguing. Wilson then heard a gunshot from that direction. A moment  
20 later, he and Mincy saw defendant appear from behind a line of trees holding a revolver  
21 and saying he had "nothing against" them. As Wilson turned and ran, defendant fired a  
22 shot that hit him in the shoulder. He heard several more shots as Mincy begged for his  
23 life.

24 According to Ramirez's testimony, when defendant and Huffstuttler returned across the  
25 creek bed arguing, defendant went into the cabin and came out with a revolver.  
26 Huffstuttler asked, "What are you going to do, shoot me?" Defendant did not respond,  
27 but instead fired one shot at close range. Huffstuttler fell to the ground and did not  
28 move. Defendant then approached Mincy and Wilson and fired several more rounds.  
Back at the cabin, he took a rifle and shot at Huffstuttler's inert body. He also took other  
steps to make the scene appear like the result of a drug deal gone bad. Ramirez refused  
to assist him. When defendant finished, they both left for Southern California.

29 Meanwhile, after traveling all night over the mountainous terrain, Wilson found his way  
30 to a neighboring ranch, where the owner called the sheriff's office. When sheriff's  
31 deputies went to defendant's cabin, they found Huffstuttler's body lying near Wilson's  
32 truck; Mincy's body was in the creek bed in a fetal position. Both had several fatal  
33 gunshot wounds; Huffstuttler had been shot with both a revolver and a rifle. The area  
34 inside and outside the cabin was in disarray with broken bottles and marijuana  
35 paraphernalia as well as some loose marijuana scattered about. The revolver, wiped  
36 clean of fingerprints, was found near Huffstuttler. A knife was found nearby as well.  
37 Spent shell casings and bullets were retrieved from near each body. At trial, Criminalist  
38 Gregory Laskowski determined that grooves in the bullets were consistent with having  
been fired from the .45-caliber weapon found at the scene. He also testified that blood  
spatters around Mincy's body indicated some gunshot wounds had been inflicted while  
he was running and at least one other while he was in a fetal position.

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Despite an extensive search, law enforcement was unable to locate defendant for several months. Authorities eventually arrested him in Chicago, where he had been living with friends and family members. Sheriff’s deputies also traced the whereabouts of Eloy Ramirez to the house of his girlfriend, Patricia Islas, in Covina, where he had gone after the killings. At trial, Ramirez corroborated the description of events recounted by Wilson.

The defense presented no evidence at the guilt phase.

**B. Penalty Phase**

**1. Prosecution Evidence**

At the penalty phase, the prosecution presented evidence of two instances of violent criminal conduct—an unadjudicated assault with great bodily injury of Matthew Spencer and the attempted manslaughter of Kenneth Ross, for which defendant was convicted and sentenced to prison. The prosecution also submitted a threatening letter defendant wrote to Jerry Halfacre while incarcerated awaiting trial. Halfacre had previously had a relationship with defendant’s daughter, Paula, and was the father of her child. Among other things, the letter warned Halfacre not to see Paula again or defendant would have him “permanently removed from the face of this Earth.” Halfacre had given the letter to his probation officer, who transferred it to a Kern County District Attorney investigator.

**2. Defense Evidence**

In addition to testimony that defendant had acted under provocation in the incidents involving Spencer and Ross, the defense presented evidence of his upbringing. Defendant’s parents divorced when he was eight years old, and within a few years neither wanted to care for him. He lived on the street until he was 16 years old when he joined the Navy and went to Vietnam. Defendant’s two daughters testified he had raised them from young ages when their mother abandoned them. Defendant also raised his stepdaughter, Pamela Castillo, after he and her mother were divorced. Other family members and friends recounted how defendant had helped them in various ways.

Bolin, 18 Cal. 4th at 309-11 (1998).

**III. JURISDICTION**

Relief by way of a petition for writ of habeas corpus extends to a person in custody pursuant to the judgment of a state court if the custody is in violation of the Constitution or laws or treaties of the United States. 28 U.S.C. §§ 2241(c)(3), 2254(a); Williams v. Taylor, 529 U.S. 362, 375 (2000). Petitioner asserts that he suffered violations of his rights as guaranteed by the U.S. Constitution. The challenged conviction arises out of Kern County Superior Court, which is located within the

1 jurisdiction of this Court. 28 U.S.C. §§ 2241(d), 2254(a).

2 This action was initiated on March 11, 1999. Because this action was initiated after April 24,  
3 1996, the amendments to 28 U.S.C. § 2254 enacted as part of the Antiterrorism and Effective Death  
4 Penalty Act (AEDPA) apply. Lindh v. Murphy, 521 U.S. 320, 336 (1997); Van Tran v. Lindsey, 212  
5 F.3d 1143, 1148 (9th Cir. 2000), overruled on other grounds by Lockyer v. Andrade, 538 U.S. 63, 71  
6 (2003).

#### 7 **IV. STANDARDS OF REVIEW**

##### 8 **A. Legal Standard - Habeas Corpus**

9 Under AEDPA, relitigation of any claim adjudicated on the merits in state court is barred unless  
10 a petitioner can show that the state court's adjudication of his claim:

11 (1) resulted in a decision that was contrary to, or involved an unreasonable application  
12 of, clearly established Federal law, as determined by the Supreme Court of the United  
13 States; or

14 (2) resulted in a decision that was based on an unreasonable determination of the facts in  
15 light of the evidence presented in the State court proceeding.

16 28 U.S.C. § 2254(d); Harrington v. Richter, 562 U.S. 86, 98 (2011); Lockyer, 538 U.S. at 70-71;  
Williams, 529 U.S. at 413.

17 “[A] state has ‘adjudicated’ a petitioner's constitutional claim ‘on the merits’ for purposes of §  
18 2254(d) when it has decided the petitioner's right to post-conviction relief on the basis of substance of  
19 the constitutional claim advanced, rather than denying the claim on the basis of a procedural or other  
20 rule precluding state court review of the merits.” Brown v. Walker, No. C 09-04663 JSW, 2014 WL  
21 4757804, at \*5 (N.D. Cal. Sept. 24, 2014) (citing Lambert v. Blodgett, 393 F.3d 943, 969 (9th Cir.  
22 2004)).

23 As a threshold matter, this Court must “first decide what constitutes ‘clearly established Federal  
24 law, as determined by the Supreme Court of the United States.’” Lockyer, 538 U.S. at 71 (quoting 28  
25 U.S.C. § 2254(d)(1)). In ascertaining what is “clearly established Federal law,” this Court must look to  
26 the “holdings, as opposed to the dicta, of [the Supreme Court's] decisions as of the time of the relevant  
27 state-court decision.” Williams, 529 U.S. at 412. “In other words, ‘clearly established Federal law’  
28 under § 2254(d)(1) is the governing legal principle or principles set forth by the Supreme Court at the

1 time the state court renders its decision.” Id. In addition, the Supreme Court decision must “squarely  
2 address [] the issue in th[e] case’; otherwise, there is no clearly established Federal law for purposes of  
3 review under AEDPA.” Moses v. Payne, 555 F.3d 742, 754 (9th Cir. 2009) (quoting Wright v. Van  
4 Patten, 552 U.S. 120, 125 (2008)); see also Panetti v. Quarterman, 551 U.S. 930, 949 (2007); Carey v.  
5 Musladin, 549 U.S. 70, 74 (2006).

6 If no clearly established Federal law exists, the inquiry is at an end and the Court must defer to  
7 the state court’s decision. See Carey, 549 U.S. 70; Wright, 552 U.S. at 126; Moses, 555 F.3d at 760.  
8 In addition, the Supreme Court has recently clarified that habeas relief is unavailable in instances where  
9 a state court arguably refuses to extend a governing legal principle to a context in which the principle  
10 should have controlled. White v. Woodall, \_\_\_ U.S. \_\_\_, 134 S. Ct. 1697, 1706 (2014). The Supreme  
11 Court stated: “[I]f a habeas court must extend a rationale before it can apply to the facts at hand,’ then  
12 by definition the rationale was not ‘clearly established at the time of the state-court decision.’” Id.  
13 (quoting Yarborough v. Alvarado, 541 U.S. 652, 666 (2004)).

14 If the Court determines there is governing clearly established Federal law, the Court must then  
15 consider whether the state court’s decision was “contrary to, or involved an unreasonable application  
16 of, [the] clearly established Federal law.” Lockyer, 538 U.S. at 72 (quoting 28 U.S.C. § 2254(d)(1)).  
17 “Under the ‘contrary to’ clause, a federal habeas court may grant the writ if the state court arrives at a  
18 conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court  
19 decides a case differently than [the] Court has on a set of materially indistinguishable facts.” Williams,  
20 529 U.S. at 412-13; see also Lockyer, 538 U.S. at 72. “The word ‘contrary’ is commonly understood to  
21 mean ‘diametrically different,’ ‘opposite in character or nature,’ or ‘mutually opposed.’” Williams, 529  
22 U.S. at 405 (quoting Webster’s Third New International Dictionary 495 (1976)). “A state-court  
23 decision will certainly be contrary to [Supreme Court] clearly established precedent if the state court  
24 applies a rule that contradicts the governing law set forth in [Supreme Court] cases.” Id.

25 “Under the ‘reasonable application clause,’ a federal habeas court may grant the writ if the state  
26 court identifies the correct governing legal principle from [the] Court’s decisions but unreasonably  
27 applies that principle to the facts of the prisoner’s case.” Williams, 529 U.S. at 413. “[A] federal court  
28 may not issue the writ simply because the court concludes in its independent judgment that the relevant

1 state court decision applied clearly established federal law erroneously or incorrectly. Rather, that  
2 application must also be unreasonable.” Id. at 411; see also Lockyer, 538 U.S. at 75-76. “A state  
3 court’s determination that a claim lacks merit precludes federal habeas relief so long as fair-minded  
4 jurists could disagree on the correctness of the state court’s decision.” Richter, 562 U.S. at 101, (citing  
5 Yarborough, 541 U.S. at 664). The Supreme Court stated:

6  
7 As a condition for obtaining habeas corpus from a federal court, a state prisoner must  
8 show that the state court’s ruling on the claim being presented in federal court was so  
lacking in justification that there was an error well understood and comprehended in  
existing law beyond any possibility for fair-minded disagreement.

9 Id. at 101-05. In other words, so long as fair-minded jurists could disagree on the correctness of the  
10 state courts decision, the decision cannot be considered unreasonable. Id. at 98-99. In applying this  
11 standard, “a habeas court must determine what arguments or theories supported . . . or could have  
12 supported the state court’s decision; and then it must ask whether it is possible fair-minded jurists could  
13 disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the  
14 Supreme Court].” Id. at 101-03. This objective standard of reasonableness applies to review under  
15 both subsections of 28 U.S.C. § 2254(d). Hibbler v. Benedetti, 693 F.3d 1140, 1146-47 (9th Cir. 2012).  
16 If the Court determines that the state court decision is objectively unreasonable, and the error is not  
17 structural, habeas relief is nonetheless unavailable unless the error had a substantial and injurious effect  
18 on the verdict. Brecht v. Abrahamson, 507 U.S. 619, 637 (1993).

19 Petitioner has the burden of establishing that the decision of the state court is contrary to or  
20 involved an unreasonable application of United States Supreme Court precedent. Baylor v. Estelle, 94  
21 F.3d 1321, 1322 (9th Cir. 1996). Although only Supreme Court law is binding on the states, Ninth  
22 Circuit precedent remains relevant persuasive authority in determining whether a state court decision is  
23 objectively unreasonable. LaJoie v. Thompson, 217 F.3d 663, 669 n.6 (9th Cir. 2000); see also  
24 Duhaime v. Ducharme, 200 F.3d 597, 600-01 (9th Cir. 1999).

25 The AEDPA requires considerable deference to the state courts. “[R]eview under § 2254(d)(1)  
26 is limited to the record that was before the state court that adjudicated the claim on the merits,” and  
27 “evidence introduced in federal court has no bearing on 2254(d)(1) review.” Cullen v. Pinholster, 563  
28 U.S. 170, 180-85 (2011)). “Factual determinations by state courts are presumed correct absent clear

1 and convincing evidence to the contrary.” Miller-El v. Cockrell, 537 U.S. 322, 340 (2003) (citing 28  
2 U.S.C. § 2254(e)(1)). However, a state court’s factual finding is not entitled to deference if the relevant  
3 state court record is unavailable for the federal court to review. See Townsend v. Sain, 372 U.S. 293,  
4 319 (1963), overruled on other grounds by Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992).

5 If a petitioner satisfies either subsection (1) or (2) of § 2254 for a claim, then the federal court  
6 considers that claim de novo. Panetti, 551 U.S. at 953 (when § 2254(d) is satisfied, “[a] federal court  
7 must then resolve the claim without the deference AEDPA otherwise requires”); Frantz v. Hazey, 533  
8 F.3d 724, 737 (9th Cir. 2008).

9 In this case, many of Petitioner’s claims were raised and rejected by the California Supreme  
10 Court on direct appeal. However, many of his claims were raised in his state habeas petition to the  
11 California Supreme Court, and summarily denied on the merits. In such a case where the state court  
12 decision is unaccompanied by an explanation, “the habeas petitioner’s burden still must be met by  
13 showing there was no reasonable basis for the state court to deny relief.” Richter, 562 U.S. at 98. The  
14 Supreme Court stated that “a habeas court must determine what arguments or theories supported or . . .  
15 *could have supported*, the state court’s decision; and then it must ask whether it is possible fair-minded  
16 jurists could disagree that those arguments or theories are inconsistent with the holding in a prior  
17 decision of [the Supreme] Court.” Id. at 101-03 (emphasis added). Petitioner bears “the burden to  
18 demonstrate that ‘there was no reasonable basis for the state court to deny relief.’” Walker v. Martel,  
19 709 F.3d 925, 939 (9th Cir. 2013) (quoting Richter, 562 U.S. at 98). “Crucially, this is not a de novo  
20 review of the constitutional question,” id., as “even a strong case for relief does not mean the state  
21 court’s contrary conclusion was unreasonable.” Id. (quoting Richter, 562 U.S. at 102); see also Murray  
22 v. Schriro, 745 F.3d 984, 998 (9th Cir. 2014). When reviewing the California Supreme Court’s  
23 summary denial of a petition, this Court must consider that the California Supreme Court’s summary  
24 denial of a habeas petition on the merits reflects that court’s determination that:

25 [T]he claims made in th[e] petition do not state a prima facie case entitling the petitioner to  
26 relief. It appears that the court generally assumes the allegations in the petition to be true, but  
27 does not accept wholly conclusory allegations, and will also review the record of the trial ... to  
assess the merits of the petitioner’s claims.

28 Pinholster, 563 U.S. at 188; see also Johnson v. Williams, 133 S. Ct. 1088, 1094-96 (2013) (holding



1 that even where the state court does not separately discuss a federal claim there is a presumption that  
2 that state court adjudicated the federal claim on the merits). Accordingly, if this Court finds Petitioner  
3 has unarguably presented a prima facie case for relief on a claim, the state court's summary rejection of  
4 that claim would be unreasonable. See e.g., Taylor v. Maddox, 366 F.3d 992, 1000 (9th Cir. 2004);  
5 Nunes v. Mueller, 350 F.3d 1045, 1054-55 (9th Cir. 2003).

6 For any habeas claim that has not been adjudicated on the merits by the state court, the federal  
7 court reviews the claim de novo without the deference usually accorded state courts under 28 U.S.C. §  
8 2254(d)(1). Chaker v. Crogan, 428 F.3d 1215, 1221 (9th Cir. 2005); Pirtle v. Morgan, 313 F.3d 1160,  
9 1167 (9th Cir. 2002). In such instances, however, the provisions of 28 U.S.C. § 2254(e) still apply.  
10 Pinholster, 563 U.S. at 185 ("Section 2254(e)(2) continues to have force where § 2254(d)(1) does not  
11 bar federal habeas relief."); Pirtle, 313 F.3d at 1167-68 (stating that state court findings of fact are  
12 presumed correct under § 2254(e)(1) even if legal review is de novo).

#### 13 **V. PROCEDURAL BARS**

14 Some of Petitioner's claims were alternatively denied by the California Supreme Court as  
15 procedurally barred. As to those claims, Respondent has invoked the independent state ground  
16 doctrine, pursuant to which a federal court will not review a question of federal law decided by a state  
17 court "if the decision of that court rests on a state law ground that is independent of the federal question  
18 and adequate to support the judgment." Vang v. Nevada, 329 F.3d 1069, 1072 (9th Cir. 2003) (quoting  
19 Coleman v. Thompson, 501 U.S. 722, 729 (1991)).

20 Since "cause and prejudice" can excuse a procedurally defaulted claim, Smith v. Baldwin, 510  
21 F.3d 1127, 1139 (9th Cir. 2007), (quoting Coleman, 501 U.S. at 750), and "prejudice" essentially  
22 requires a merits analysis, the Court will proceed to the merits of claims found to be procedurally  
23 defaulted without determining whether the state procedural default is adequate and independent to bar  
24 relief in federal court. Id., (quoting Coleman, 501 U.S. 732-35). A district court may exercise  
25 discretion to proceed to the merits in advance of litigation of procedural default. See Franklin v.  
26 Johnson, 290 F.3d 1223, 1232 (9th Cir. 2002) (courts empowered to reach the merits if on their face  
27 clearly not meritorious despite asserted procedural bar); Bell v. Cone, 543 U.S. 447, 451 n.3 (2005) (an  
28 application for habeas corpus may be denied on the merits even if unexhausted in state court); Loggins



1 v. Thomas, 654 F.3d 1204, 1215 (11th Cir. 2011) (relief may be denied on the merits where petition is  
2 clearly not meritorious despite asserted procedural bar).

### 3 **VI. LIMITED EVIDENTIARY HEARING**

4 Petitioner alleges in claim C2 that defense counsel was ineffective for failing to renew the  
5 October 12, 1990 change of venue motion (CT at 238-46) following voir dire of the jury and in spite of  
6 alleged inflammatory pretrial publicity and alleged lack of impartiality among the prospective jurors.  
7 (ECF No. 113 at 16-38; ECF No. 178 at 43-63.)

8 Petitioner raised this same claim on direct appeal. (Appellant's Opening Brief, "AOB", at 11-  
9 25.) The California Supreme Court denied the claim as procedurally barred because defense counsel  
10 did not renew the motion to change venue or seek a definitive ruling. Bolin, 18 Cal. 4th at 312. That  
11 court also rejected the claim on the merits. See Id. at 312-14.

12 Petitioner raised the claim again in his state habeas corpus petition (SHCP at 53-89), which the  
13 California Supreme Court again rejected. (CSC Order Den. Pet. Habeas Corpus.)

14 Petitioner supported the venue motion with: the *America's Most Wanted* program, both the  
15 original re-enactment of the crime and the follow-up segment on Petitioner's arrest (ECF No. 214, EH  
16 Ex. 54); a defense-commissioned Community Attitude Survey (ECF No. 214, EH Ex. 52; see also  
17 11/1/90 RT at 3-28); a folder of newspaper clippings and videotapes (ECF No. 214, EH Ex. 53; CT at  
18 332); and a local News 29 broadcast about the role of *America's Most Wanted* in Petitioner's arrest.  
19 (CT 332; 11/1/90 RT at 28.)

20 Petitioner offered, for prevailing professional norms, the 1989 *ABA Guidelines for the*  
21 *Appointment and Performance of Counsel in Death Penalty Cases* ("ABA Guidelines"); the 1987  
22 National Legal Aid and Defender Association (NLADA) *Standards for the Appointment of Counsel in*  
23 *Death Penalty Cases*; excerpts from the *California Death Penalty Defense Manual* (1986 through  
24 1989) regarding jury selection as well as pretrial motions for change of venue; and the declaration of  
25 Strickland expert James S. Thomson. (ECF No. 214, EH Ex.'s 57, 58, 59, 60, and 72.) For evidence  
26 regarding the performance of defense counsel, he offers the declarations of counsel Soria and Cater,  
27 and expert Thomson. (Id., EH Ex.'s 65, 66, and 72.)

28 Petitioner argued that his survey showed that 45 percent of Kern County residents surveyed

1 were familiar with the case. (11/1/90 RT at 21:27-22:2.) Petitioner requested that, if the change of  
2 venue motion was not granted, those potential jurors who had seen the *America's Most Wanted*  
3 reenactment be excused for cause without even participating in voir dire. (11/1/90 RT at 22:25-26.)

4 Respondent countered that only approximately 15 percent of the Kern County residents  
5 surveyed had seen the *America's Most Wanted* reenactment (11/1/90 RT at 24:26-25:2) and that only a  
6 small portion of those felt swayed by seeing it (*id.*), such that Petitioner had not shown he could not get  
7 a fair trial in Kern County. (11/1/90 RT at 25:10-12.)

8 The trial judge took the motion under consideration (RT 11/1/90, at 28:16-19, 50:6-24),  
9 informing defense counsel that he was not inclined to grant the motion to change venue but that he was  
10 "very, very concerned about that program. . . ." (11/1/90 RT at 28.) The court "reserve[d] ruling" on  
11 the venue motion (11/1/90 RT at 50:6-18) because it wanted:

12 [T]o see first of all how many prospective run-ins we get who actually have seen this  
13 video and then I would like to take a few of those and I realize you and Mr. Cater  
14 [defense counsel] would have a great many question that may not be necessary and see  
15 what their general reaction is . . . [¶] [I]f there are general reactions, what I think there is,  
I think I might be inclined to give a blanket for cause." (11/1/90 RT at 50:8-16.)

16 The trial court then stated that:

17 "Let me just make a finding, I think I did this morning, but to make it perfectly clear, but  
18 for this re-enactment on *America's Most Wanted*, I do not think there are grounds to  
19 change the venue on any of the criteria that we have before us concerning that. That's  
the big issue. Fair enough?

20  
21 (11/1/90 RT at 50:19-24.)

22 Defense counsel never raised the venue issue again, and the trial court made no further ruling on  
23 it. (RT at 1640:28-45:13.) Respondent argues the motion was impliedly denied when the jury was  
24 sworn and the prosecution's opening statement began. (*Id.*)

25 **A. Clearly Established Law**

26 **1. Ineffective Assistance of Counsel**

27 The Sixth Amendment right to effective assistance of counsel, applicable to the states through  
28 the Due Process Clause of the Fourteenth Amendment, applies through the sentencing phase of a trial.

1 U.S. Const. amend. VI; U.S. Const. amend. XIV, § 1; Gideon v. Wainwright, 372 U.S. 335, 343-45  
2 (1963); Silva v. Woodford, 279 F.3d 825, 836 (9th Cir. 2002); Murray, 745 F.3d at 1010-11.

3 The source of clearly established federal law for ineffective assistance of counsel claims is  
4 Strickland v. Washington. 466 U.S. 668 (1984). In a petition for writ of habeas corpus alleging  
5 ineffective assistance of counsel, the court must consider two factors. Richter, 562 U.S. at 104;  
6 Strickland, 466 U.S. at 687; Lowry v. Lewis, 21 F.3d 344, 346 (9th Cir. 1994). First, the petitioner  
7 must show that counsel’s performance was deficient, requiring a showing that counsel made errors so  
8 serious that he or she was not functioning as the “counsel” guaranteed by the Sixth Amendment.  
9 Strickland, 466 U.S. at 687. More specifically, the petitioner must show that “counsel’s representation  
10 fell below an objective standard of reasonableness,” and must identify counsel’s alleged acts or  
11 omissions that were not the result of reasonable professional judgment considering the circumstances.  
12 Richter, 562 U.S. at 104, (citing Strickland, 466 U.S. at 688); accord United States v. Quintero-Barraza,  
13 78 F.3d 1344, 1348 (9th Cir. 1995). Petitioner must show that counsel’s errors were so egregious as to  
14 deprive defendant of a fair trial, which Strickland defines as “one whose result is reliable.” 466 U.S. at  
15 688. Judicial scrutiny of counsel’s performance is highly deferential, and the habeas court must guard  
16 against the temptation “to second-guess counsel’s assistance after conviction or adverse sentence.” Id.  
17 at 689. Instead, the habeas court must make every effort “to eliminate the distorting effects of  
18 hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct  
19 from counsel’s perspective at the time.” Id.; see also Richter, 562 U.S. at 106-08. A court indulges a  
20 “‘strong presumption’ that counsel’s representation was within the ‘wide range’ of reasonable  
21 professional assistance.” Richter, 562 U.S. at 104 (quoting Strickland, 466 U.S. at 687); accord  
22 Sanders v. Ratelle, 21 F.3d 1446, 1456 (9th Cir. 1994). This presumption of reasonableness means that  
23 not only does the court “give the attorneys the benefit of the doubt,” but the court must also  
24 “affirmatively entertain the range of possible reasons [defense] counsel may have had for proceeding as  
25 they did.” Pinholster, 563 U.S. at 196.

26 The Supreme Court has “declined to articulate specific guidelines for appropriate attorney  
27 conduct and instead ha[s] emphasized that “[t]he proper measure of attorney performance remains  
28 simply reasonableness under prevailing professional norms.” Wiggins v. Smith, 539 U.S. 510, 521

1 (2003) (quoting Strickland, 466 U.S. at 688). However, “general principles have emerged regarding  
2 the duties of criminal defense attorneys that inform [a court’s] view as to the ‘objective standard of  
3 reasonableness’ by which [a court must] assess attorney performance, particularly with respect to the  
4 duty to investigate.” Summerlin v. Schriro, 427 F.3d 623, 629 (2005). “[S]trategic choices made after  
5 thorough investigation of law and facts relevant to plausible options are virtually unchallengeable.”  
6 Strickland, 466 U.S. at 690. However,

7  
8 [S]trategic choices made after less than complete investigation are reasonable precisely  
9 to the extent that reasonable professional judgments support the limitations on  
10 investigation. In other words, counsel has a duty to make reasonable investigations or to  
11 make a reasonable decision that makes particular investigations unnecessary. In any  
12 ineffectiveness case, a particular decision not to investigate must be directly assessed for  
13 reasonableness in all the circumstances, applying a heavy measure of deference to  
14 counsel’s judgments.

15 Wiggins, 539 U.S. at 521-22, (quoting Strickland, 466 U.S. at 690–91); see also Thomas v. Chappell,  
16 678 F.3d 1086, 1104 (9th Cir. 2012) (counsel’s decision not to call a witness can only be considered  
17 tactical if he had “sufficient information with which to make an informed decision”); Reynoso v.  
18 Giurbino, 462 F.3d 1099, 1112–1115 (9th Cir. 2006) (counsel’s failure to cross-examine witnesses  
19 about their knowledge of reward money cannot be considered strategic where counsel did not  
20 investigate this avenue of impeachment); Jennings v. Woodford, 290 F.3d 1006, 1016 (9th Cir. 2002)  
21 (counsel’s choice of alibi defense and rejection of mental health defense not reasonable strategy where  
22 counsel failed to investigate possible mental defenses).

23 Second, the petitioner must demonstrate prejudice, that is, he must show that “there is a  
24 reasonable probability that, but for counsel’s unprofessional errors, the result . . . would have been  
25 different.” Strickland, 466 U.S. at 694. “It is not enough ‘to show that the errors had some conceivable  
26 effect on the outcome of the proceeding.’” Richter, 562 U.S. at 104, (quoting Strickland, 466 U.S. at  
27 693). “Counsel’s errors must be ‘so serious as to deprive the defendant of a fair trial, a trial whose  
28 result is reliable.’” Richter, 562 U.S. at 104 (quoting Strickland, 466 U.S. at 687). Under this standard,  
the court asks “whether it is ‘reasonably likely’ the result would have been different.” Richter, 562 U.S.  
at 112 (quoting Strickland, 466 U.S. at 696). That is, only when “[t]he likelihood of a different result  
[is] substantial, not just conceivable,” id., has the defendant met Strickland’s demand that defense

1 errors were “so serious as to deprive the defendant of a fair trial.” Id. at 103-05 (quoting Strickland,  
2 466 U.S. at 687). A court need not determine whether counsel’s performance was deficient before  
3 examining the prejudice suffered by the petitioner as a result of the alleged deficiencies. Strickland,  
4 466 U.S. at 697. Since the defendant must affirmatively prove prejudice, any deficiency that does not  
5 result in prejudice must necessarily fail.

6 Under AEDPA, the court does not apply Strickland de novo. Rather, the court must determine  
7 whether the state court’s application of Strickland was unreasonable. Richter, 562 U.S. at 100-101.  
8 Establishing that a state court’s application of Strickland was unreasonable under 28 U.S.C. § 2254(d)  
9 is very difficult. Richter, 562 U.S. at 102 (on deferential § 2254(d) review, relief is granted only for  
10 “extreme malfunctions” in the state criminal justice system, not for ordinary errors that can be corrected  
11 on appeal).

12 Since the standards created by Strickland and § 2254(d) are both “highly deferential”, Richter,  
13 562 U.S. at 105 (quoting Strickland, 466 U.S. at 689), “when the two apply in tandem, review is  
14 ‘doubly’ so.” Id. (quoting Knowles v. Mirzayance, 556 U.S. 111, 123 (2009)). Further, because the  
15 Strickland rule is a “general” one, courts have “more leeway . . . in reaching outcomes in case-by-case  
16 determinations” such that the range of reasonable applications is substantial. Id. at 123; see also Premo  
17 v. Moore, 562 U.S. 115, 122 (2011) (citing Strickland, 466 U.S. at 689-90) (“[T]he Strickland standard  
18 must be applied with scrupulous care, lest ‘intrusive post-trial inquiry’ threaten the integrity of the very  
19 adversary process the right to counsel is meant to serve.”).

20 Notwithstanding the foregoing, in issuing its decision following the limited evidentiary hearing,  
21 the Court “reviews de novo the evidence elicited through discovery and at the evidentiary hearing in  
22 these proceedings and is no longer constrained by the limitations imposed by § 2254(d).” Williams v.  
23 Davis, No. CV 00-10637 DOC, 2016 WL 1254149, at \*8 (C.D. Cal. Mar. 29, 2016) (citing Frantz, 533  
24 F.3d at 737) (“In sum, where the analysis on federal habeas, in whatever order conducted, results in the  
25 conclusion that § 2254(d)(1) is satisfied, then federal habeas courts must review the substantive  
26 constitutionality of the state custody de novo.”); accord Williams v. Woodford, 859 F. Supp. 2d 1154,  
27 1161 (E.D. Cal. 2012) (Kozinski, J., sitting by designation).

28 **2. Change of Venue**

1 The Sixth Amendment secures to criminal defendants the right to trial by an impartial jury.  
2 Skilling v. United States, 561 U.S. 358, 377-78 (2010); Irvin v. Dowd, 366 U.S. 717, 722 (1961). The  
3 Constitution further provides that the trial shall occur “in the State where the . . . Crimes . . . have been  
4 committed.” Art. III, § 2, cl. 3; see also U.S. Const., Amend. 6 (right to trial by “jury of the State and  
5 district wherein the crime shall have been committed”). “The Constitution’s place-of-trial  
6 prescriptions, however, do not impede transfer of the proceeding to a different district at the  
7 defendant’s request if extraordinary local prejudice will prevent a fair trial—a ‘basic requirement of  
8 due process.’” Skilling, 561 U.S. at 378.

9 Nevertheless, “juror impartiality, we have reiterated, does not require ignorance.” Skilling, 561  
10 U.S. at 381 (citing Irvin, 366 U.S. at 722) (jurors are not required to be “totally ignorant of the facts and  
11 issues involved”; “scarcely any of those best qualified to serve as jurors will not have formed some  
12 impression or opinion as to the merits of the case.”); Reynolds v. United States, 98 U.S. 145, 155-156  
13 (1879) (“[E]very case of public interest is almost, as a matter of necessity, brought to the attention of all  
14 the intelligent people in the vicinity, and scarcely any one can be found among those best fitted for  
15 jurors who has not read or heard of it, and who has not some impression or some opinion in respect to  
16 its merits.”).

17 To merit relief for violation of his due process rights due to pretrial publicity, petitioner must  
18 demonstrate that the case is one in which prejudice is presumed, or he must demonstrate actual  
19 prejudice. Skilling, 561 U.S. at 379, 385.

20 Under California law, “[a] motion for change of venue or continuance shall be granted  
21 whenever it is determined that because of the dissemination of potentially prejudicial material, there is  
22 a reasonable likelihood that in the absence of such relief, a fair trial cannot be had.” Maine v. Superior  
23 Court, 68 Cal. 2d 375, 383 (1968); (see CT at 257). The factors to be considered in granting or denying  
24 a motion for change of venue are: “1) the nature and gravity of the offense, 2) the size and nature of the  
25 community, 3) the status of the victim, 4) the status of the defendant, 5) the nature and extent of the  
26 publicity.” Martinez v. Superior Court, 29 Cal. 3d 574, 578 (1981); (see CT at 242, 257).

27 **a. Presumed Prejudice**

28 A presumption of prejudice is “rarely invoked and only in extreme situations.” United States v.

1 McVeigh, 153 F.3d 1166, 1181 (10th Cir. 1998), partially overruled on other grounds by Hooks v.  
2 Ward, 184 F.3d 1206, 1227 (10th Cir. 1999). The Supreme Court has determined that pretrial publicity  
3 so manifestly tainted a criminal prosecution that prejudice must be presumed in only three cases:  
4 Rideau v. Louisiana, 373 U.S. 723 (1963); Estes v. Texas, 381 U.S. 532 (1965); and Sheppard v.  
5 Maxwell, 384 U.S. 333 (1966).

6 “The foundation precedent is Rideau.” Skilling, 561 U.S. at 379. In Rideau, the case turned on  
7 an actual filmed confession broadcast to the entire community. 373 U.S. at 724. “What the people [in  
8 the community] saw on their television sets,” the Supreme Court observed, “was Rideau, in jail,  
9 flanked by the sheriff and two state troopers, admitting in detail the commission of the robbery,  
10 kidnapping, and murder.” Id. at 725. “[T]o the tens of thousands of people who saw and heard it,” the  
11 Supreme Court explained, the interrogation “in a very real sense was Rideau’s trial—at which he  
12 pleaded guilty.” Id. at 726. The Supreme Court therefore “d[id] not hesitate to hold, without pausing  
13 to examine a particularized transcript of the voir dire,” that “[t]he kangaroo court proceedings” trailing  
14 the televised confession violated due process. Id. at 726–727.

15 In the two cases to follow Rideau, the analyses and holdings turned on the massive media  
16 interference with court proceedings and the constant and pervasive media coverage during trial. See  
17 Skilling, 561 U.S. at 379–80. In Estes, “extensive publicity before trial swelled into excessive exposure  
18 during preliminary court proceedings as reporters and television crews overran the courtroom and  
19 ‘bombard[ed] . . . the community with the sights and sounds of the pretrial hearing. The media’s  
20 overzealous reporting efforts, we observed, ‘led to considerable disruption’ and denied the ‘judicial  
21 serenity and calm to which petitioner was entitled.’” Id. (quoting Estes, 381 U.S. at 536). In Sheppard,  
22 the Supreme Court noted that “bedlam reigned at the courthouse during the trial and newsmen took  
23 over practically the entire courtroom,” thrusting jurors “into the role of celebrities.” 384 U.S. at 353,  
24 355. Pretrial publicity consisted of “months [of] virulent publicity about [the defendant] and the  
25 murder.” Id. at 354. Ultimately, the Supreme Court “upset the murder conviction because a ‘carnival  
26 atmosphere’ pervaded the trial.” Skilling, 561 U.S. at 380 (quoting Sheppard, 384 U.S. at 358).

27 When pretrial publicity is at issue, “primary reliance on the judgment of the trial court makes  
28 [especially] good sense” because the judge “sits in the locale where the publicity is said to have had its



1 effect” and may base her evaluation on her “own perception of the depth and extent of news stories that  
2 might influence a juror.” Mu’Min v. Virginia, 500 U.S. 415, 427 (1991).

3 **B. Analysis of Claim C2**

4 Petitioner alleges that defense counsel was ineffective for failing to investigate and renew his  
5 change of venue motion following (1) voir dire, which he claims demonstrated inflammatory pretrial  
6 publicity and partiality among the prospective jurors; and (2) the trial court’s denial of certain of  
7 defense counsel’s “for cause” challenges of potential jurors who had seen the *America’s Most Wanted*  
8 re-enactment.

9 As noted, the trial court reserved ruling on the change of venue motion until it could question  
10 potential jurors regarding their exposure to pretrial publicity (11/1/90 RT at 50:6-18; RT at 1640:28-  
11 45:13) and see “first of all how many prospective run-ins we get who actually have seen this video and  
12 . . . what their general reaction is.” (11/1/90 RT at 50:8-12.) However, that court voiced its concern  
13 that the average person might be unable to rise above the publicity relating to the show’s “quite  
14 dramatic” re-enactment of the alleged incident (11/1/90 RT at 26:20)), and noting that:

15 Let me just make a finding, I think I did this morning, but to make it perfectly clear, but  
16 for this re-enactment on *America’s Most Wanted*, I do not think there are grounds to  
17 change the venue on any of the criteria that we have before us concerning that. That’s  
18 the big issue. Fair enough?

18 (11/1/90 RT at 50:19-24.)

19 The California Supreme Court, in rejecting this claim, stated:

20 Prior to trial, defendant moved for a change of venue due to pretrial publicity about the  
21 case. Not only had the local television and print media given the killings substantial  
22 coverage, the program, *America’s Most Wanted*, featured a television reenactment of the  
23 crimes during a segment aired just prior to defendant’s arrest. The broadcast apparently  
24 led to his identification in Chicago as the alleged perpetrator, and a second airing shortly  
25 thereafter described his apprehension. In support of the motion, defendant submitted  
26 videotaped copies of the television episodes as well as local news clippings reporting the  
27 crimes. At the hearing on the change of venue motion, defense counsel also referred to  
28 the results of a public opinion survey the defense had undertaken in Kern County. Based  
on the survey, counsel represented that 45 percent of the people responding indicated  
they had some knowledge of the case due to the media attention. Of this number, 20  
percent had seen the *America’s Most Wanted* reenactment.

28 Bolin, 18 Cal. 4th at 311-12. That court went on to observe that:

1 Counsel's failure to renew the change of venue motion did not result from ignorance or  
2 inadvertence and reflected a reasonable trial strategy. [Citation] The impact of the  
3 pretrial publicity generally and the *America's Most Wanted* episodes in particular was a  
4 critical focus of the voir dire. Although many prospective jurors had been exposed to  
5 some pretrial publicity, including the segment reenacting the killings, for the most part  
6 few recalled the specifics or had formed a resolute impression of [Petitioner's] guilt. In  
7 particular, those who eventually sat on the jury all gave assurances they would decide  
8 the case based solely on the courtroom evidence. [Citation]

9 In light of these responses, counsel could well have recognized the effect of the publicity  
10 had not been as substantial as feared, especially after an 11-month interim. Thus,  
11 renewed effort to seek a change of venue would be futile since the trial court had  
12 conditioned any change in its tentative ruling on a determination the television coverage  
13 had impaired the ability to assemble an impartial jury. In addition, the reenactment was  
14 relevant only to the guilt phase portion of the trial. With guilt virtually a foregone  
15 conclusion, counsel's concern may at that point have turned to the penalty phase, which  
16 was substantially insulated from the effect of pretrial publicity. [Citation] Given the  
17 possibility of a valid trial tactic, we reject this claim of ineffective assistance. [Citation]

18 Id. at 314.

19 Upon consideration of the record and the following findings of fact after limited evidentiary  
20 hearing the Court concludes that voir dire of the jury did not demonstrate exposure to pretrial publicity  
21 rising to the level of presumptive prejudice, and that defense counsel was not deficient by failing to  
22 renew the change of venue motion.

23 **1. Presumed Prejudice**

24 Petitioner argues that the nature and extent and material falsity of the pretrial publicity, and the  
25 lack of impartiality among the venire pool, support a presumption of prejudice.

26 As noted, the Court previously denied Petitioner claim of actual prejudice (i.e., "actual partiality  
27 or hostility that could not be laid aside"), see Harris v. Pulley, 885 F.2d 1354, 1363 (9th Cir. 1988).  
28 (ECF No. 261 at 54:12-15; ECF No. 276, at 53:4-7.)

Furthermore, the Court previously stated that the Strickland prejudice prong must be established  
for claim C2 and that its Strickland analysis will be informed by whether it is reasonably likely that  
venue would have been changed from Kern County because of presumed prejudice had Bolin's  
attorneys renewed the motion. (ECF No. 330 at 2:2-3); see Styers v. Schriro, 547 F.3d 1026, 1030 (9th  
Cir. 2008) (citing Strickland, 466 U.S. at 695) ("[T]he governing legal standard plays a critical role in

1 defining the question to be asked in assessing prejudice for counsel's errors.”). Thus Respondent’s  
2 argument that the Court has substituted a presumed prejudice standard in place of the Strickland  
3 standard of prejudice is rejected. Respondent’s re-argument and citation to Thomas v. Borg, 159 F.3d  
4 1147, 1149-52 (9th Cir. 1998), a case rejecting an ineffective assistance claim relating to jury  
5 composition by applying the Strickland prejudice standard, does not persuade the Court otherwise.

6 **a. Nature and Extent of Pretrial Publicity**

7 **1) *America’s Most Wanted Program***

8 Petitioner contends that the program, which initially aired on January 7, 1990, was an  
9 inflammatory re-enactment of events according to the Kern County Sheriff’s Department (ECF No. 113  
10 at 21:1-3) and that the prosecution admitted as much. (11/1/90 RT at 25:6-9.) He also contends the  
11 program presented inaccurate background information on Petitioner. (ECF No. 113 at 21:2-4.)

12 The trial court, after viewing the program, found it “quite dramatic” (11/1/90 RT at 26:20)  
13 attended by considerable “media hoopla” (RT at 1226:21-25) and a “pretty graphic dramatization of  
14 this alleged incident.” (RT at 761:8-9). The trial court was “very, very concerned about that program.”  
15 (Id. at 28:18-19.)

16 Shortly thereafter, local television news aired a story on Petitioner’s capture, including excerpts  
17 from the *America’s Most Wanted* program. (ECF No. 214, EH Ex. 54.)

18 On January 14, 1990, *America’s Most Wanted* aired a follow-up program, advising viewers of  
19 Petitioner’s arrest (Id.; 11/1/90 RT at 17:6-13; 113 at 21:17-19), including an interview with Jim  
20 Wilson and a rebroadcast of the alleged last words of Steve Mincy pleading for his life, comments from  
21 Mr. Mincy’s mother that his daughter was missing her deceased dad (ECF No. 113 at 21:17-23), and  
22 information about the fear of residents near the crime scene that Petitioner might return. (ECF No. 113  
23 at 21:23-27; 1/1/90 Supp. RT at 16:24-20:25.) This second broadcast revisited the false booby trap  
24 allegations (11/1/90 RT at 7), discussed below, included victim impact statements from Jim Wilson  
25 and from Steve Mincy’s daughter, (11/1/90 RT at 7:9-20:25), and falsely stated that: “[I]n 1981  
26 [Petitioner] killed a man with a shotgun blast in an argument. He was paroled after serving 2 years. In  
27 1986, [Petitioner] stabbed a man 15 times, but he was acquitted.” (11/1/90 RT at 16:7-12; cf., RT at  
28 2246-48; CT at 125-28; SHCP Ex. 42:191.)



- 1 • A September 9, 1989 article which reported that Petitioner's van had been found  
2 abandoned in Covina, California; that the search for him continued; and that police  
3 patrols in the Walker Basin area had increased following possible sightings of Petitioner  
4 in the area. (EH Ex. 53.) The article also included information about other pot farms in  
5 that area. (Id.)
- 6 • A January 6, 1990 article, which falsely report details of Wilson's escape, that he  
7 crawled to safety over 14 hours (id.; ECF No. 113 at 20-22); reported on Petitioner's  
8 alleged violent history; and falsely reported that 4 pipe bombs were found at the crime  
9 scene when in fact only 3 unloaded alleged pipe bombs were found. (ECF No. 113 at  
10 20:20-28; RT at 1863, 1888.)
- 11 • A January 8, 1990 article which reported on Petitioner's arrest and repeated the  
12 erroneous information that Jim Wilson had "crawled eight miles over 14 hours to reach  
13 safety." (ECF No. 113 at 22:25-28.)
- 14 • A January 17, 1990 article, which repeated the erroneous information above and  
15 reported Petitioner's return to California following his capture in Illinois, his pleading  
16 not guilty to the two murder counts, the attempted murder count, and the marijuana  
17 cultivation count, discovery of four pipe bombs in the cabin which officials thought  
18 were used as booby traps, (EH Ex. 53; ECF No. 113 at 22:24-23:1), and stated that  
19 during arraignment, the courtroom "was fortified by seven Kern County sheriff's  
20 deputies." (ECF No. 113 at 23: 2-3.)
- 21 • A January 27, 1990 article, which repeated the erroneous information above and  
22 reported a delay in Petitioner's preliminary hearing until March 2, 1990. (EH Ex. 53;  
23 ECF No. 113 at 22:24-23:1.)
- 24 • A March 3, 1990 article summarizing the March 2, 1990 preliminary examination  
25 testimony of Jim Wilson and Eloy Ramirez. (EH Ex. 53; ECF No. 276 at 13:27-28.)

26 Respondent counters that the print publicity was not persistent and pervasive because only one  
27 newspaper, the *Bakersfield Californian*, covered the trial, with six articles published in the week  
28 following the crime (through September 9, 1989), and another four articles published near the

1 televising of the *America's Most Wanted* segments (through January 27, 1990.) (ECF No. 194 at  
2 40:27-41:7.) Respondent argues these facts support the state court finding that most of the news  
3 articles appeared almost a year before trial, Bolin, 18 Cal. 4th 314, and that the articles were  
4 insufficient to show presumed prejudice. See Hamilton v. Ayers, 458 F. Supp. 2d 1075, 1093 (E.D.  
5 Cal. October 30, 2006), reversed in part on other grounds, 583 F.3d 1100, 1135-36 (9th Cir. 2009)  
6 (citing United States v. Sherwood, 98 F.3d 402, 410 (9th Cir. 1996) (presumed prejudice standard  
7 requires the community be “saturated with prejudicial and inflammatory media publicity about the  
8 crime.”).

9 The record suggests that there was no local media coverage (print, radio or television) following  
10 the preliminary hearing (CT at 8-12) until jury selection began in late November 1990. (EH RT 41-43,  
11 181.) Moreover, the potential jurors were admonished numerous times by the trial court to avoid any  
12 contact with the media coverage of the case. (RT at 25, 228, 235, 249, 326, 1642-43, 1892-93, 1976-  
13 77, 2090.)

### 14 3) *Community Attitude Survey*

15 Petitioner argued at the hearing that the defense-commissioned Kern County community  
16 attitude venue change survey (EH Ex. 52), which involved 317 Kern County residents registered to  
17 vote and holding California driver's licenses, showed that 45% of the Kern County residents surveyed  
18 were familiar with the case from various sources, (id. at 3-5; 11/1/90 RT at 21:27-24:11); 52% of those  
19 familiar with the case, or 23% of all respondents, had seen the *America's Most Wanted* program, (id.;  
20 see also ECF No. 178 at 45:12-14); and 66% of those familiar with the case, or 29.7% of all  
21 respondents, had been exposed to other pretrial publicity, (EH Ex. 52 at 3-5).

22 Of the 45% who were aware of the case, 60% of those, or 27% of all respondents, believed  
23 Bolin to be guilty. (Id.) The percentage of respondents who believed Bolin to be guilty was higher in  
24 the category of individuals who saw the *America's Most Wanted* program (77%, versus 45% for those  
25 who had not seen the program). Furthermore, of those who watched the program, 66% responded they  
26 were led to their belief in Bolin's guilt because of the program, while 34% did not form an opinion.  
27 (Id.)

28 Additionally, of the 45% who were aware of the case, 69% favored death, 14% favored life, and

1 17% needed more information to form an opinion. (Id.) Comparing respondents who saw the  
2 *America's Most Wanted* program against those who did not see it, the percentage favoring the death  
3 penalty was 76% for those who saw it versus 61% for those who did not see it. (Id.)

4 Petitioner argues that defense counsel Soria misstated the results of the survey at the venue  
5 change hearing by telling the trial judge that “of the 45% of residents who were aware of the case  
6 through the media, 20% had seen the *America's Most Wanted* program.” (ECF No. 178 at 45 n.40.)  
7 He claims that according to his community survey, 75% of those who saw the *American's Most Wanted*  
8 program were convinced of Petitioner's guilt of the charged crimes, (ECF No. 113 at 22:21-24; 11/1/90  
9 RT at 21) and that over half the final jury pool (56 of 110) admitted seeing and remembering portions  
10 of the *America's Most Wanted* program. (ECF No. 113 at 23:21-24.)

11 Mr. Soria argued at the time of the motion that over half the potential jury pool would have seen  
12 portions of the *America's Most Wanted* reenactment; and that about three-quarters of those who saw the  
13 show believed Petitioner was guilty. (RT, 11/1/90 at 21.) He suggested at that time about 15 percent of  
14 Kern County residents had actually viewed the reenactment of the crime on *America's Most Wanted*.  
15 (11/1/90 RT at 24:1-5, 28:11.)

16 The prosecution admitted the show was “probably inflammatory” (11/1/90 RT at 25:7-9) and  
17 that the show included inaccurate information regarding Petitioner's background (RT at 386:12-19), but  
18 argued that only 15% of the Kern County residents surveyed had actually seen the *America's Most*  
19 *Wanted* reenactment (11/1/90 RT at 24:24-26:14) and that only a small percentage of those felt they  
20 were prejudiced by seeing it (Id.). The prosecution asserted that such small percentages did not support  
21 a change of venue, (id.; ECF No. 194 at 34:22-35:8), *i.e.*, that prior to voir dire, the pretrial publicity  
22 did not establish that Petitioner could not get a fair trial in Kern County. (ECF No. 194 at 40:20-24.)

23 Respondent contends the motion to change venue was impliedly denied by the trial court when  
24 the jury was sworn. (RT at 1641:28-41:5.)

#### 25 4) *Voir Dire*

26 Petitioner argues that the initial venire pool reflected a “high degree of prejudicial media  
27 exposure,” noting that, of the 158 prospective jurors initially questioned on voir dire: 37 prospective  
28 jurors had seen the *America's Most Wanted* program, (ECF No. 178 at 46:2-5), of whom 16 were



1 excused for cause “because of attitudes hostile to the defense” (Id. at 46:4-5); 18 prospective jurors had  
2 learned about the case primarily from television other than *America’s Most Wanted* (ECF No. 178 at  
3 49:26-50:1); and 31 prospective jurors read about Petitioner’s case in the newspaper. (ECF No. 178 at  
4 53:2-4.)

5 Petitioner’s Strickland expert, Mr. Thomson, noting Mr. Soria’s averment of not recalling any  
6 strategic reason for failing to renew the change of venue motion unless he and Mr. Cater had been  
7 successful in selecting a jury of people who had not seen the *America’s Most Wanted* program, stated  
8 that:

9 Unfortunately, counsel had not been successful in that regard: four seated jurors (Lee,  
10 Vaughn, Hanson, and Bowles) disclosed that they had seen the *America’s Most Wanted*  
11 episode regarding Mr. Bolin [Record citation] Another seated juror (Barnes) admitted to  
12 being influenced by newspaper reports about the case. [Record citation] Failure to renew  
the venue motion under these circumstances is inconsistent with prevailing professional  
norms at the time of Mr. Bolin’s trial.

13 (EH Ex. 72, ¶ 48.)

14 Respondent counters that Petitioner, at the time of the motion, did not carry his burden of  
15 showing that he could not get a fair trial in Kern County, (RT 11/1/90 at 24), given that only 15% of  
16 surveyed county residents had seen the *America’s Most Wanted* reenactment (id. at 28), and that only a  
17 small portion of those expressed possible prejudice from seeing the program (id. at 24-26). Respondent  
18 contends the survey supports a tactical decision by defense counsel not to pursue the change of venue  
19 motion where counsel reasonably could have been satisfied with the jury as constituted following voir  
20 dire. (See ECF No. 194 at 39:3-7.) Respondent goes on to argue that, for the same reasons, the change  
21 of venue motion, even if it had been re-asserted, had no reasonable probability of success. (Id. at 39:8-  
22 11.)

23 **b. No Presumed Prejudice**

24 Petitioner claims that prejudicial pretrial publicity saturated the community. He argues this  
25 included the dramatic and graphic *America’s Most Wanted* re-enactment of the crime. (See RT at 282,  
26 565, 574, 602-603, 675, 1060, and 1133-35.) He argues the broadcast’s dramatized re-enactment was  
27 akin to the televised confession in Rideau. (ECF No. 178 at 44:16-25.) He emphasizes what he views  
28 as non-factual and factually incorrect and conflated content, citing to Daniels v. Woodford, 428 F.3d

1 1181, 1210-12 (9th Cir. 2005), as an analogous case where prejudice was presumed from pretrial  
2 publicity. He points out even the prosecution admitted that the information provided in *America's Most*  
3 *Wanted* was "inaccurate with regard to [Petitioner's] background." (RT at 386:12-19.)

4 Petitioner contends that voir dire demonstrated media coverage at preliminary hearing (CT at 8-  
5 12) and thereafter was so extensive and extreme that a fair trial could not be had in Kern County and  
6 counsel's failure to renew the venue change motion following voir dire was presumptively prejudicial  
7 given his evidentiary proffer at the hearing. (ECF No. 214 at 18:16-20:16.)

8 This Court finds that the noted facts developed during the evidentiary hearing do not stray  
9 significantly from those in the state record, as discussed below.

10 Mr. Soria testified that he believed less than 50% of the venire pool was aware of the  
11 *American's Most Wanted* program. (EH RT at 32:25-33:4.)

12 The record at evidentiary hearing suggests that, of the jurors who passed the initial hardship  
13 process and who filled out the juror questionnaires, approximately 51% were aware of the case; about  
14 24% of those stated they were aware of the case from *America's Most Wanted* (this percentage  
15 increases to approximately 40% if jurors who were expressed uncertainty of their awareness and/or its  
16 source are considered). (EH Ex.'s. 1-7, 9.) Moreover, of the jurors aware of the case, approximately  
17 29% believed Petitioner was probably guilty, and approximately 23% believed Petitioner was probably  
18 guilty because of pretrial publicity. (Id.)

19 These percentages were similar to the community survey, which showed 45% of those surveyed  
20 were aware of the case; 23% were aware of the case from *America's Most Wanted* with 66% of those  
21 led to believe Petitioner was guilty of the charges; and 29% had seen or heard media stories about the  
22 case other than *America's Most Wanted*. (ECF No. 214, EH Ex. 52.) Those jurors responding to the  
23 survey who had seen *America's Most Wanted* were more likely to view Petitioner as guilty of the  
24 charges than those responding to the survey who had not seen *America's Most Wanted*. (Id.) Those  
25 jurors responding to the survey who had seen *America's Most Wanted* also were more likely to favor a  
26 death sentence upon conviction. (Id.)

27 The foregoing reasonably suggest that no more than 40% of the venire pool had seen the  
28 *America's Most Wanted* program and no more than a one-third of those were predisposed to guilt.

1 The Court finds that the media coverage in this case falls short of the type of massive media  
2 attention that manifestly tainted proceedings in Rideau, Estes, and Sheppard. In those cases, “the  
3 influence of the news media, either in the community at large or in the courtroom itself, pervaded the  
4 proceedings. Crater v. Galaza, 491 F.3d 1119, 1135 (9th Cir. 2007), (citing Murphy v. Florida, 421  
5 U.S. 794, 799 (1975)). Those cases “cannot be made to stand for the proposition that juror exposure to  
6 information about a state defendant's prior convictions or to news accounts of the crime with which he  
7 is charged alone presumptively deprives the defendant of due process.” Id.

8 Moreover, the size and characteristics of the community from which the instant venire was  
9 drawn suggest as much. For example, in Rideau, defendant's jailhouse interrogation and confession  
10 was broadcast three times to a total of some 97,000 (i.e., 65%) people living in the parish of 150,000  
11 from which the venire was drawn. 373 U.S. at 724. Kern County, on the other hand, was double that  
12 size with a population of 300,000, (EH RT at 44:13-14), of which the Community Survey suggested  
13 23% had seen the *America's Most Wanted* broadcast.

14 Moreover, the taped interrogation and confession in Rideau had been created “with the active  
15 cooperation and participation of the local law enforcement officers, [citation] and two local deputy  
16 sheriffs later were seated on Rideau's trial jury for what the Supreme Court denounced as “kangaroo  
17 court proceedings.” Rideau, 373 U.S. at 726. Here, Kern County deputies took phone calls generated  
18 by *America's Most Wanted*, but Petitioner has not demonstrated the deputies participated in production  
19 of the *America's Most Wanted* reenactment as seen in Rideau.

20 The publicity in this case was not pervasive and constant. There were news articles, local  
21 television and the *America's Most Wanted* broadcasts concerning the case around the time of the  
22 murders, Petitioner's capture, and preliminary hearing. However, the coverage subsided over the  
23 nearly 1-year period prior to jury selection and trial, and was not persistent and pervasive. Bolin, 18  
24 Cal. 4th at 314.

25 Coverage in the *Bakersfield Californian* was sporadic: ten articles spanning September 1989 to  
26 March 1990, all substantially prior to the December 3, 1990 empaneling of the jury. There were no  
27 further articles or media coverage in the local news prior to jury selection in late November 1990. (EH  
28 RT at 41-42.) Once jury selection began, jurors were repeatedly admonished to avoid any radio,

1 television, or newspaper coverage of the case. (EH Ex. 26.)

2 The trial court made clear that neither the press coverage in the *Bakersfield Californian* nor the  
3 local January 1990 local news broadcasts warranted a change of venue. (EH Ex. 24 at 50.) Mr. Soria,  
4 at the evidentiary hearing, acknowledged his view that there was no media saturation between the  
5 preliminary hearing and the opening statement. (EH RT at 43:5-9.) Mr. Cater agreed that the publicity  
6 had attenuated over time. (EH RT at 181:4-9.)

7 The false allegations relating to the voluntary manslaughter, the stabbing assault and battery,  
8 Petitioner allegedly being an ex-Navy SEAL explosives expert, and his alleged connection to other  
9 marijuana operations in the area, were clarified by the argument and evidence presented to the jury.  
10 (RT at 1652:4-14, 1666:14-1667:6, 2588-89, 2598; CT at 125-30, 588.) The supposed pipe bombs  
11 found in the cabin, (RT at 1862-65, 1887:10-1891:18), were not charged as a criminal offense or  
12 argued as aggravating circumstance evidence during the penalty phase. (CT at 229, 552.)

13 The Court concludes that, for the reasons stated, prejudice cannot be presumed in this case. See  
14 Hamilton, 458 F. Supp. 2d at 1093 (prejudice is not established where the nature of the news coverage  
15 was factual and not inflammatory and the bulk of the publicity occurred months before jury selection  
16 began); Casey v. Moore, 386 F.3d 896, 910 (9th Cir. 2004) (whether a jury was biased is a question of  
17 fact and trial court's finding on this question is entitled to a presumption of correctness); Nebraska Press  
18 Ass'n v. Stuart, 427 U.S. 539, 554 (1976) (pretrial publicity even pervasive, adverse publicity does not  
19 inevitably lead to an unfair trial); accord McVeigh, 153 F.3d at 1181 (noting that presumed prejudice is  
20 "rarely invoked and only in extreme situations"). Nor has Petitioner provided any authority that  
21 selection for portrayal on *America's Most Wanted* is alone a basis to presume prejudice.

22 In the rare case that prejudice is presumed, there will have been a "barrage of inflammatory  
23 publicity immediately prior to trial,' . . . amounting to a 'huge . . . wave of public passion.'" Patton v.  
24 Yount, 467 U.S. 1025, 1033 (1984) (quoting Murphy, 421 U.S. at 798 and Irvin, 366 U.S. at 728). For  
25 the reasons stated, such was not the case here.

26 **2. Defense Strategy: The Empaneled Jury Was Acceptable to Counsel**

27 Mr. Soria and Mr. Cater used a juror rating system that scored the jurors; they discussed the  
28 scoring for each individual juror. (EH RT at 52:18-53:5.) The criteria used by counsel in scoring

1 jurors included consideration of how much negative impact was elicited for those jurors who saw  
2 *America's Most Wanted* (EH RT at 55:5-17) and other forms of pretrial publicity (EH RT at 55:20-  
3 56:11), and whether the juror was believable (EH RT at 57:7-9).

4 Additionally, the rating system reflected whether, and the extent to which, a juror's initially low  
5 score was rehabilitated by beliefs that would support selection of a sentence of life without parole,  
6 jurors he referred to as being "pro-life", resulting in a higher juror score. (EH RT at 67:9-21.) A  
7 juror's rating could change over time, from juror questionnaire through voir dire. (EH RT at 123:13-  
8 24.)

9 Defense counsel considered each juror as a whole package. (EH RT at 57:18-21.) A juror was  
10 dismissed where the rating system dictated. (EH RT at 59:20-25.)

11 Mr. Soria stated that he challenged jurors for cause, for having seen *America's Most Wanted*, in  
12 order to preserve the issue on appeal. (EH RT at 50:17-21.) The trial judge denied some of these for-  
13 cause challenges. (See e.g., EH RT at 51:8-11.) Defense counsel unsuccessfully challenged for cause  
14 six of the twelve seated jurors (jurors Robert Bowles, Dale Campbell, Julie Hanson, Patricia Hinson,  
15 Jeannine Lee, and Michael Vaughn). (See ECF No. 276 at 33-34 & n.17.)

16 Mr. Soria stated that he left on the panel jurors who had seen *America's Most Wanted* because  
17 he felt evidence of guilt was overwhelming. (See EH RT at 13:4.) He was more concerned with  
18 avoiding jurors whose beliefs would support selection of a death sentence, jurors he referred to as being  
19 "pro-death penalty" (EH RT at 13:10-11) and picking pro-life jurors (EH RT at 17:12, 81:16-18). Mr.  
20 Soria, who was lead counsel at the time, states that he and Mr. Cater were in agreement on this primary  
21 goal of selecting a pro-life jury, which he states was difficult in Kern County at that time. (EH RT at  
22 49:1-13.) Though Mr. Cater testified at the evidentiary hearing that he felt the major objective was to  
23 get jurors empaneled who had not seen *America's Most Wanted* (EH RT at 154:2-9), he agreed that  
24 getting a pro-life jury was a primary consideration. (EH RT at 184: 11-15.)

25 Mr. Soria was responsible for filing the change of venue motion. (EH RT at 151:1-7.) He  
26 stated that it did not occur to him to renew the motion (EH RT at 11:23-24, 12) to keep off jurors who  
27 had seen the *America's Most Wanted* program (EH Ex. 16, ¶ 8; EH RT at 86-89); that he was satisfied  
28 with the jury empaneled; and that any contrary statements in his 2008 declaration were prior to

1 refreshing his recollection for the 2013 evidentiary hearing. (EH RT at 33, 49-60, 85, 105:11-107:3,  
2 185-89.) Mr. Soria testified that he did not see the need to use preemptory challenges simply because  
3 he had challenged for cause (EH RT at 26: 9-17, 69:19-70:7), and he was concerned whom he might  
4 get if he dismissed any of the finally empaneled jurors. (EH RT at 77:4-6.) Mr. Soria could not recall  
5 any disagreement with Mr. Cater that the finally empaneled jury was acceptable to the defense. (EH  
6 RT at 81:8-11.)

7 Mr. Cater stated that he was not happy with the jury they passed on, and that he had expected  
8 the prosecution to continue with challenges. (EH RT at 189:16-23.) However, Mr. Cater conceded that  
9 he consulted with Mr. Soria regarding the selection of jurors and had no major disagreements with Mr.  
10 Soria as to the jury chosen. (EH RT at 190:10-12.) Mr. Cater also conceded that a potential juror's  
11 awareness of the case was not "an absolute death knell"; that if the juror appeared impartial even  
12 though having viewed the *America's Most Wanted* program and was "very good" on the death penalty,  
13 the juror would not have warranted a preemptory challenge. (EH RT at 154.) He also agreed that  
14 saving a defendant's life in a capital case was the primary consideration. (EH RT at 184.)

15 The Court finds and concludes that Petitioner has not impeached defense counsel's juror  
16 selection methodology. Defense counsel, in addition to the effect of pretrial publicity, considered  
17 potential jurors' feelings about the death penalty and Petitioner not testifying and the prosecution  
18 witnesses. (See e.g., EH RT at 13, 17, 29, 37, 48, 54-55, 154, 184-85; EH Ex.'s. 1r at TC000843,  
19 TC000230; 2a at TC001225; 2c at TC001226, TC000244; 2e at TC001224; 2f at TC001221; 2g at  
20 TC001227, Q19; 2i at TC001220; 5d at TC000244; 5l at TC000900, TC000437; 5r at TC000893,  
21 TC000251; and 6b at TC000243.) To this end, although juror Barnes was familiar with the case from  
22 sources other than *America's Most Wanted*, defense counsel favored his views on the death penalty (EH  
23 RT at 61-63, 66-67) because juror Barnes believed that imposition of the death penalty should be used  
24 "only . . . as a last resort if the crime demands it." (EH Ex. 2a at Q20; EH RT at 61.)

25 Similarly, juror Bowles's exposure to *America's Most Wanted* was minimal and, more  
26 importantly, he was offended by the show because it suggested Petitioner was guilty of the crimes  
27 charged. (EH RT at 25, 55; EH Ex. 2b at TC001219, 13971401.) Juror Hanson gave a credible  
28 assurance of impartiality during voir dire and remembered little about the show despite her earlier



1 questionnaire response that she thought Petitioner was probably guilty based on the show. (EH RT at  
2 25, 64-66; EH Ex. 2d at 1092-1100.) Defense counsel retained juror Hinson, despite having made a pro  
3 forma challenge for cause based on the show, because she did not remember the show, believed it  
4 would be difficult to vote for death, and her overall rating was middling, a three. (EH RT at 27, 63-64;  
5 EH Ex. 2e at TC001224.) Juror Lee “absolutely” could put aside what she had learned from *America’s*  
6 *Most Wanted*, had not read any other news, and hated to see the death penalty used. (EH RT at 55-56;  
7 EH Ex. 2g at TC001227, Q19-20, 240-247.) Juror Lee believed that defense attorneys had “tough  
8 job[s]” and that both the guilty and innocent deserved representation. (EH RT at 56; EH Ex. 2g at  
9 Q13.) Juror Goff was subjected to a pro forma “for cause” challenge based on his having seen the  
10 *America’s Most Wanted* program, to preserve the issue for appeal, but Mr. Goff was retained as a pro-  
11 life sentence juror favorable to the defense (RT at 1427-1441.)

12 Petitioner makes much of defense counsel allowing juror Vaughn to remain in the final twelve  
13 jurors. (See EH RT at 85:20-89:11.) Petitioner argued that the score defense counsel had given  
14 Vaughn warranted removal. Petitioner argued that Vaughn’s juror questionnaire suggested that he was  
15 pro-death penalty, had been exposed to pretrial publicity, and felt Petitioner was guilty. However,  
16 defense counsel Soria responded that juror Vaughn’s score was middling, not low, (EH RT at 104:16-  
17 17), and that he saw things in juror Vaughn’s background (e.g., drug use; military service in Viet Nam)  
18 that made him a favorable juror for the defense. (EH RT at 127-29.) Co-counsel Cater was uncertain  
19 whether Vaughn’s overall rating favored the defense or the prosecution. (EH RT at 174:16-19.) He  
20 scored juror Vaughn as middling on death penalty. (EH RT at 178:14-16.) Mr. Cater also testified at  
21 the evidentiary hearing that juror Vaughn’s belief the crime involved Petitioner fighting with a friend,  
22 (EH RT at 176:11-13) favored the defense theory of voluntary manslaughter or imperfect self-defense.

23 The evidence developed at the May 14, 2013 hearing suggests that as a matter of jury selection  
24 strategy, defense counsel viewed pretrial publicity as important, but not controlling, as long as the juror  
25 gave credible assurances of impartiality and offered other benefits for Petitioner toward the overarching  
26 goal of avoiding a death sentence. This was not an unreasonable strategy given that Kern County juries  
27 were “very pro-prosecution” regarding guilt in the 1980’s, (EH RT at 49-50), with one-third to one-half  
28 of Kern County jurors then favoring the death penalty. (*Id.* at 110.)



1 Furthermore, the Court finds Mr. Soria's testimony at the evidentiary hearing was forthcoming  
2 and corroborated by defense jury selection notes. He adequately addressed why his 2008 declaration  
3 (see EH Ex. 16) failed to explain the reasons he did not renew the venue motion – because he had not  
4 received and reviewed relevant case materials prior to making the statements therein – and that he had  
5 reviewed such materials prior to his testimony at the hearing. (EH RT at 8-9, 11, 33-40, 107.)

6 It does not appear unreasonable that, on the facts of this case, defense counsel would have a  
7 primary strategic goal of selecting pro-life jurors, and a secondary strategic goal of selecting jurors who  
8 had not seen the *America's Most Wanted* broadcast. See Duff-Smith v. Collins, 973 F.2d 1175, 1183  
9 (5th Cir. 1992) (strategic choice not to pursue change of venue motion proper where counsel could  
10 have been satisfied with the panel as constituted after voir dire). Petitioner has not made a sufficient  
11 evidentiary showing that the defense strategy was objectively unreasonable. Nor is the Court  
12 convinced by Petitioner's contention that the above-described jury selection strategy was simply an  
13 excuse for counsel's insufficient investigation. (See, e.g., EH RT at 13, 48-50, 167-72.) That  
14 contention fails for reasons discussed *ante* and in claim W, *post*.

15 At bottom, Petitioner has not demonstrated that the defense in mitigation, including life  
16 experience and social history, was insufficiently developed prior to voir dire so as to preclude defense  
17 counsel's use of their asserted juror scoring methodology. Cf. Chateloin v. Singletary, 89 F.3d 749,  
18 753 (11th Cir. 1996) (effective assistance found where counsel had no recollection of whether he  
19 waived jury trial to avoid death penalty, but testified that he believed that to be a reasonable tactic and  
20 had experience to support that opinion).

21 Furthermore, defense counsel's consistent "for cause" challenges of jurors who had seen the  
22 *America's Most Wanted* program, (see EH RT, at 50:13-19; 181:16-20; EH Ex.'s. 1a at 562; 1f at 1435;  
23 1k at 1507; 1o at 1235; 1r at 868; 2b at 1402; 2c at 1012; 2d at 1100; 2e at 1120; 2g at 245; 2l at 384-  
24 87; 4c at 729; 5d at 987; 5h at 436; 5u at 1172-73; 5w at 1185; 5bb at 766; 6a at 955-56; 6d at 619; 6e  
25 at 1057; 6f at 1141; 6h at 1162; 6i at 1177; 6j at 290; 6k at 1299; 6m at 452; 6n at 847; 7b at 1372; RT  
26 at 465; EH RT at 50:17-51:22, 101:15-21, 120-122, 181-186), could have reasonably been seen as a  
27 means to preserve the issue on appeal without risking use of peremptory challenges in a way that  
28 impaired final say on the jury selected. See Jeffrey G. Adachi et al., Cal. Criminal Law Procedure and

1 Practice § 15.26 (2013 CEB); see also id. at § 15.17 (“it is unlikely that a trial judge who may have just  
2 denied a challenge to a juror for cause based on prejudice stemming from publicity will grant a motion  
3 to change venue a short time later.”). Especially so here, given that the same jury sat for the guilt and  
4 penalty phases. (See EH RT at 22:7-10.)

5 **3. Futility of Renewed Motion to Change Venue**

6 The Court finds that the trial court’s statements and rulings during voir dire, as well as the  
7 testimony of counsel Cater and Soria, reasonably demonstrated that a renewed change of venue motion  
8 likely would have been denied.

9 **a. State Law Requirements**

10 Defense counsel could not renew a change of venue motion until facts were disclosed during  
11 voir dire supporting the claim that a fair trial could not be had in Kern County because of pretrial  
12 publicity. People v. Coleman, 48 Cal. 3d 112, 133, 136 (1989); Odle v. Superior Court, 32 Cal. 3d 932,  
13 943-44 (1982); People v. Wallace, 6 Cal. 2d 759, 764 (1936); see also EH Ex. 24 at 50.

14 Even then, counsel had to demonstrate that other efforts besides a venue change had been  
15 insufficient to protect his client’s right to an impartial jury, by: (1) challenging for cause every juror  
16 who had been exposed to pretrial publicity; (2) exercising a peremptory challenge against every juror  
17 who had been so exposed; and (3) moving to strike the jury panel. Coleman, 48 Cal. 3d at 136; Odle,  
18 32 Cal. 3d at 943; see also People v. Bittaker, 48 Cal. 3d 1046, 1087-88 (1989), overruled on other  
19 grounds by People v. Black, 58 Cal.4th 912 (2014) (to preserve claim of improper denial of cause  
20 challenge, defendant must use peremptory challenge against juror, exhaust peremptory challenges or  
21 justify failure to do so, and state dissatisfaction with jury selected).

22 **b. Trial Court Disinclined to Grant Relief**

23 Petitioner faults defense counsel for not renewing the venue motion. He argues that under state  
24 law, the venue change was required given the reasonable likelihood a fair trial could not be had, the  
25 small community size and the nature of the crime. Corona v. Superior Court, 24 Cal. App. 3d 872,  
26 883-84 (1972); Martinez, 29 Cal. 3d at 583-85 (1981).

27 Petitioner also faults counsel for not seeking a “blanket for cause” ruling excluding all jurors  
28 who had been exposed to the *America’s Most Wanted* program. (ECF No. 178 at 59: 16-19.) He points

1 to the trial judge's statement that:

2 [H]e wanted to determine first of all how many prospective run-ins we get who actually  
3 have seen this video [*America's Most Wanted*] and... see what their reaction is. [T]hat if  
4 there were] general [prejudicial] reactions... [he] might be inclined to give a blanket for  
5 cause.

6 (Id.; see also 11/1/90 RT at 50.)

7 Petitioner argues these omissions were not part of any reasonable litigation strategy or  
8 intentional abandonment of the venue motion.

### 9 **1) *Venue Change Motion***

10 Counsel could reasonably have believed that a renewed venue change motion would have been  
11 denied given the facts of this case. Mr. Soria, though acknowledging the importance of making  
12 motions and objections in the trial court in order to preserve issues for appellate review (EH RT at 50,  
13 101-03, 109), testified at the evidentiary hearing that he believed the venue motion, if renewed, would  
14 have been denied. (EH RT at 32-33; 46; 81:3-7; 109:25-110:3; 114, 153:15-17.) Likewise, Mr. Cater  
15 testified that it was unlikely such a motion would have been granted. (EH RT at 194-95.)

16 At the evidentiary hearing, Mr. Soria testified that he felt the motion to change venue was "not  
17 good" because less than 50% of the jurors were aware of the *American's Most Wanted* program. (EH  
18 RT at 32:25-33:4.) Co-counsel Cater testified at the evidentiary hearing that, although he believed the  
19 venue motion had merit given the level of publicity and uniqueness of the *America's Most Wanted*  
20 program, (EH RT at 151:17-21), he had never brought a venue motion himself and that he had never  
21 seen one granted in Kern County. (EH RT at 179:2-12.)

22 Defense counsel acknowledged that, according to their survey, the number of Kern County  
23 residents who had heard of his case was small compared to other cases where venue motions had been  
24 granted, (11/1/90 RT at 23), and conceded that the nature and extent of the news coverage would not  
25 have warranted a change of venue absent the reenactment of the crime on *America's Most Wanted*.  
26 (11/1/90 RT at 23.) Moreover, voir dire could reasonably have suggested that the passage of time  
27 between significant media coverage and the trial limited the effect of pretrial publicity. (See, e.g., EH  
28 Ex.'s. 1c at 1460:7-10; 2c at 1005-06; 6f at 1135-36.)

Mr. Soria stated that he did not regret commissioning the survey or filing the venue motion,

1 because he believed the then-unique nature of *America's Most Wanted* warranted the filing of the  
2 motion. (EH RT at 46, 114, 176, 180.) But he nonetheless believed his chances of getting the motion  
3 granted were “nonexistent.” (Id. at 109:25-110:3.)

4 Mr. Cater testified that there was no strategic reason for not renewing the motion, (EH RT at  
5 153:6-8), that he and Mr. Soria simply overlooked doing so, (EH RT at 194:2-3), and that it was “a  
6 mistake” not to get a final ruling on the motion. (EH RT at 153:18-21.) However, Mr. Cater goes on to  
7 concede that the trial court likely would not have granted the venue motion. (EH RT at 153:15-17.) He  
8 believed that the trial judge would have invited them to renew the motion had the judge been inclined  
9 to grant it. (Id. at 194-95.)

10 Defense counsel acknowledge that they did not use all their peremptory challenges, (EH RT at  
11 19:21-23; 187:5-14), exercising only four of the available twenty peremptory challenges, (RT at 1633-  
12 38), effectively precluding any change of venue. (EH RT at 69:19-70:7.) However, Mr. Soria was an  
13 experienced capital defense attorney, (EH RT at 37-39), who, prior to the venue change motion, had  
14 consulted with jury experts in a separate action regarding the requirements for a successful venue  
15 change motion. (EH RT at 45-47.) Furthermore, neither Mr. Soria nor Mr. Cater had seen a venue  
16 motion granted in Kern County. (EH RT at 44, 179.) Mr. Soria stated that he was aware of a venue  
17 motion with 70% media saturation that was nonetheless denied in Kern County. (EH RT at 44:20-  
18 45:3.) This suggests a basis for deference to counsel’s decision not to renew the motion given  
19 Strickland’s presumption of competent assistance. Stewart v. Secretary, Dep’t of Corrections, 476 F.3d  
20 1193, 1209 n.25 (11th Cir. 2007) (noting that counsel’s experience strengthens the presumption of  
21 reasonable assistance).

22 Defense counsel could reasonably have concluded that the trial court would have denied a  
23 renewed change of venue motion. (See EH RT at 51, 182-83.)

## 24 **2) “Blanket For Cause” Ruling**

25 Counsel could reasonably have believed the trial court would not grant a “blanket for cause”  
26 ruling relating to *America's Most Wanted* because that court actively rehabilitated certain of these  
27 jurors. The trial court granted defense cause challenges for jurors who not only remembered pretrial  
28 publicity about the case but who also could not set aside their beliefs about Petitioner’s guilt because of

1 this publicity. (See, e.g., EH Ex.'s. 6a at 955-56; 6c at 1604; 6d at 619; 6e at 1062-63; 6h at 1161-62;  
2 6i at 1177; 6j at 280-90; 6k at 1296-99; 6n at 844-47.) The trial court also denied many other cause  
3 challenges based on exposure to pretrial publicity because the jurors either remembered very little  
4 about the case or could set aside what they had learned, and they had provided credible assurances that  
5 they could put aside any initial beliefs about Petitioner's guilt. (See e.g., EH RT at 182; EH Ex.'s. 1a at  
6 563; 1f at 1435-40; 1k at 1498-1507; 1o at 1228-35; 1r at 859-68; 2b at 1402-03; 2c at 1005-13; 2d at  
7 1098-1100; 2e at 1111-20; 2g at 243-45; 2l at 373-78, 384-87; 4c at 724-30; 5d at 976-91; 5h at 433-38;  
8 5u at 1162-74; 5w at 1178-90; 5bb at 761-66; RT at 459-66.)

9 Here, the trial court excused nine jurors based on exposure to pretrial publicity. On the other  
10 hand, it denied nineteen cause challenges on the same basis because none of these jurors "had such  
11 fixed opinions that they could not judge impartially the guilt of the defendant." See Yount, 467 U.S. at  
12 1035. Six of these potential jurors who saw the *America's Most Wanted* program or believed they may  
13 have seen it were actually selected as jurors, over defense challenges for cause, based on credible  
14 assurances of impartiality. (RT at 243-45 re Marie Lee; RT at 1111-20 re Patricia Hinson; RT at 362-  
15 87 re Michael Vaughn; RT at 1005-14 re Dale Campbell; RT at 1092-1102 re Julie Hanson; RT at  
16 1393-1403 re Robert Bowles.) Similarly, juror Gilbert Barnes as selected as a juror even though he  
17 was exposed to print and television coverage (RT at 90-106) and stated during voir dire that he thought  
18 Petitioner was guilty based thereon. The trial court's resolution of these questions is entitled to  
19 deference. Yount, 467 U.S. at 1038 (deference accorded to trial judge's determination where based on  
20 voir dire and juror demeanor).

21 Defense counsel could reasonably have concluded that the trial court would not have entertained  
22 a blanket challenge for cause. (See EH Ex. 24 at 50.)

#### 23 **4. No Prejudicially Deficient Conduct by Defense Counsel**

24 Petitioner argues that defense counsel Soria was deficient by not renewing the venue motion  
25 and by being pre-occupied with the prospect of a job change and the press of the noted concurrent  
26 capital case, People v. Holt, E.D. Cal. Case No. 1:97-cv-6210-AWI, and did not adequately prepare for  
27 voir dire, the venue change, or the penalty phase.

28 It was not unreasonable for defense counsel to adopt the strategy discussed above for selecting

1 the jury, and to forego renewal of the venue motion by placing priority in avoiding a death sentence  
2 over the effect of pretrial publicity. (EH RT at 48-49.) The joint decision of defense counsel to select a  
3 favorable jury regarding penalty selection was a reasonable strategic alternative to exhausting all of  
4 Petitioner's peremptory challenges, which could have resulted in losing favorable jurors and still not  
5 obtaining a change of venue. Given Mr. Soria's almost ten years' experience as a criminal defense  
6 attorney at the time, his experience as counsel in fifteen prior murder cases and three prior capital cases,  
7 (EH RT at 37-47), Strickland's presumption of competent assistance is persuasive. See Stewart, 476  
8 F.3d at 1209 (noting that counsel's experience strengthens the presumption of reasonable assistance).

9 In rejecting Petitioner's ineffective assistance of counsel claim on direct appeal, the California  
10 Supreme Court observed:

11 Counsel's failure to renew the change of venue motion did not result from ignorance or  
12 inadvertence and reflected a reasonable trial strategy. [Citation] The impact of the pretrial  
13 publicity generally and the *America's Most Wanted* episodes in particular was a critical focus  
14 of the voir dire. Although many prospective jurors had been exposed to some pretrial  
15 publicity, including the segment reenacting the killings, for the most part few recalled the  
16 specifics or had formed a resolute impression of [Petitioner's] guilt. In particular, those who  
17 eventually sat on the jury all gave assurances they would decide the case based solely on the  
18 courtroom evidence. [Citation] In light of these responses, counsel could well have recognized  
19 the effect of the publicity had not been as substantial as feared, especially after an 11-month  
20 interim. Thus, renewed effort to seek a change of venue would be futile since the trial court  
had conditioned any change in its tentative ruling on a determination the television coverage  
had impaired the ability to assemble an impartial jury. In addition, the reenactment was  
relevant only to the guilt phase portion of the trial. With guilt virtually a foregone conclusion,  
counsel's concern may at that point have turned to the penalty phase, which was substantially  
insulated from the effect of pretrial publicity. [Citation] Given the possibility of a valid trial  
tactic, we reject this claim of ineffective assistance. [Citation]

21 Bolin, 18 Cal. 4th at 314.

22 The above noted record on evidentiary hearing suggests that defense counsel employed this  
23 strategy in jury selection. While defense counsel believed that the effect of the pretrial publicity upon  
24 potential jurors was an important consideration in selecting a jury, it appears that counsel considered  
25 avoiding a death sentence to be of paramount importance to Petitioner. Moreover, jurors "who are least  
26 willing and likely to vote death are more apt to be good jurors on the question of guilt." (EH Ex. 15 at  
27 A-20.)

28 Defense counsel could reasonably have found that given the strength of the evidence against



1 Petitioner and the knowledge that Kern County jurors were generally supportive of the death penalty,  
2 jurors' thoughts about the death penalty were more important than mere exposure to pretrial publicity  
3 or even significant exposure to pretrial publicity if the juror gave credible assurances of impartiality and  
4 offered other benefits for Petitioner. Mr. Soria's experience with Kern County juries for 10 years had  
5 demonstrated that such juries were "very pro-prosecution." (EH RT at 49-50.) Moreover, at that time,  
6 one-third to one-half of Kern County jurors were in favor of the death penalty. (Id. at 110.)

7 Defense counsel also considered whether potential jurors wanted Petitioner to testify to prove  
8 his innocence, their likely reactions to the prosecution witnesses including the surviving victim, Jim  
9 Wilson, and juror rehabilitation during voir dire. (EH RT at 13, 17, 29-30, 37, 48, 54-55, 154, 184-85;  
10 see also EH Ex.'s. 1a at 563; 1f at 1435-40; 1k at 1498-1507; 1o at 1228-35; 1r at 859-68; 2b at 1402-  
11 03; 2c at 1005-13; 2d at 1098-1100; 2e at 1111-20; 2g at 243-45; 2l at 373-78, 384-87; 4c at 724-30; 5d  
12 at 976-91; 5h at 433-38; 5u at 1162-74; 5w at 1178-90; 5bb at 761-66; RT at 459-66.) For example,  
13 juror Barnes was familiar with the case from media exposure, yet defense counsel liked his views on  
14 the death penalty (EH RT at 61-67) because juror Barnes believed that imposition of the death penalty  
15 should be used "only. . . as a last resort if the crime demands it." (EH Ex. 2a at Q20; EH RT at 61.)

16 Similarly, juror Bowles saw, but was offended by the *America's Most Wanted* program. (EH RT  
17 at 25, 55; EH Ex. 2b at TC001219, 1397.) Juror Hanson, who stated in her juror questionnaire that she  
18 thought Petitioner was probably guilty based on the *America's Most Wanted* program, later gave  
19 assurance of impartiality during voir dire, saying she remembered little of the show. (EH RT at 25, 64-  
20 66; EH Ex. 2d at 1092-94, 1097-1102.) Defense counsel retained juror Hinson, despite having made a  
21 pro forma challenge for cause based on the program, because she did not remember the show, believed  
22 it would be difficult to vote for death, and her overall rating was a three. (EH RT at 27, 51, 59, 63-64;  
23 EH Ex. 2e at TC001224.) Juror Lee "absolutely" could put aside what she had learned from *America's*  
24 *Most Wanted*, had not read any other news, and hated to see the death penalty used. (EH RT at 55-56;  
25 EH Ex. 2g at TC001227, Q19-20, 240-43.)

26 While perhaps not as important as significant exposure to publicity or views on the death  
27 penalty, defense counsel also weighed other juror characteristics in deciding whether to exercise  
28 peremptory challenges against jurors who either had limited exposure to publicity or who had provided



1 credible assurances of impartiality. (EH RT at 125-26.) Counsel relied upon their instincts and  
2 considered each juror independently in deciding which jurors to select. (Id. at 57, 59-60, 66-67, 185.)  
3 For example, though one potential juror, Mr. Newberry, had seen the *American's Most Wanted*  
4 program and felt Petitioner was probably guilty, defense counsel's notes reflect both counsel and  
5 Petitioner liked Mr. Newberry. (EH Ex. 4c at Q1.) Similarly, a juror's prior experience with inmates  
6 or drugs was considered by defense counsel, (see EH Ex.'s. 1d at TC000436, TC000868; 2b at Q13;  
7 5bb at TC000227), as was prior military service in Vietnam, (EH Ex. 2l at Q5, Q13).

8         Though counsel Cater could not recall the meaning of the defense notes on juror Vaughn, (EH  
9 RT at 173-76), he "was pleased to see" that Vaughn's knowledge of the case gained from the *America's*  
10 *Most Wanted* program was consistent with their "theory of defense." (EH RT at 176.) Defense counsel  
11 also considered juror Lee's belief that defense attorneys had "tough job[s]" and that both the guilty and  
12 innocent deserved representation. (EH RT at 56; EH Ex. 2g at Q13.)

13         Mr. Soria, at the evidentiary hearing went on to explain that he did not exhaust all his  
14 peremptory challenges because he liked the jurors he had on the panel. (EH RT at 60.) Had he used all  
15 of his peremptory challenges, he would not have known the final composition of the jury, especially in  
16 a case such as this where counsel was unaware which jurors would be called to replace jurors who had  
17 been excused on a peremptory challenge. (Id. at 70.)

18         Additionally, the noted defense strategy for juror selection was independently supported by trial  
19 counsel's handwritten notes taken during jury selection, (see, e.g., EH Ex.'s 1a-7i.), regarding decisions  
20 about particular jurors. (See, e.g., EH RT at 16, 122-23, 186.) As noted, Mr. Soria explained why his  
21 2008 declaration (see EH Ex. 16) failed to clearly set out the defense jury selection and venue strategy,  
22 i.e., that he had not reviewed any of these materials prior to making the statements in his 2008  
23 declaration but had reviewed them prior to his testimony at the evidentiary hearing. (EH RT at 8-9, 11,  
24 33-34, 36, 39-40, 95-96, 107.)

25         Petitioner also claims counsel was deficient for not seeking a ruling on the venue motion in  
26 order to preserve the issue for appeal. He argues the professional norms embodied in the *ABA*  
27 *Guidelines* provide for preservation of appeal issues. (See ECF No. 178 at 62:24-63:2; *ABA Guideline*  
28 11.7.3.) However, Petitioner has not demonstrated *ABA Guidelines* create a duty counsel was bound to

1 follow. See e.g., Bobby v. Van Hook, 558 U.S. 4, 8-9 (2009) (*ABA Guidelines* have been viewed as  
2 essentially guides that inform reasonable attorney conduct, but not “inexorable commands”). Even if  
3 *ABA Guidelines* could be viewed as required conduct, counsel could reasonably have decided that an  
4 appeal of the venue issue would have lacked merit for the reasons discussed above. Additionally,  
5 counsel’s noted juror selection strategy, going to trial with a jury with whom they were satisfied, could  
6 reasonably be seen as outweighing considerations of appeal preservation.

7 The facts developed at the evidentiary hearing suggest that it was not unreasonable for the  
8 California Supreme Court to reject claimed ineffective assistance of counsel relating to the motion to  
9 change venue. Defense counsel was not required to make a futile and potentially counterproductive  
10 renewal of the change of venue motion, even in a capital case. See James v. Borg, 24 F.3d 20, 26 (9th  
11 Cir. 1994) (counsel not incompetent for failing to file meritless suppression motion). Nor was it  
12 prejudicial because there was no reasonable probability the motion to change venue, if renewed, would  
13 have been granted. Finally, even if there was a violation of state law as Petitioner contends, see  
14 Coleman, 48 Cal. 3d at 136, such is not alone a sufficient basis for federal habeas relief. Pulley v.  
15 Harris, 465 U.S. 37, 41 (1984).

16 5. **Conclusions Regarding Limited Evidentiary Hearing – Claim C2**

17 For the reasons stated, Petitioner has failed to demonstrate that counsel was deficient by failing  
18 to renew the change of venue motion and that, but for counsel’s unprofessional errors, venue in this  
19 proceeding would have been different. Strickland, 466 U.S. at 687-98.

20 Claim C2 is denied.

21 C. **Ineffective Assistance of Counsel at the Penalty Phase**

22 Petitioner, at the evidentiary hearing, attempted to develop facts relating to Mr. Soria’s  
23 allegedly inadequate penalty phase preparation and conduct. However, such matters are outside the  
24 scope of the evidentiary hearing granted by the Court. (ECF Nos. 261 at 54:12-15, 276 at 53:4-7.)  
25 Moreover, for claims like these, that are adjudicated on the merits in state court, a petitioner can only  
26 rely on the record that was before the state court to satisfy the requirements of § 2254(d). See Schriro  
27 v. Landrigan, 550 U.S. 465, 474 (2007); Pinholster, 563 U.S. at 181. Here, evidentiary development of  
28 allegations relating to IAC at the penalty phase is precluded because Petitioner has not satisfied the §

1 2254(d) gateway for reasons stated in claim W, *post*.

2 Even if the Court could consider the purported evidentiary proffer at the evidentiary hearing, no  
3 prima facie claim has been stated. Mr. Soria, at the evidentiary hearing, initially testified he took no  
4 steps, prior to November 1990, to prepare for the penalty phase. (EH RT at 23:23-24:7.) He stated that  
5 he was somewhat pre-occupied with the prospect of taking a job with the Monterey Public Defender,  
6 (Id. at 21:11-15), and with the demands of acting as petitioner's counsel in Holt through May 1990.  
7 (Id. at 30:24-31:11.) However, Mr. Soria later testified that he was in fact preparing for both the guilt  
8 and penalty phases in this action prior to trial, during the period July-November 1990. (Id. at 68:15-  
9 69:15.)

10 Mr. Cater, who came in as second chair in late July, testified at the evidentiary hearing that no  
11 sufficient penalty defense had been prepared by Mr. Soria. (Id. at 161:14-19, 163:8-22, 166:17-19,  
12 167:12-16, 169:19-21.) Mr. Cater testified that Mr. Soria and his investigator, Bruce Binns, provided  
13 little, if anything, relating to their penalty phase preparation. (Id. at 148:9-12.) But later in his  
14 testimony, Mr. Cater conceded that he did receive Mr. Soria's penalty file, including research and  
15 discovery, though stating that these files did not contain much information. (Id. at 159:15-21.)

16 For the reasons stated above and in claim W, *post*, Petitioner was not and is not entitled to  
17 evidentiary development of claimed ineffective assistance of defense counsel at the penalty phase.

## 18 **VII. REVIEW OF RECORD CLAIMS**

### 19 **A. Claims Relating to Pretrial Issues**

#### 20 **1. Review of Claim A**

21 Petitioner alleges the trial court erred in denying Mr. Soria's July 1990 pretrial motion to  
22 withdraw from the case, despite Mr. Soria's lack of interest and preparation and his valid reasons to  
23 withdraw, forcing Petitioner to proceed to trial with an unwilling, incompetent, disloyal and ineffective  
24 attorney.

25 Petitioner raised this same claim in his petition for writ of habeas corpus in the California  
26 Supreme Court. The California Supreme Court ruled that, to the extent Petitioner's claim alleged trial-  
27 court error, the claim was procedurally barred because this claim could have been, but was not, raised  
28 on direct appeal. (CSC Order Den. Pet. Habeas Corpus [citing In re Harris, 5 Cal. 4th at 825 n.3 and In

1 re Dixon, 41 Cal. 2d at 759].) The California Supreme Court also summarily rejected Petitioner's  
2 claim on the merits in a decision unaccompanied by explanation. (Id.)

3 **a. Clearly Established Law**

4 Trial court error violates due process where it renders the resulting criminal trial fundamentally  
5 unfair. Chambers v. Mississippi, 410 U.S. 284, 294, 303 (1973).

6 The standard for ineffective assistance of counsel is set forth at in claim C2, *ante*.

7 **b. Analysis of Claim A**

8 Petitioner alleges that the trial court abused its discretion by refusing to appoint new lead  
9 counsel unless Mr. Soria could quickly find replacement lead counsel agreeable to keeping the  
10 previously set October 22, 1990 trial date. (7/18/90 RT at 3-4.) Mr. Soria was unable to do so, but he  
11 agreed to go forward with Mr. Cater as second counsel. (7/30/90 RT at 9-11.)

12 A breakdown in the attorney-client relationship can result in a denial of the right to effective  
13 assistance of counsel. Frazer v. United States, 18 F.3d 778, 782-83, 785 (9th Cir. 1994); see also  
14 Brown v. Craven, 424 F.2d. 1166, 1169-70 (9th Cir. 1970) (trial court's failure to conduct inquiry into  
15 irreconcilable conflict arising from the client's refusal to communicate or cooperate with counsel  
16 resulted in denial of effective assistance of counsel); Schell v. Witek, 218 F.3d 1017, 1026, (9th Cir.  
17 2000) (citing Smith v. Lockhart, 923 F.2d 1314, 1320 (8th Cir. 1991)) (the overarching constitutional  
18 question is whether the attorney-client conflict has become so great that "it resulted in a total lack of  
19 communication or other significant impediment that resulted in turn in an attorney-client relationship  
20 that fell short of that required by the Sixth Amendment").

21 Here, the record reflects that, on July 18, 1990, the trial court heard Soria's motion to  
22 withdraw as counsel. Soria argued that he had been seeking other employment, (7/18/90 In Camera  
23 Hearing RT 14 at 3-4, 11), and that sufficient time remained for new counsel to get up to speed.  
24 (7/18/90 In Camera Hearing RT at 4-5, 10-11.) The trial court denied Soria's request without  
25 prejudice and stated that it would reconsider Soria's motion on the following conditions: (1) that  
26 Soria provided the court with the names of two attorneys who were willing to work together and  
27 represent Petitioner "within the next week"; (2) the attorneys would be ready to begin trial on  
28 October 22, 1990, "or very shortly thereafter"; and (3) Petitioner had met with the two attorneys and

1 felt “comfortable” with them representing him. (7/18/90 RT at 12; see also 7/18/90 RT at 3.) Both  
2 Mr. Soria and Petitioner agreed that the court’s denial of the motion to withdraw and the conditions  
3 on reconsideration of the motion were “fair.” (7/18/90 RT at 12.)

4 On July 30, 1990, Mr. Soria indicated his willingness to continue handling Petitioner’s case and  
5 that he had found a co-counsel, Mr. Cater, to assist him. (7/18/90 RT at 9.) The trial court then  
6 appointed Mr. Cater as co-counsel. (Id. at 9-10.)

7 Petitioner cites to the *ABA Guidelines* and argues that the trial court “unreasonably applied” the  
8 Sixth Amendment duty of investigation in a capital case because its ruling would not have allowed a  
9 new counsel sufficient time to prepare for trial. (ECF No. 178 at 17-18.) But even if a failure to abide  
10 by the *ABA Guidelines* could establish ineffectiveness of counsel, the trial court was not provided any  
11 reason to believe that Mr. Soria was not abiding by them, (see claim I, *post*), or that any newly  
12 appointed counsel could not abide by them.

13 Mr. Soria informed the court that he brought the motion when he did because “there would be a  
14 significant amount of time for new counsel to come in” and he had “done enough investigation that [he]  
15 could bring [new] counsel up to speed” before trial. (7/18/90 In Camera Hearing RT at 4-5.) Moreover,  
16 even if the trial court’s ruling could have conflicted with the *ABA Guidelines* regarding the amount of  
17 preparation time needed for a newly appointed counsel, the issue was never before the trial court  
18 because Mr. Soria chose to remain on the case. (7/18/90 RT at 9.)

19 Mr. Soria also had indicated that he was “on the middle of the fence” about withdrawing in any  
20 event and agreed with the court’s assessment that he was primarily making the motion to withdraw  
21 because he did not currently have a second counsel, which he felt was necessary to presenting the case  
22 effectively. (7/18/90 In Camera Hearing RT at 7-8, 10-11.) Mr. Soria then indicated that another  
23 counsel, Mr. Cater, had expressed interest, and the court indicated he would do “an excellent job.”  
24 (7/18/90 In Camera Hearing RT at 13.)

25 To the extent Petitioner complains that Mr. Soria subsequently performed deficiently alleged in  
26 claims B2, C2, D, G2, H2, I1-I17, J, W1-W9 and Y, these claims all fail for the reasons stated, *post*.

27 Petitioner also argues by inference that the trial court abused its discretion in denying Mr.  
28 Soria’s motion to withdraw given that court’s subsequent grant of Petitioner’s Marsden motion

1 following the guilt phase. In granting the Marsden motion, the trial court removed Mr. Soria due to a  
2 complete breakdown in the attorney-client relationship to the point of conflict of interest (RT at 2271-  
3 96), appointing Mr. Cater to be lead counsel for the penalty phase. (CT at 544-45; RT at 2298-2301.)  
4 However, the trial court cannot be found to have abused its discretion in denying the motion to  
5 withdraw based upon events that occurred after ruling on that motion. (See ECF No. 178 at 14-18.)  
6 Mr. Soria's performance at trial is irrelevant when determining the propriety of the trial court's pre-trial  
7 ruling on the motion to withdraw.

8 Similarly unavailing is Petitioner's claim that the trial court erred in subsequently denying Mr.  
9 Cater's post-sentencing motion for appointment of independent counsel. At that time, the trial court  
10 "did not see anything wrong with [Mr. Soria's] representation and [did not think] by any stretch of the  
11 imagination that any more favorable determination would have occurred." (2/25/91 RT at 16-17.) This  
12 Court agrees, for reasons discussed in claim W, *post*.

13 A fair-minded jurist could have found that Petitioner failed to establish that he was denied a fair  
14 trial, or to the extent alleged, that defense counsel's performance fell below an objective standard of  
15 reasonableness and that, but for counsel's unprofessional errors, the result of the proceeding would  
16 have been different. Strickland, 466 U.S., at 687-98.

17 It does not appear that the California Supreme Court's rejection of the claim was contrary to, or  
18 an unreasonable application of, clearly established federal law, as determined by the Supreme Court, or  
19 that the state court's ruling was based on an unreasonable determination of the facts in light of the  
20 evidence presented in the state court proceeding. See 28 U.S.C. § 2254(d).

21 Claim A is denied.

22 **2. Review of Claims B1 & B2**

23 Petitioner next claims ineffective assistance by defense counsel's preparation and submission of  
24 a jury questionnaire that contained prejudicial information and induced the jurors to prejudge the  
25 question of his guilt or innocence, and he claims that the trial court erred in using the questionnaire.  
26 (ECF No. 113 at 14-15.)

27 Petitioner raised both claims in his petition for writ of habeas corpus in the California Supreme  
28 Court. (CSC Pet. Habeas Corpus at 25-28, 51-53.) The California Supreme Court ruled that

1 Petitioner’s first claim was procedurally barred because the claim could have been, but was not raised  
2 on direct appeal. (CSC Order Den. Pet. Habeas Corpus [citing In re Harris, 5 Cal. 4th at 825 n.3 & In re  
3 Dixon, 41 Cal. 2d at 759].) The California Supreme Court also summarily rejected both of Petitioner’s  
4 claims on the merits without explanation. (CSC Order Den. Pet. Habeas Corpus.)

5 **a. Clearly Established Law**

6 “[T]he right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial,  
7 ‘indifferent’ jurors.” Irvin, 366 U.S. at 722; see also Skilling, 561 U.S. at 377-78. In a capital case, “a  
8 prospective juror may be excluded for cause because of his or her views on capital punishment . . . if  
9 the juror’s views would ‘prevent or substantially impair the performance of his duties as a juror in  
10 accordance with his instructions and his oath.’” Wainwright v. Witt, 469 U.S. 412, 424 (1985) (citing  
11 Adams v. Texas, 448 U.S. 38, 45 (1980)). Thus, “a juror who in no case would vote for capital  
12 punishment, regardless of his or her instructions, is not an impartial juror and must be removed for  
13 cause.” Morgan v. Illinois, 504 U.S. 719, 728 (1992). Likewise, a juror who would automatically  
14 impose the death penalty if a defendant is found guilty is not impartial and must be removed for cause.  
15 Id. at 733; Ross v. Oklahoma, 487 U.S. 81, 85 (1988).

16 “[P]art of the guarantee of a defendant’s right to an impartial jury is an adequate voir dire to  
17 identify unqualified jurors.” Morgan, 504 U.S. at 729. “Voir dire ‘is conducted under the supervision  
18 of the court, and a great deal must, of necessity, be left to its sound discretion.’” Ristaino v. Ross, 424  
19 U.S. 589, 594 (1976) (quoting Connors v. United States, 158 U.S. 408, 413 (1895)). “[T]he trial court  
20 retains great latitude in deciding what questions should be asked on voir dire.” Mu’Min, 500 U.S. at  
21 424. No hard-and-fast formula dictates the necessary depth or breadth of voir dire, see United States v.  
22 Wood, 299 U.S. 123, 145–146 (1936), and “[t]he Constitution . . . does not dictate a catechism for voir  
23 dire, but only that the defendant be afforded an impartial jury.” Morgan, 504 U.S. at 729. A trial  
24 court’s failure to ask certain questions does not violate the Constitution unless it “render[s] the  
25 defendant’s trial fundamentally unfair.” Mu’Min, 500 U.S. at 426.

26 “[T]he trial court retains great latitude in deciding what questions should be asked on voir  
27 dire.” Id. at 424. A trial court’s failure to ask certain questions does not violate the Constitution unless  
28 it “render[s] the defendant’s trial fundamentally unfair.” Id. at 426.



1 Two specific inquires of voir dire are constitutionally compelled: inquiries into racial prejudice  
2 against a defendant charged with a violent crime against a person of a different racial group, *id.* at 424;  
3 and, in a capital case, inquiries into a juror's views on capital punishment. *Morgan*, 504 U.S. at 730-32.

4 The standard for ineffective assistance of counsel is set out in claim C2, *ante*. 299 U.S. 123

5 **b. Analysis of Claims B1 & B2**

6 Petitioner alleges that the questionnaire, prepared and submitted by defense counsel (SHCP Ex.  
7 1; 11/1/90 Supp. RT at 35-36), prejudicially informed potential jurors of outside evidence, that he had  
8 been the subject of *America's Most Wanted*, leading jurors to prejudge his guilt, biasing them against  
9 him. (See, e.g., RT 92-93; 364-378; 1482-83; 1488-89.) He complains counsel was ineffective in  
10 unnecessarily exposing jurors to the information about the *America's Most Wanted* broadcast and that  
11 doing so may have caused jurors to form conclusions not based upon the admitted evidence. See  
12 *Taylor v. Kentucky*, 436 U.S. 478, 485 (1978) (jury to reach their conclusion solely from the legal  
13 evidence adduced); *Brecht*, 507 U.S. at 637.

14 The questionnaire informed potential jurors that *America's Most Wanted* had created and aired a  
15 detailed re-enactment of the crime and that local stations had referenced, promoted and aired the  
16 episode. (See SHCP Ex. 1, Question 71.) The questionnaire asked potential jurors to state, based upon  
17 what they had seen, heard or read about the case, whether they would say that Petitioner was "definitely  
18 guilty, probably guilty, definitely not guilty or probably not guilty." (SHCP Ex. 1, Questions 71 C, 73.)

19 The Court finds these claims unpersuasive. As an initial matter, the trial court has broad  
20 discretion in the manner in which it conducts voir dire. *Ristaino*, 424 U.S. at 594; *Mu'Min*, 500 U.S. at  
21 424. There is no constitutional right to a written questionnaire or that certain questions be included or  
22 omitted. When a defendant challenges voir dire procedures, the issue is whether a particular question  
23 rendered the trial fundamentally unfair. See *Mu'Min*, 500 U.S. at 425-266. Equally so where the case  
24 has appeared on *American's Most Wanted*, such a "[a] searching voir dire of the prospective jurors is  
25 the primary tool to determine if the impact of the publicity rises to th[e] level of actual prejudice." *Jin*  
26 *Sig Choi v. Warren*, No. CIV. 12-3473 KM, 2015 WL 4042016, at \*17 (D.N.J. June 30, 2015).

27 The California Supreme Court, for reasons discussed in claim C2, *ante*, could reasonably have  
28 determined that the trial court's need to gauge potential prejudice relating to *America's Most Wanted*

1 supported the specific questions regarding *America's Most Wanted*. Rather than inviting unfair  
2 prejudice of guilt, the questionnaire reasonably could be seen as exposing it. "The Fourteenth  
3 Amendment guarantees each criminal defendant the right to a trial by an impartial jury free of outside  
4 influences. See Sheppard, 384 U.S. at 362. Even if some potential jurors' view of Petitioner's guilt or  
5 innocence was impacted by the questionnaire, (see e.g., RT at 1489-91 where the trial court appears to  
6 acknowledge as much), where responses demonstrated bias the Petitioner was able to mount a for cause  
7 challenge. (See e.g., RT at 452 [juror Thompson], RT at 619-20 [juror Crawford], RT at 1497, 1510  
8 [juror Clifford].)

9 At voir dire, the court must examine the jurors' statements "to determine whether a community-  
10 wide sentiment exists against the defendant [citation] . . . [n]egative media coverage by itself is  
11 insufficient to establish actual prejudice, and the existence of a juror's preconceived notion as to the  
12 guilt or innocence of the defendant, without more, is not sufficient to rebut the presumption of  
13 impartiality. Foley v. Parker, 488 F.3d 377, 387 (6th Cir. 2007). Petitioner has not demonstrated the  
14 questionnaire was improper under clearly established law. "[N]either th[e] court nor the parties should  
15 be precluded from asking 'case-specific' questions to attempt to discover a potential juror's bias based  
16 on facts that are or are likely to be at issue in this case." U.S. v. Johnson, 366 F. Supp.2d 822, 849  
17 (N.D. Iowa 2005). Similarly, the Court rejects Petitioner's argument under Bayramoglu v. Estelle, 806  
18 F.2d 880, 887 (9th Cir. 1986), that the questionnaire introduced the jury to prejudicial extrinsic  
19 evidence. Bayramoglu is distinguishable to the extent that case involved clear juror misconduct during  
20 deliberations, researching possible criminal penalties and providing the results to other jurors. Here,  
21 the allegedly prejudicial outside information was provided to the venire pool pretrial and was  
22 reasonably necessary to ferret out jurors who might be biased upon learning of evidence to be admitted  
23 at trial. Even if Bayramoglu were factually on point, that court's determination the juror misconduct  
24 was harmless because the offending juror was removed and the other jurors were told to disregard the  
25 outside evidence would suggest harmless error here as well. Potential jurors whose bias was shown by  
26 the questionnaire were removed for cause; the petite jury was instructed to consider only the admitted  
27 evidence.

28 It follows that counsel was not ineffective by drafting and submitting the questionnaire. As

1 noted, in addition to broadcast media, numerous articles about the crime also appeared in the local  
2 newspaper, the *Bakersfield Californian*. (EH Ex. 53.) Given the facts of this case, a fair trial  
3 necessitated gauging the jurors' exposure to media coverage and its impact. As Respondent notes,  
4 counsel had "full authority to manage the conduct of the trial." Taylor v. Illinois, 484 U.S. 400, 417-18  
5 (1988); New York v. Hill, 528 U.S. 110, 114-15 (2000). Petitioner was "bound" by the acts of his  
6 counsel and, "[a]bsent a demonstration of ineffectiveness, counsel's word on such matters is the last."  
7 Hill, 528 U.S. at 115; Allum v. Twomey, 484 F.2d 740, 745 (9th Cir. 1973) ("assuming the lawyer's  
8 competence, the client must accept the consequences of his trial strategy").

9 Even if counsel was deficient regarding the questionnaire, Petitioner has not demonstrated  
10 prejudice. The state supreme court could reasonably have determined the information in the  
11 questionnaire did not add to or conflict with evidence admitted at trial in any material way. Moreover,  
12 all jurors who had been exposed to pretrial publicity agreed they would follow instructions and  
13 deliberate based solely on the admitted evidence. (RT at 2182-2218; ECF No. 194 at 32:1-7 citing RT  
14 at 1005-07, 1011-12 [juror Campbell], 1111-15 [juror Hinson], 1142, 1145 [juror Lauer], 94, 100-03  
15 [juror Barnes], 365-66, 375, 377-78 [juror Vaughn], 1397-98 [juror Bowles], 238, 240, 244-45 [juror  
16 Lee], 1092-94, 1097-1100 [juror Hanson], and 1422-23, 1426 [juror Medina].) The state supreme court  
17 could reasonably have concluded there was no reasonable probability of a more favorable outcome had  
18 the questionnaire not been used.

19 Finally, Petitioner's re-argument relating to actual and presumed prejudice is unpersuasive for  
20 reasons discussed in claim C2, *ante*, summarized as follows. The Court previously denied on the  
21 merits Petitioner's allegation of actual prejudice (i.e., "actual partiality or hostility that could not be laid  
22 aside." See Harris, 885 F.2d at 1363; ECF No. 261 at 54:12-15; ECF No. 276, at 53:4-7.) This was not  
23 a case where prejudice is presumed, i.e., where there was a "barrage of inflammatory publicity  
24 immediately prior to trial,' . . . amounting to a 'huge . . . wave of public passion." Yount, 467 U.S.  
25 1025, 1033 (1984) (quoting Murphy, 421 U.S. at 798 and Irvin, 366 U.S. at 728).

26 For the reasons stated, a fair-minded jurist could have found that Petitioner failed to establish  
27 that he was denied a fair trial, or to the extent alleged, that defense counsel's performance fell below an  
28 objective standard of reasonableness and that, but for counsel's unprofessional errors, the result of the

1 proceeding would have been different, Strickland, 466 U.S. at 687-98. It follows that there was no trial  
2 court error in that regard.

3 It does not appear that the California Supreme Court's rejection of the claim was contrary to, or  
4 an unreasonable application of, clearly established federal law, as determined by the Supreme Court, or  
5 that the state court's ruling was based on an unreasonable determination of the facts in light of the  
6 evidence presented in the state court proceeding. See 28 U.S.C. § 2254(d).

7 Claims B1 and B2 are denied.

8 **3. Review of Claim D**

9 In this claim, Petitioner alleges that defense counsel was ineffective during voir dire of each of  
10 the twelve empanelled jurors regarding whether the jurors were willing to consider mitigating factors at  
11 the sentence selection phase. Petitioner also claims that the trial court compounded the error by failing  
12 to explain the mitigating factors to be considered at the penalty phase.

13 Petitioner raised this same claim in his petition for writ of habeas corpus in the California  
14 Supreme Court (CSC Pet. Habeas Corpus at 35-51), which the California Supreme Court rejected on  
15 the merits. (CSC Order Den. Pet. Habeas Corpus.)

16 **a. Clearly Established Law**

17 The legal standard for ineffective assistance of counsel is set out in claim C2, *ante*.

18 **b. Analysis of Claim D**

19 Petitioner claims that defense counsel conducted ineffective voir dire regarding "whether the  
20 jurors were willing to consider mitigating factors" and that "[t]he trial court compounded that error by  
21 limiting its explanation of factors to consider at the penalty phase to the circumstances of the crime as  
22 opposed to mitigating factors." (ECF No. 113 at ¶ 164.)

23 Petitioner alleges that defense counsel's voir dire was deficient regarding "the nature of  
24 mitigation" and the statutory mitigation factors so that the jurors could answer whether they were  
25 willing to consider mitigating factors during their sentence deliberations. (ECF No. 113 at ¶ 165; see  
26 also RT at 90-106 re Gilbert Barnes; RT at 389-97 re Connie Pauley; RT at 236-50 re Marie Lee; RT at  
27 361-87 re Michael Vaughn; RT at 1111-23 re Patricia Hinson; RT at 1144-47 re Beverly Lauer; RT  
28 1088-91 re Ralph Lopes; RT at 1009-14 re Dale Campbell; RT at 1096-1102 re Julie Hanson; RT at

1 1352-62 re Steven Parkison; RT at 1399-1404 re Robert Bowles; RT at 1424-27 re John Medina.)

2 The Court is not persuaded that defense counsel acts ineffectively at voir dire by not requesting  
3 that potential jurors be instructed about the nature of statutory mitigation. As noted, only two specific  
4 inquires of voir dire are constitutionally compelled: inquiries into racial prejudice against a defendant  
5 charged with a violent crime against a person of a different racial group, Ristaino, 424 U.S. at 595; and,  
6 in a capital case, inquiries into a juror's views on capital punishment. Morgan, 504 U.S. at 730-732.  
7 Since the Supreme Court has not decided the issue raised by Petitioner, the state supreme court's  
8 decision could not be contrary to or an unreasonable application of United States Supreme Court  
9 precedent. See Carey, 549 U.S. at 76.

10 Moreover, defense counsel could have had tactical reasons for not asking questions about  
11 mitigation in the abstract. Knowing that there may not have been anything significant to present in  
12 mitigation or that what was available may not ultimately materialize, counsel may have sought to avoid  
13 potential prejudice caused by discussion of mitigating factors not later presented at the penalty phase.  
14 “[W]hen counsel focuses on some issues [and excludes] others, there is a strong presumption that he  
15 did so for tactical reasons rather than through sheer neglect.” Jacobs v. Horn, 395 F.3d 92, 118 (3d Cir.  
16 2005) (citing Yarborough v. Gentry, 540 U.S. 1, 8 (2003)); cf. People v. Lucas, 12 Cal. 4th 415, 482-84  
17 (1995) (rejecting defendant's claim that he needed a new penalty jury to avoid potential prejudice  
18 caused by court's voir dire statements that defense would present evidence in mitigation at penalty  
19 trial).

20 Even had defense counsel sought to question prospective jurors regarding “the nature of  
21 mitigation,” the trial court could have properly denied such requests or sustained objections to such  
22 questions. People v. Sanders, 11 Cal. 4th 475, 539 (1995) (the scope of questions to be asked at voir  
23 dire is a matter for the court's discretion); see also 11/1/90 RT at 37-45 (court notes limitations in voir  
24 dire set by Proposition 115 and desire not to unnecessarily prolong voir dire, allowing use of juror  
25 questionnaire). In short, defense counsel was not required to question the venire about potential  
26 mitigation evidence in order to be constitutionally effective. See Hale v. Gibson, 227 F.3d 1298, 1317-  
27 18 (10th Cir. 2000) (no ineffectiveness for failure to voir dire about defense strategy); Paradis v. Arave,  
28 954 F.2d 1483, 1491 (9th Cir. 1992), vacated on other grounds, 507 U.S. 1026 (1993) (no

1 ineffectiveness for failure to voir dire about possible defense).

2       Petitioner also alleges that the trial court failed to explain the mitigating factors to be considered  
3 at the penalty phase and (along with the prosecutor) referred to the Penal Code § 190.3 factors as  
4 “guidelines” (see claim U1, *post*), “clearly vitiat[ing] any narrowing of the jury’s discretion in  
5 determining what penalty to render.” (ECF No. 113 at 47:9-11.) However, the trial court is not  
6 required to instruct the jurors at voir dire. The jury was properly instructed at the penalty phase. Prior  
7 to commencing their deliberations, the jurors were instructed with CALJIC No. 8.85 and specifically  
8 instructed that they “shall consider all of the evidence,” including any mitigating factors found  
9 applicable (RT at 2605-07; see also claim U, *post*); they were provided instructions explaining what  
10 mitigating factors were (RT at 2615); and they were told how they should be weighed. (RT at 2615-  
11 16.) Jurors are presumed to follow the court’s instructions. Weeks v. Angelone, 528 U.S. 225, 234  
12 (2000); United States v. Olano, 507 U.S. 725, 740 (1993); Aguilar v. Alexander, 125 F.3d 815, 820 (9th  
13 Cir. 1997); United States v. Brady, 579 F.2d 1121, 1127 (9th Cir. 1978). Petitioner’s suggestion the  
14 jury’s impartiality was undermined by the alleged error (see ECF No. 178 at 66:5-6) could reasonably  
15 be seen as only speculative.

16       Petitioner’s allegation that the trial court “limit[ed] its explanation of factors to consider at the  
17 penalty phase to the circumstances of the crime as opposed to mitigating factors”, (see ECF No. 113 at  
18 37:16-17), does not demonstrate constitutional error. It does not appear that the court’s comments were  
19 meant to be an exhaustive list of the penalty factors and the law. Instead, it appears that court’s  
20 comments were meant to give the prospective jurors “a general idea of the nature of the proceeding.”  
21 People v. Livaditis, 2 Cal. 4th 759, 781 (1992). If the jury somehow misunderstood this, “the penalty  
22 phase instructions ultimately given obviated any prejudice.” People v. Wright, 52 Cal. 3d 367, 414  
23 (1990) (disapproved on other grounds by People v. Wright, 49 Cal.4th 405, 459 (2010)).

24       Futhermore, Petitioner does not allege that the trial court failed to inquire into the noted  
25 constitutionally compelled areas of voir dire. Ristaino, 424 U.S. at 595; Morgan, 504 U.S. at 730-732.  
26 Since the Supreme Court has not decided the issue raised by Petitioner, the state supreme court’s  
27 decision could not be contrary to or an unreasonable application of United States Supreme Court  
28 precedent. See Carey, 549 U.S. at 76.

1 Finally, Petitioner cannot demonstrate any prejudice on this claim. Even if counsel had asked  
2 the mitigation questions he claims should have been asked, it is unknown what the jurors' answers  
3 would have been, what rulings the trial court would have made on cause challenges subsequently made,  
4 and how the jury makeup would have changed, if at all. White v. Luebbers, 307 F.3d 722, 728 (8th Cir.  
5 2002). Furthermore, "it is exceedingly unlikely that directing the venire's attention to the potential  
6 mitigating evidence would either have disposed the jury that was selected to lenity or have altered the  
7 composition of the jury in a direction favorable to him." Lear v. Cowan, 220 F.3d 825, 829 (7th Cir.  
8 2000). More importantly, prior to trial, each of the jurors assured the court that he or she could be fair  
9 and impartial. Bolin, 18 Cal. 4th at 314, 316; see Leavitt v. Arave, 383 F.3d 809, 826-27 (9th Cir.  
10 2004) (giving weight to jurors' assurances of impartiality); Quintero-Barraza, 78 F.3d at 1350 & n.5  
11 (trial court's conclusion regarding "juror impartiality" is a "factual issue" given "special deference"  
12 under AEDPA).

13 A fair-minded jurist could have found that Petitioner failed to establish defense counsel's  
14 performance fell below an objective standard of reasonableness and that, but for counsel's  
15 unprofessional errors, the result of the proceeding would have been different. Strickland, 466 U.S. at  
16 687-98.

17 For the reasons above, this Court also agrees with the California Supreme Court that there was  
18 no reasonable likelihood that Petitioner did not receive a fair trial despite the limited voir dire regarding  
19 Penal Code § 190.3 mitigation factors.

20 Accordingly, the California Supreme Court's rejection of this claim was not contrary to, or an  
21 unreasonable application of, clearly established federal law, or an unreasonable determination of the  
22 facts in light of the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d).

23 Claim D is denied.

24 **4. Review of Claim E**

25 In this claim, Petitioner alleges that the trial court erred by failing to excuse five prospective  
26 jurors, who were ultimately placed on the panel, four of whom were challenged for cause, and he  
27 alleges ineffective assistance by counsel's failure to dismiss these jurors by peremptory challenge.

28 Petitioner presented this same claim to the California Supreme Court on direct appeal. (AOB at



1 26-34.) The California Supreme Court held that Petitioner’s claim had not been preserved for appeal  
2 based on the well-settled rule in California that “exhaustion of peremptory challenges is a condition  
3 precedent to an appeal based on the composition of the jury.” Bolin, 18 Cal. 4th at 315, (citing Ross,  
4 487 U.S. at 90). That Court stated:

5 Defendant’s right to a fair and impartial jury is not compromised as long [as] he could have  
6 secured the juror’s removal through the exercise of a peremptory challenge. Accordingly,  
7 California courts hold that the defendant must exercise his peremptory challenges to remove  
8 prospective jurors who should have been excluded for cause, and that to complain on appeal  
of the composition of the jury, the defendant must have exhausted those challenges. [Citation]  
Defendant did not do so; he may not now claim error.

9 Bolin, 18 Cal. 4th at 315. The California Supreme Court also rejected Petitioner’s related ineffective  
10 assistance claim as follows:

11 [W]e also reject defendant’s passing suggestion that defense counsel rendered ineffective  
12 assistance in failing to utilize all available peremptory challenges. “[T]he decision whether to  
13 accept a jury as constituted is obviously tactical, and nothing on the appellate record  
14 demonstrates counsel’s tactical choice here was either unreasonable or prejudicial.” [Citation]  
15 We have reviewed the voir dire of the jurors in question. Whether or not they had been  
exposed to any pretrial publicity, including viewing *America’s Most Wanted*, each gave  
credible assurances he or she would decide the case based only on what transpired in the  
courtroom.

16 Id. at 316.

17 **a. Clearly Established Law**

18 “[T]he right to jury trial guarantees to the criminally accused a fair trial by a panel of  
19 impartial, ‘indifferent’ jurors.” Irvin, 366 U.S. 717, 722 (1961); see also Skilling, 561 U.S. at 377-78.  
20 In a capital case, “a prospective juror may be excluded for cause because of his or her views on  
21 capital punishment . . . if the juror’s views would ‘prevent or substantially impair the performance of  
22 his duties as a juror in accordance with his instructions and his oath.’” Wainwright, 469 U.S. at 424  
23 (quoting Adams, 448 U.S. at 45). Thus, “a juror who in no case would vote for capital punishment,  
24 regardless of his or her instructions, is not an impartial juror and must be removed for cause.”  
25 Morgan, 504 U.S. at 728. Likewise, a juror who would automatically impose the death penalty if a  
26 defendant is found guilty is not impartial and must be removed for cause. Id. at 733; Ross, 487 U.S.  
27 at 85.

28 “[P]art of the guarantee of a defendant’s right to an impartial jury is an adequate voir dire to

1 identify unqualified jurors.” Morgan, 504 U.S. at 729. “Voir dire ‘is conducted under the  
2 supervision of the court, and a great deal must, of necessity, be left to its sound discretion.’” Ristaino,  
3 424 U.S. at 594 (quoting Connors, 158 U.S. at 413). “[T]he trial court retains great latitude in  
4 deciding what questions should be asked on voir dire.” Mu’Min, 500 U.S. at 424. “No hard-and-fast  
5 formula dictates the necessary depth or breadth of voir dire,” Wood, 299 U.S. at 145–146, and “[t]he  
6 Constitution . . . does not dictate a catechism for voir dire, but only that the defendant be afforded an  
7 impartial jury.” Morgan, 504 U.S. at 729. A trial court’s failure to ask certain questions does not  
8 violate the Constitution unless it “render[s] the defendant’s trial fundamentally unfair.” Mu’Min, 500  
9 U.S. at 426.

10 The ineffective assistance standard is set out in claim C2, *ante*.

11 **b. Analysis of Claim E**

12 Petitioner alleges that these jurors were biased due to media coverage. Juror Barnes stated he  
13 “definitely” believed Petitioner was guilty based on newspaper and television coverage. (RT at 90-  
14 93.) However, Mr. Barnes later stated he did not “know” whether Petitioner was guilty (RT at  
15 93-94) and stated he could decide the case based on what he heard in the courtroom. (Id.) Petitioner  
16 also alleges that juror Barnes was pre-disposed toward the death penalty. (ECF No. 113 at 48:28-  
17 49:13.) Juror Barnes stated that he would have no doubt about the death penalty for very violent  
18 crime consistent with the perpetrator’s past record. (RT at 104.)

19 Juror Vaughn saw the *America’s Most Wanted* broadcast and based on it felt Petitioner was  
20 “probably guilty” (RT at 364-65), but not necessarily so. (RT at 378.) Petitioner notes that Juror  
21 Vaughn also failed to disclose on his questionnaire a prior arrest for possession of marijuana. (RT at  
22 381-83.)

23 Juror Bowles had seen the *America’s Most Wanted* program. (RT at 1396.)

24 Juror Lee may have seen the *America’s Most Wanted* program. (RT at 238-39.)

25 Juror Hanson saw the *America’s Most Wanted* program and remembered some general  
26 information about the crime. (RT at 1092-1100.)

27 Petitioner argues that, notwithstanding the above showing of “bias,” the trial court denied  
28 defense counsel’s for-cause challenges against jurors Lee, Vaughn, Hanson and Bowles. (See RT at

1 245 (Lee); RT at 378-79 (Vaughn); RT at 1100 (Hanson); RT at 1402 (Bowles.)

2 This claim fails. Petitioner does not cite to established authority that a trial court violates due  
3 process in not excusing a juror for cause even when the defendant is able to but fails to exercise a  
4 peremptory challenge. In Ross, the Supreme Court found no due process violation where the state  
5 had a rule requiring the defendant to exhaust all peremptory challenges before complaining of an  
6 allegedly erroneous denial of a cause challenge. 487 U.S. at 90. Accordingly, the state supreme  
7 court's decision could not be contrary to or an unreasonable application of United States Supreme  
8 Court precedent. See Carey, 549 U.S. at 76.

9 Additionally, the California Supreme Court could reasonably have determined that Petitioner  
10 failed to show that these jurors were other than impartial. (See claim C2, *ante*.) Petitioner's argument  
11 that juror Barnes was predisposed to the death penalty is not sufficiently supported in the evidentiary  
12 record. A potential juror's view regarding the death penalty may not be the basis of a for-cause  
13 challenge unless those views would "prevent or substantially impair the performance of his duties as  
14 a juror in accordance with his instructions and his oath." Wainwright, 469 U.S. at 424 (quoting  
15 Adams, 448 U.S. at 45).

16 The record demonstrates that each of the five jurors referenced by Petitioner assured the trial  
17 court that she/he could be fair and impartial. Juror Barnes assured the court and counsel that he could  
18 decide the case on the facts presented in court, not in the media (RT at 92-103) and that he could  
19 presume Petitioner's innocence at the start of trial (*id.*); Juror Vaughn likewise assured the court and  
20 counsel that he accepted the presumption of innocence (RT at 365-84) and that he could be fair  
21 despite prior knowledge of the case (*id.*); Juror Bowles told the court that he had not seen enough of  
22 the *America's Most Wanted* program's reenactment of the crime "to really remember what it was  
23 about" (RT at 1397), that he had no opinion one way or the other about Petitioner's guilt or innocence  
24 (*id.*), and that he could be a fair and impartial juror in this case (RT at 1398); Juror Lee "[v]aguely"  
25 remembered the case from television (RT at 238), but she assured the court and counsel she  
26 absolutely could put aside whatever prior knowledge of the case she had and decide the case on the  
27 evidence presented in the courtroom (RT at 240-46); and Juror Hanson recalled some of the details of  
28 the charged crimes from the *America's Most Wanted* program (RT at 1092-1102) but assured the

1 court she could put that information out of her mind and decide the case on the evidence presented in  
2 court. (Id.)

3 Petitioner contends the trial court gave too much weight to these jurors' statements that they  
4 could follow the law. (ECF No. 178 at 58:18-59:7.) However, for the reasons discussed above, the  
5 state supreme court could reasonably have found that Petitioner "presented no evidence that any of  
6 the jurors that convicted and sentenced him were unable or unwilling to properly perform their  
7 duties." United States v. Padilla-Mendoza, 157 F.3d 730, 734 (9th Cir. 1998). "[A]n impartial jury  
8 consists of nothing more than 'jurors who will conscientiously apply the law and find the facts.'" Lockhart v. McCree, 476 U.S. 162, 178 (1986) (quoting Wainwright, 469 U.S. at 423). Each of the  
9 above five jurors stated that their prior knowledge of the case would not affect their sitting as fair and  
10 impartial jurors. The California Supreme Court could reasonably have found that the trial court's  
11 denial of Petitioner's for-cause challenges as to these jurors was not an abuse of its discretion causing  
12 an unfair trial.  
13

14 Even if the trial court had erred, the California Supreme Court could reasonably have found  
15 the error to be harmless. The overarching issue was whether the jury that sat for the trial was  
16 impartial. See Poland v. Stewart, 169 F.3d 573, 583 (9th Cir. 1999) (holding trial court's denial of  
17 challenges for cause did not violate Sixth Amendment where no prejudice shown). Here, Petitioner  
18 has not demonstrated on the evidentiary record that the empaneled jury was other than impartial.  
19 (See claim C2, ante.)

20 Petitioner's additional allegation, albeit un-argued, that defense counsel was ineffective for  
21 failing to make peremptory challenges against these five allegedly biased jurors fails for the reasons  
22 stated above, as well as those discussed in claim F, *post*. Accordingly, a fair-minded jurist could have  
23 found that Petitioner failed to establish trial court error, or that he was denied a fair trial, or that  
24 defense counsel's performance fell below an objective standard of reasonableness and that, but for  
25 counsel's unprofessional errors, the result of the proceeding would have been different. Strickland,  
26 466 U.S. at 687-98.

27 It does not appear that the state supreme court's rejection of the claim was contrary to, or an  
28 unreasonable application of, clearly established federal law, as determined by the Supreme Court, or

1 that the state court's ruling was based on an unreasonable determination of the facts in light of the  
2 evidence presented in the state court proceeding. See 28 U.S.C. § 2254(d).

3 Claim E is denied.<sup>6</sup>

4 **5. Review of Claim F**

5 Petitioner alleges in this claim that defense counsel was ineffective by failing to challenge the  
6 empaneled jurors for cause or by available peremptory challenges.

7 The California Supreme Court considered and rejected this same claim on the merits on direct  
8 appeal, noting that:

9 “[T]he decision whether to accept a jury as constituted is obviously tactical, and nothing on  
10 the appellate record demonstrates counsel’s tactical choice here was either unreasonable or  
11 prejudicial.’ [Citation] We have reviewed the voir dire of the jurors in question. Whether or  
12 not they had been exposed to any pretrial publicity, including viewing *America’s Most  
13 Wanted*, each gave credible assurances he or she would decide the case based only on what  
14 transpired in the courtroom.”

15 Bolin, 18 Cal. 4th at 316.

16 **a. Clearly Established Law**

17 The standard for ineffective assistance of counsel is set out in claim C2, *ante*.

18 **b. Analysis of Claim F**

19 Petitioner faults defense counsel for failing to challenge and remove Jurors Barnes, Vaughn,  
20 Bowles, Hanson, and Lee. (ECF No. 178 at 70-72.)

21 Petitioner re-argues that the empaneled jury was tainted with prejudicial publicity; that juror  
22 Barnes had prejudged guilt and the penalty; and that at least juror Vaughn had prejudged guilt. He  
23 argues that defense counsel acknowledged as much when making for-cause challenges against jurors  
24 Lee, Vaughn, Hanson and Bowles, who had seen the *America’s Most Wanted* program. (See RT at  
25 245 (Lee); RT at 378-79 (Vaughn); RT at 1100 (Hanson); RT at 1402 (Bowles.) Petitioner also  
26 claims defense counsel was ineffective by failing to exercise available peremptory challenges against  
27 these five jurors.

28 However, the evidentiary record suggests defense counsel may have had tactical reasons to

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<sup>6</sup> Here, Respondent contends this claim is not cognizable because it creates and retroactively applies a “new rule” of constitutional law under Teague v. Lane, 489 U.S. 288 (1989). Respondent advances this argument as to numerous other claims as well. Unless otherwise noted, the Court declines to address Respondent’s Teague arguments where the claim lacks merit.

1 keep all of the noted jurors. Juror Barnes had some reservations about the death penalty (RT at 97-  
2 98, 104) and had not seen the reenactment of the charged crimes on the *America's Most Wanted*  
3 program (RT at 92), the latter possibly being the reason defense counsel did not challenge juror  
4 Barnes for cause (see claim E, *ante*).

5 Juror Vaughn admitted in his questionnaire that at one time he had a “problem” with  
6 marijuana, and he admitted during voir dire that he had used marijuana for “probably four or five  
7 years.” (RT at 371.) Juror Vaughn also admitted that he had been arrested once for marijuana and  
8 ultimately had the charge reduced from a felony to a misdemeanor. (RT at 381-83.) Since Petitioner  
9 was charged with a marijuana offense, counsel could have tactically believed that having juror  
10 Vaughn, who himself had used marijuana and who had been convicted of a crime, would be  
11 sympathetic to Petitioner in some respects.

12 As to juror Bowles, he specifically stated that he doesn't “agree” with *America's Most Wanted*  
13 (RT at 1396) because “everybody has their day in court and if a person has not been convicted or  
14 proven guilty, I don't feel they should be shown on that program . . . . [¶] They, now, people, the  
15 general public, oh, he is guilty because it's shown on TV. He is guilty. I don't agree with that.” (RT at  
16 1397:19-26.) Mr. Soria lodged a pro forma challenge based on the *America's Most Wanted* program.  
17 (RT at 1402:14-15.) However, Mr. Soria otherwise passed juror Bowles for cause. (RT at 1402:14-  
18 15.) This could suggest that apart from building the appeal record regarding the *America's Most*  
19 *Wanted* program, Mr. Soria found juror Bowles to be unbiased.

20 Juror Lee indicated that she “absolutely” does not believe everything in the newspaper and  
21 views television as “entertainment” rather than a source of news. (RT at 237:16-21.) She expressed  
22 some uncertainty about imposing the death penalty (RT at 242:9-21) and held a job as a union  
23 steward (RT at 243:9-13), something the defense could have found favorable. In any event, she  
24 assured the court that she “absolutely” could put her prior minimal knowledge about the case aside  
25 and decide it on the evidence presented in court. (RT at 240, 242-45.)

26 Juror Hanson remembered little about the case from *America's Most Wanted*, assuming what  
27 she knew even pertained to Petitioner's case and she had not mistaken it for something else. (RT at  
28 1092-94, 1097-99.) Furthermore, defense counsel could have felt that juror Hanson's former career

1 with the welfare department and the fact that she was presently unemployed were favorable to the  
2 defense. (RT at 1095:8-15.) Juror Hanson also had taken many courses in psychology and  
3 psychiatry in preparation for becoming a counselor. (RT at 1101:16-25.) Since Petitioner was  
4 considering whether to offer psychiatric evidence, he may have viewed juror Hanson as someone who  
5 would favorably view such evidence.

6 This Court is not persuaded by the claim. Petitioner has not made an evidentiary showing that  
7 undermines the California Supreme Court's conclusion that defense counsel's failure to use  
8 peremptory challenges could have been a reasonable tactical decision. Davis v. Woodford, 333 F.3d  
9 982, 995-96 (9th Cir. 2003), amended and superseded 384 F.3d 628, 643 (9th Cir. 2004) (no  
10 ineffectiveness in failing to use peremptory challenges where jurors' statements did not demonstrate  
11 actual or implied bias; each said they could "follow the judge's instructions and decide the case  
12 impartially"); Quintero-Barraza, 78 F.3d at 1349-50 (where juror stated it would be "difficult" for  
13 him to be impartial because he believed persons to be guilty until proven innocent, no ineffectiveness  
14 in failing to strike juror because decision was manifestly tactical and due respect was paid to juror's  
15 oath); Denham v. Deeds, 954 F.2d 1501, 1505 (9th Cir. 1992) (where juror stated that defendant may  
16 have told her about the charged crime while she waited on them at work, no ineffectiveness to fail to  
17 challenge her because she said she could be fair and where decision could be tactical).

18 Nor has Petitioner shown that the California Supreme Court incorrectly concluded that  
19 Petitioner failed to demonstrate any prejudice from the decision of counsel not to object to these  
20 jurors. Bolin, 18 Cal. 4th at 316 ("nothing on the appellate record demonstrates counsel's tactical  
21 choice here was either unreasonable or prejudicial"). Prior to trial, each of the jurors assured the  
22 court that he or she could be fair and impartial. Id. at 314, 316; see Leavitt, 383 F.3d at 826-27  
23 (giving weight to jurors' assurances of impartiality). As explained in claim E, *ante*, all five of these  
24 jurors provided what could reasonably be viewed as credible assurances that each could decide the  
25 case on the evidence presented in court.

26 For the reasons stated, a fair-minded jurist could have found that Petitioner failed to establish  
27 that he was denied a fair trial, or to the extent alleged, that defense counsel's performance fell below  
28 an objective standard of reasonableness and that but for counsel's unprofessional errors the result of



1 the proceeding would have been different. Strickland, 466 U.S. at 687-98.

2 It does not appear that the state supreme court's rejection of the claim was contrary to, or an  
3 unreasonable application of, clearly established federal law, as determined by the Supreme Court, or  
4 that the state court's ruling was based on an unreasonable determination of the facts in light of the  
5 evidence presented in the state court proceeding. See 28 U.S.C. § 2254(d).

6 Claim F is denied.

7 **6. Review of Claims G, G1 & G2**

8 Petitioner, in these claims, cites to People v. Wheeler, 22 Cal. 3d 258 (1978), and Batson v.  
9 Kentucky, 476 U.S. 79 (1986), and alleges that the prosecution improperly used racially  
10 discriminatory peremptory challenges to excuse prospective jurors with Hispanic surnames.  
11 Specifically, he points to potential jurors Nancy Burciaga (RT at 1632:19-20), Dina Romero (RT at  
12 1635:22-23), and Arthur Cordova (RT at 1636:19-20). He faults both the trial court and counsel for  
13 failing to make a Wheeler/Batson objection. (ECF No. 113 at 52-54; ECF No. 178 at 72-80.)  
14 Petitioner also contends that the California Supreme Court did not adjudicate the merits of his  
15 constitutional allegations. (Id.) All this, he claims, violated his Sixth Amendment right to a jury  
16 drawn from a representative cross-section of the community and his Fourteenth Amendment right to  
17 equal protection. (Id.)

18 Petitioner presented these same allegations to the California Supreme Court on direct appeal.  
19 That court held Petitioner's failure to make a Wheeler motion waived alleged prosecutorial misconduct  
20 and trial court error. Bolin, 18 Cal. 4th at 316-17. The California Supreme Court also denied on the  
21 merits the allegation that trial counsel was ineffective by failing to preserve the Wheeler issue. Bolin,  
22 18 Cal. 4th at 317.

23 Respondent counters that the claims are procedurally defaulted, waived by counsel's failure to  
24 object—an independent and adequate state ground. Petitioner replies that any waiver and default was  
25 caused by the ineffective assistance of his trial counsel, citing Martinez v. Ryan, 132 S. Ct. 1309, 1317  
26 (2012) (an attorney's errors during direct appeal may provide cause to excuse a procedural default).

27 The Court will review the merits of the unadjudicated allegations de novo, see Pirtle, 313 F.3d  
28 at 1167-68 & n.4; Coleman, 501 U.S. at 732-35, without determining whether the state procedural

1 default is adequate and independent to bar relief in federal court. See Franklin, 290 F.3d at 1232  
2 (courts empowered to reach the merits if on their face clearly not meritorious despite asserted  
3 procedural bar); Loggins, 654 F.3d at 1215 (relief may be denied on the merits where petition is clearly  
4 not meritorious despite asserted procedural bar).

5 As to the adjudicated ineffective assistance allegations, these are reviewed deferentially under  
6 AEDPA. See Williams, 133 S. Ct. at 1094-96.

7 The three claims are analyzed separately below.

8 **a. Review of Claim G – Prosecutorial Misconduct**

9 Petitioner alleges that the noted three potential jurors were improperly removed by the  
10 prosecution’s discriminatory peremptory challenges.

11 ***1) Clearly Established Law***

12 To constitute a due process violation, the prosecutorial misconduct must be “of sufficient  
13 significance to result in the denial of the defendant’s right to a fair trial.” Greer v. Miller, 483 U.S.  
14 756, 765 (1987) (quoting United States v. Bagley, 473 U.S. 667, 682 (1985)). “Before a federal court  
15 may overturn a conviction resulting from a state trial . . . it must be established not merely that the  
16 [State’s action] is undesirable, erroneous, or even universally condemned, but that it violated some  
17 right which was guaranteed to the defendant by the Fourteenth Amendment.” Smith v. Phillips, 455  
18 U.S. 209, 221 (1982) (quoting Cupp v. Naughten, 414 U.S. 141, 146 (1973)).

19 Any claim of prosecutorial misconduct must be reviewed within the context of the entire trial.  
20 Greer, 483 U.S. at 765-66; United States v. Weitzenhoff, 35 F.3d 1275, 1291 (9th Cir. 1994). The  
21 court must keep in mind that “[t]he touchstone of due process analysis in cases of alleged  
22 prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor” and “the aim  
23 of due process is not punishment of society for the misdeeds of the prosecutor but avoidance of an  
24 unfair trial to the accused.” Phillips, 455 U.S. at 219. “Improper argument does not, per se, violate a  
25 defendant’s constitutional rights.” Thompson v. Borg, 74 F.3d 1571, 1576 (9th Cir. 1996) (quoting  
26 Jeffries v. Blodgett, 5 F.3d 1180, 1191 (9th Cir. 1993)). Furthermore, the Supreme Court has stated:

27 [A]rguments of counsel generally carry less weight with a jury than do instructions from the  
28 court. The former are usually billed in advance to the jury as matters of argument, not  
evidence, . . . , and are likely viewed as the statements of advocates; the latter, we have often

1 recognized, are viewed as definitive and binding statements of the law. Arguments of counsel  
2 which misstate the law are subject to objection and to correction by the court. This is not to  
3 say that prosecutorial misrepresentations may never have a decisive effect on the jury, but  
4 only that they are not to be judged as having the same force as an instruction from the court.  
5 And the arguments of counsel, like the instructions of the court, must be judged in the context  
6 in which they are made.

7 Boyde v. California, 494 U.S. 370, 384-85 (1990).

8 If prosecutorial misconduct is established, and it was constitutional error, the error must be  
9 evaluated pursuant to the harmless error test set forth in Brecht. See Thompson, 74 F.3d at 1577  
10 (“Only if the argument were constitutional error would we have to decide whether the constitutional  
11 error was harmless.”).

## 12 2) *Analysis of Claim G*

13 The California Supreme Court reviewed this claim on direct appeal and held that Petitioner’s  
14 failure to make a Wheeler motion waived the claim. Bolin, 18 Cal. 4th at 316-17.

15 The Sixth Amendment guarantees trial by a jury drawn from a representative cross-section of  
16 the community. Batson, 476 U.S. at 96-98. The Equal Protection Clause prohibits a prosecutor from  
17 using peremptory challenges to exclude potential jurors solely on account of their race, e.g., on the  
18 assumption that black jurors as a group are unable to impartially consider the case against a black  
19 defendant. Id. at 79.

20 Under Batson and its state corollary, Wheeler, in order to contest the discriminatory use of  
21 peremptory challenges by the prosecution, a defendant must establish a prima facie case of  
22 discrimination by showing circumstances indicating that the exclusion of jurors was based on their  
23 race. Batson, 476 U.S. at 1723; Wheeler, 22 Cal. 3d at 281. These circumstances include but are not  
24 limited to a pattern of striking members of a certain racial group, or voir dire questions that reveal the  
25 prosecutor’s intent to strike solely for racial reasons. Id. Once a defendant puts forth a prima facie  
26 case, the prosecutor must come forward with “clear and reasonably specific” neutral explanations for  
27 the peremptory strikes. Id.

28 In Purkett v. Elem, 514 U.S. 765, 767 (1995), the Supreme Court provided a three-step Batson  
analysis: (1) the opponent of the peremptory challenge makes a prima facie showing of racial  
discrimination, (2) the burden of proof then shifts to the proponent of the strike to present a race-

1 neutral explanation, noting that unless a discriminatory intent is inherent in the explanation, the  
2 reason offered will be deemed race-neutral, and (3) the court then determines whether the opponent of  
3 the strike has proved purposeful discrimination. In 1991, the Supreme Court decided Powers v. Ohio,  
4 499 U.S. 400, 402 (1991), which expanded the Batson rule to cases where, as here, the petitioner and  
5 excluded jurors are not of the same ethnicity.

6 In considering a Batson objection or ruling, all of the circumstances that bear upon the issue  
7 of racial animosity must be consulted. Snyder v. Louisiana, 552 U.S. 472, 478 (2008) (citing Miller-  
8 El v. Dretke, 545 U.S. 231, 239 (2005)). In the Ninth Circuit, the first prong under Batson, the prima  
9 facie showing of racial discrimination, is accorded deferential review in a habeas proceeding. Tolbert  
10 v. Page, 182 F.3d 677, 682 (9th Cir. 1999).

11 Because there was no Wheeler/Batson objection at trial the reasons for the prosecution  
12 challenge of these three potential jurors are not express in the state record. See Dias v. Sky Chefs,  
13 Inc., 948 F.2d 532, 534 (9th Cir. 1991) (Batson objections “must occur as soon as possible, preferably  
14 before the jury is sworn.”). Petitioner relies upon an inference of racial discrimination arising from  
15 his allegations that, of thirteen Hispanic potential jurors in the original pool of 158 (AOB at 36), nine  
16 were removed for hardship or cause, (ECF No. 178 at 52-53), and the three noted above were  
17 removed by prosecution peremptory challenge, leaving one Hispanic, juror Medina, seated on the  
18 jury. (Id.) He cites to Williams v. Runnels, 432 F.3d 1102, 1107 (9th Cir. 2006), in arguing that this  
19 statistical disparity is sufficient to raise an inference of purposeful discrimination. (See ECF No. 178  
20 at 74.)

21 As the California Supreme Court noted, excuse for financial hardship is not alone a basis for a  
22 Wheeler challenge. See Bolin, 18 Cal. 4th at 316, n.3. Petitioner claims a statistical inference of  
23 discrimination, that though Hispanics comprised only a small percentage of the venire pool surviving  
24 hardship (i.e., 4 Hispanics in the 149 member venire pool), 75% of Hispanics (i.e., 3 of 4) were  
25 subject of peremptory challenge. Petitioner argues these circumstances suggest purposeful racial  
26 discrimination. See Windham v. Merkle, 163 F.3d 1092, 1099 (1998) (“to establish a prima facie  
27 case of purposeful racial discrimination, a defendant must interpose an objection on the ground that  
28 the prosecutor has exercised peremptory challenges against prospective jurors because of their race

1 [and] defendant must articulate facts and other relevant circumstances that raise an inference that the  
2 prosecutor exercised peremptory challenges to exclude the veniremen from the petit jury on account  
3 of their race.”).

4 Respondent counters that the claim is waived by defense counsel’s failure to object.  
5 Petitioner replies that any waiver was caused by the ineffective assistance of counsel.

6 Here, Petitioner relies upon only the alleged Hispanic surnames of the challenged jurors to  
7 support an inference of discrimination. However, Petitioner does not demonstrate, other than through  
8 counsel’s surmise, that the challenged jurors Burciaga, Romero and Cordova had Hispanic surnames  
9 and were Hispanic. Cf. Williams, 432 F.3d at 1107 (petitioner, an African-American, made a prima  
10 facie statistical disparity showing under Batson where prosecution excused three of four African-  
11 Americans from a 59 member jury pool).

12 Petitioner also fails to show that anything in these jurors’ questionnaires and voir dire signaled  
13 purposeful racial motivation. See e.g., U.S. v. Esparsen, 930 F.2d 1461, 1465-67 (10th Cir. 1991) (no  
14 discriminatory peremptory challenge where racial identity of venire members with Hispanic surnames  
15 was uncertain and nothing during voir dire suggested a racial motivation); cf. People v. Trevino, 39  
16 Cal. 3d 667, 684-86 (1985), disapproved on other grounds, People v. Johnson, 47 Cal. 3d. 1194,  
17 1216-21 (1989) (prima facie Wheeler claim to exclude Hispanics stated where prosecution challenged  
18 individuals based solely on Spanish surnames where Hispanics comprised 30% of the total population  
19 of the county).

20 Moreover, that an alleged Hispanic, Mr. Medina, was not challenged and remained a sitting  
21 juror, suggests an absence of discriminatory selection. See Esparsen, 930 F.2d at 1468 (presence on  
22 the final jury of a member of the excluded cognizable group is relevant to a Batson challenge when  
23 the prosecution had an opportunity to strike the juror).

24 A California Court of Appeal has held that “the exclusion of disproportionate numbers of  
25 minority jurors per se” does not automatically establish a prima facie case of discrimination under  
26 Wheeler. People v. Allen, 212 Cal. App. 3d 306, 316 (1989). Furthermore, “[a] prima facie case of  
27 group bias requiring prosecutorial explanation arises only if from all the circumstances of the case the  
28 trial court finds a strong likelihood that the persons were being challenged because of their group

1 association rather than specific bias.” Carrera v. Ayers, 699 F.3d 1104, 1109 (9th Cir. 2012).

2 Here, the evidentiary record also suggests non-discriminatory reasons for these peremptory  
3 challenges. Potential juror Burciaga expressed a pro-life stance during voir dire, (see RT at 1461-67),  
4 and questioned her ability to impose a death sentence in this case. (Id.) Petitioner appears to concede  
5 that juror Burciaga was challenged due to her position on the death penalty. (See claim H, *post*; ECF  
6 No. 113 at 54-55.)

7 Potential juror Romero suggested during voir dire that previously her husband was the subject  
8 of child support proceedings brought by the district attorney’s office. (RT at 317-18.) Similarly,  
9 during voir dire, potential juror Cordova suggested possible dissatisfaction with law enforcement  
10 relating to criminal proceedings against family members, (RT at 160-61), that his prior service as a  
11 juror in a murder case had been “very stressful” (RT at 167:25-27), and that he questioned whether  
12 the death penalty was fairly applied (RT at 166-75).

13 Petitioner also alleges in passing that he was denied the opportunity to develop facts  
14 supporting this claim. (See ECF No. 178 at 76 n.71.) But he has shown neither the requisite (28  
15 U.S.C. § 2254(e)(2)(A)(ii)) diligence, i.e., facts that could not have been previously discovered by  
16 diligent counsel, nor the requisite purposeful discrimination against these jurors by the prosecution.  
17 Any suggestion that counsel was deficient by failing to make a Wheeler/Batson objection is  
18 insufficient to support this claim given the possibility counsel was reasonably motivated by trial  
19 tactics a discussed in claim G2, *post*. Furthermore, Petitioner has not otherwise shown on the record  
20 that he was denied factual development of this claim. See Dias, 948 F.2d 532, 535 (9th Cir. 1991)  
21 (“No case requires a trial court to address *sua sponte* [an unadvanced Wheeler objection], an issue  
22 that neither this court nor the Supreme Court has decided. Trials are still adversary proceedings in  
23 which counsel may not lay traps for a trial judge and then expect relief from an appellate court.”).

24 In sum, the California Supreme Court could reasonably have found the record devoid of facts  
25 showing how race was involved in the instant peremptory challenges and supporting an inference that  
26 the prosecutor exercised the challenges on account of race. See Carrera, 699 F.3d at 1110 (six  
27 peremptory strikes of Hispanic-surnamed venirepersons not sufficient to show Wheeler bias where  
28 obvious non-discriminatory reasons for striking and two Hispanic-surnamed persons seated on the

1 jury); cf. Johnson, 125 S. Ct. at 2418 (inference of discriminatory statistical disparity found where  
2 African-American petitioner being tried for murdering his Caucasian girlfriend's daughter objected to  
3 prosecutor's challenge of all three African-American's on the jury panel).

4 For the reasons stated, this claim does not demonstrate constitutional error. Moreover,  
5 Respondent would be prejudiced by consideration of an untimely Wheeler objection when  
6 Respondent did not have the opportunity to contemporaneously respond during voir dire. See Dias,  
7 948 F.2d at 535.

8 Claim G is denied.

9 **b. Review of Claim G1 – Trial Court Error on Batson/Wheeler Claim**

10 Petitioner alleges that the trial court erred in not *sua sponte* initiating a Wheeler/Batson  
11 objection to the prosecution's use of peremptory challenges against the three potential jurors.

12 The California Supreme Court reviewed this claim on direct appeal and, as with the above  
13 claim, held that Petitioner's failure to make a Wheeler motion waived the claim. Bolin, 18 Cal. 4th at  
14 316-17.

15 **1) *Clearly Established Law***

16 The standard for trial court error is set out in claim A.

17 **2) *Analysis of Claim G1***

18 Petitioner alleges that the trial court had a *sua sponte* duty to raise the Wheeler/Batson issue  
19 because of the prosecution's blatant use of peremptory challenges on racial grounds and that failure to  
20 do so "had a substantial and injurious effect or influence in determining the jury's verdict." (ECF No.  
21 113 at 53:14-15); Brecht, 507 U.S. at 637. He claims this violated his Sixth Amendment right to a  
22 jury drawn from a representative cross-section of the community and his Fourteenth Amendment  
23 right to equal protection.

24 The initial burden of mounting a Batson challenge is on the aggrieved party. See Purkett, 514  
25 U.S. at 767. Petitioner has not cited authority that the trial court had a *sua sponte* obligation to  
26 question the prosecution's challenges. On review, the California Supreme Court found no such  
27 obligation. Bolin, 18 Cal. 4th at 316-17 (citing Wheeler, 22 Cal. 3d at 280); see also Dias, 948 F.2d  
28 532, 535 (9th Cir. 1991) ("It is too late to claim on appeal that the trial court erred when counsel



1 never asked the judge to do anything.”). Even if such an obligation were found to exist, the  
2 prosecution’s challenges to jurors Burciaga, Romero and Cordova were not constitutionally infirm for  
3 the reasons stated above.

4 For the reasons stated, this claim does not demonstrate constitutional error. Moreover,  
5 Respondent would be prejudiced by consideration of an untimely Wheeler objection when  
6 Respondent did not have the opportunity to contemporaneously respond during voir dire. See Dias,  
7 948 F.2d at 535.

8 Claim G1 is denied.

9 c. **Review of Claim G2 – Ineffective Assistance on Wheeler/Batson Claim**

10 Petitioner contends that trial counsel was ineffective by not lodging a Wheeler/Batson  
11 objection to the above noted peremptory challenges.

12 The California Supreme Court reviewed this claim on direct appeal and found it to be without  
13 merit. Bolin, 18 Cal. 4th at 317.

14 1) ***Clearly Established Law***

15 The standard for ineffective assistance of counsel is set out in claim C2, *ante*.

16 2) ***Analysis of Claim G2***

17 The California Supreme Court denied these allegations, finding:

18 On this record, we are unable to determine the reason counsel did not make a timely  
19 challenge. He may have perceived the prosecutor could adequately rebut the charge, or  
20 he himself may have been dissatisfied with the individuals excused. Since the decision  
21 may well have been “an informed tactical choice within the range of reasonable  
22 competence, the conviction must be affirmed. [Citation]”

23 Id.

24 The Court, considering the discussion in claims G and G1, *ante*, finds this determination is not  
25 unreasonable. Judicial scrutiny of counsel’s performance is highly deferential and the habeas court  
26 must guard against the temptation “to second-guess counsel’s assistance after conviction or adverse  
27 sentence.” Strickland, 466 U.S. at 689. A court indulges a “‘strong presumption’ that counsel’s  
28 representation was within the ‘wide range’ of reasonable professional assistance.” Richter, 562 U.S. at  
104 (quoting Strickland, 466 U.S. at 687). This presumption of reasonableness means that not only do  
we “give the attorneys the benefit of the doubt,” we must also “affirmatively entertain the range of

1 possible reasons [defense] counsel may have had for proceeding as they did.” Pinholster, 563 U.S. at  
2 196.

3 “The proper measure of attorney performance remains simple reasonableness under prevailing  
4 professional norms.” Wiggins, 539 U.S. at 521 (quoting Strickland, 466 U.S. at 688). The California  
5 Supreme Court could reasonably have found that Petitioner failed to demonstrate the prosecution’s  
6 challenge of these three jurors was for reasons of race, and that defense counsel could have reasonably  
7 refrained from raising a futile Wheeler/Batson objection.

8 A fair-minded jurist could have found that Petitioner failed to establish that he was denied a  
9 fair trial, or to the extent alleged, that defense counsel’s performance fell below an objective standard  
10 of reasonableness and that there was a reasonable probability Petitioner would have prevailed on a  
11 Wheeler challenge had it been raised by counsel. Mitcham v. Davis, 103 F. Supp. 3d 1091, 1108,  
12 citing Carrera, 699 F.3d at 1108; Strickland, 466 U.S. at 687-98.

13 It does not appear that the state supreme court’s rejection of the claim was contrary to, or an  
14 unreasonable application of, clearly established federal law, as determined by the Supreme Court, or  
15 that the state court’s ruling was based on an unreasonable determination of the facts in light of the  
16 evidence presented in the state court proceeding. See 28 U.S.C. § 2254(d).

17 Claim G2 is denied.

18 **7. Review of Claims H, H1 & H2**

19 Petitioner, in these claims, alleges prosecutorial misconduct and ineffective assistance relating  
20 to exclusion of nine potential jurors with reservations about the death penalty, denying him rights to  
21 equal protection, an impartial jury drawn from a cross-section of the community, and a reliable  
22 determination of guilt and sentence, violating his rights under the Sixth, Eighth and Fourteenth  
23 Amendments to the U.S. Constitution.

24 The prosecutorial misconduct claim was raised on direct appeal and denied on the merits.  
25 Bolin, 18 Cal. 4th at 317.

26 The ineffective assistance claim, failing to object to the prosecutor’s use of peremptory  
27 challenges to exclude potential jurors with reservations about the death penalty, (ECF No. 113 at 57-  
28 58; ECF No. 178 at 82), also was raised on direct appeal and denied on the merits. Bolin, 18 Cal. 4th

1 at 317.

2 Petitioner alleges that these claims were not adjudicated by the state court. (ECF No. 113 at  
3 57:11-12.) This is incorrect, as the California Supreme Court rejected these allegations on the merits.  
4 See Bolin, 18 Cal. 4th at 317.

5 These claims are analyzed separately below.

6 a. **Review of Claims H, H1**

7 ***1) Clearly Established Law***

8 The legal standard for prosecutorial misconduct is set out in claim G, *ante*.

9 The legal standard for ineffective assistance is set out in claim C2, *ante*.

10 ***2) Analysis of Claims H and H1***

11 In claims H and H1, Petitioner alleges that the prosecution used at least nine of fourteen  
12 peremptory challenges exercised to exclude potential jurors who, while voicing some concern of  
13 sentencing someone to death, nonetheless stated they could vote for death in an appropriate case.  
14 (ECF No. 113 at 54-57); (juror Fuson, RT at 1316-22); (juror Burciaga, RT at 1461-65); (juror Goff,  
15 RT at 1427-40); (juror Lewis, RT at 1501-07); (juror O'Neal, RT at 734-35); (juror Lucas, RT at 542-  
16 48); (juror Hatfield, RT at 661-64); (juror Sprague, RT at 814, 818-20); (juror Holder, RT at 1413-  
17 15).

18 Petitioner cites Witherspoon v. Illinois, 391 U.S. 510, 522-23 (1967), as authority that the  
19 prosecution improperly used peremptory challenges to exclude jurors solely because of reservations  
20 about the death penalty. He claims this denied him an impartial jury and “had a substantial and  
21 injurious effect or influence in determining the jury’s verdict.” Brecht, 507 U.S. at 637.

22 In rejecting this claim on direct appeal, the California Supreme Court stated:

23  
24 Relying primarily on Witherspoon v. Illinois (1968) 391 U.S. 510 and Wainwright v. Witt  
25 (1985) 469 U.S. 412, defendant contends the prosecutor violated various constitutional rights  
26 by using peremptory challenges to excuse prospective jurors who expressed scruples about  
27 imposing the death penalty. Witherspoon and Witt set forth the standard for determining  
28 whether the trial court properly excused prospective jurors for cause based on their attitudes  
toward capital punishment. [Citation] With respect to peremptory challenges, this court has  
consistently held such excusals do not implicate any constitutional guaranty. [Citation]  
Defendant offers no persuasive reason to reexamine that determination. Consequently,  
counsel was not ineffective for failing to make an objection.

1 Bolin, 18 Cal. 4th at 317.

2 This Court agrees that Petitioner's reliance upon Witherspoon, and also Gray v. Mississippi,  
3 481 U.S. 648 (1987), is misplaced given their facts. Those cases involved prosecution for-cause  
4 challenges of potential jurors who expressed general objections to or scruples about the death penalty.  
5 As noted in claim E, *ante*, "[t]he right to jury trial guarantees to the criminally accused a fair trial by a  
6 panel of impartial, 'indifferent' jurors." Irvin, 366 U.S. at 722; see also Skilling, 561 U.S. at 377-78.  
7 In a capital case, "a prospective juror may be excluded for cause because of his or her views on  
8 capital punishment . . . if the juror's views would 'prevent or substantially impair the performance of  
9 his duties as a juror in accordance with his instructions and his oath.'" Wainwright, 469 U.S. at 424  
10 (quoting Adams, 448 U.S. at 45). Thus, "a juror who in no case would vote for capital punishment,  
11 regardless of his or her instructions, is not an impartial juror and must be removed for cause."  
12 Morgan, 504 U.S. at 728.

13 The California Supreme Court held that, because the prosecutor's exercise of peremptory  
14 challenges to excuse jurors with scruples about the death penalty does not implicate any  
15 constitutional guaranty, defense counsel was not ineffective for failing to make a futile objection.  
16 Bolin, 18 Cal. 4th at 317. Failure to object is not ineffectiveness where an objection would have  
17 lacked merit. United States v. Aguon, 851 F.2d 1158, 1172 (9th Cir. 1988), overruled on other  
18 grounds by Evans v. United States, 504 U.S. 255 (1992).

19 "The Supreme Court has never questioned the propriety, under the Constitution, of using  
20 peremptory challenges to remove from the jury persons likely to support the defendant's position" on  
21 capital punishment. Gosier v. Welborn, 175 F.3d 504, 510 (7th Cir. 1999). It follows that the  
22 California Supreme Court's conclusion was neither an unreasonable application of, nor contrary to,  
23 Supreme Court law. Carey, 549 U.S. at 76.

24 A criminal defendant has the right to an impartial jury drawn from a venire that has not been  
25 tilted in favor of capital punishment by selective prosecutorial challenges for cause. Uttecht v.  
26 Brown, 551 U.S. 1, 9 (2007); cf. Wainwright, 469 U.S. at 424 (exclusion for cause is proper where a  
27 juror's views on capital punishment would impair the performance of his duties). Petitioner concedes  
28 that none of the jurors about whom he complains was excluded for cause. (ECF No. 113 at 54:12-19;

1 ECF No. 178 at 80:22-81:2.) Furthermore, peremptory challenges are not of constitutional  
2 dimension. Ross, 487 U.S. at 88; Gray, 481 U.S. at 663. The California Supreme Court on direct  
3 appeal stated that:

4 “[W]ith respect to peremptory challenges, this court has consistently held such excusals do  
5 not implicate any constitutional guaranty.”

6 Bolin, 18 Cal. 4th at 317. The Supreme Court has upheld use of peremptory challenges that do not  
7 discriminate on a constitutionally suspect basis. See e.g., Holland v. Illinois, 493 U.S. 474, 478 (1990)  
8 (rejecting argument that “a prosecutor’s use of peremptory challenges to eliminate a distinctive group  
9 in the community deprives the defendant of a Sixth Amendment right to the ‘fair possibility’ of a  
10 representative jury”).

11 Respondent suggests, and this Court agrees that the California Supreme Court reasonably  
12 could have determined these nine peremptory challenges were not related to the potential jurors’  
13 reservations over the death penalty. Prospective juror Lucas’s son had a drug related arrest (RT at  
14 539-40); prospective juror Hatfield had a DUI (RT at 656-58); prospective juror Sprague had been  
15 federally indicted and prosecuted, but not convicted (RT at 810-13); and prospective juror O’Neal  
16 was an ex-felon who had served time in prison for burglary and robbery (RT at 731-33). As to the  
17 other five challenges, Petitioner’s speculation alone that a challenge was exercised because of the  
18 prospective juror’s reservations about the death penalty is not a basis for a constitutional violation.

19 For the reasons stated, a fair-minded jurist could have found that Petitioner failed to establish  
20 that he was denied a fair trial, or to the extent alleged, that defense counsel’s performance fell below  
21 an objective standard of reasonableness and that, but for counsel’s unprofessional errors, the result of  
22 the proceeding would have been different

23 Accordingly, it does not appear that the state supreme court’s rejection of these claims was  
24 contrary to, or an unreasonable application of, clearly established federal law, as determined by the  
25 Supreme Court, or that the state court’s ruling was based on an unreasonable determination of the  
26 facts in light of the evidence presented in the state court proceeding. See 28 U.S.C. § 2254(d).

27 Claims H and H1 are denied.

28 **b. Review of Claim H2**

1 In claim H2, Petitioner alleges defense counsel's ineffective assistance by failing to object to  
2 the prosecution's noted selection of an allegedly pro-death penalty jury. Petitioner alleges that there  
3 was no tactical reason for counsel's failure to object.

4 **1) *Clearly Established Law***

5 The legal standard for ineffective assistance of counsel is set out in claim C2, *ante*.

6 **2) *Analysis of Claim H2***

7 This claim fails for the same reasons discussed in claims H and H1, *ante*. A fair-minded jurist  
8 could have found that Petitioner has not demonstrated the prosecution's use of peremptory challenges  
9 was constitutionally infirm, or that he was denied a fair trial. Defense counsel's failure to object,  
10 where objection would be futile, was not objectively unreasonable. See Aguon, 851 F.2d at 1172;  
11 Strickland, 466 U.S., at 687-698. Additionally, Petitioner has not demonstrated that but for counsel's  
12 performance there is a reasonable probability of a more favorable result. Strickland, 466 U.S. at 687-  
13 98. For the reasons discussed in claim E, *ante*, he has not demonstrated on the evidentiary record that  
14 the empaneled jury was other than impartial.

15 It does not appear that the state supreme court's rejection of the claim was contrary to, or an  
16 unreasonable application of, clearly established federal law, as determined by the Supreme Court, or  
17 that the state court's ruling was based on an unreasonable determination of the facts in light of the  
18 evidence presented in the state court proceeding. See 28 U.S.C. § 2254(d).

19 Claim H2 is denied.

20 **B. Claims Relating to Guilt Phase**

21 **1. Review of Claim I**

22 This claim consists of seventeen subclaims alleging ineffective assistance at the guilt phase,  
23 resulting in a complete breakdown of the adversarial process, denying Petitioner's rights under the  
24 Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution.

25 The California Supreme Court considered and rejected ineffective assistance of counsel  
26 claims at the guilt phase on direct appeal, noting generally that:

27  
28 Defendant alleges numerous instances of ineffective assistance of counsel. To prevail on such  
claims, he must establish not only deficient performance, i.e., representation below an

1 objective standard of reasonableness, but also resultant prejudice. [Citation] Tactical errors are  
2 generally not deemed reversible, and counsel's decision making must be evaluated in the  
3 context of the available facts. [Citation] To the extent the record on appeal fails to disclose  
4 why counsel acted or failed to act in the manner challenged, we will affirm the judgment  
5 "unless counsel was asked for an explanation and failed to provide one, or unless there simply  
6 could be no satisfactory explanation ...." [Citation] Finally, prejudice must be affirmatively  
7 proved; the record must demonstrate "a reasonable probability that, but for counsel's  
8 unprofessional errors, the result of the proceeding would have been different. A reasonable  
9 probability is a probability sufficient to undermine confidence in the outcome." [Citation]

7 Bolin, 18 Cal. 4th at 333-35.

8 The seventeen subclaims are addressed separately below

9 **a. Clearly Established Law**

10 The legal standard for ineffective assistance of counsel is set out in claim C2, *ante*.

11 **b. Review of Claim I1**

12 In this claim, Petitioner alleges defense counsel's cumulative failure to adequately investigate,  
13 prepare for or present the guilt phase as alleged in claims I2-I17 amounts to ineffective assistance of  
14 counsel.

15 This claim was raised and denied on direct appeal.

16 Petitioner also raised this same claim in his petition for writ of habeas corpus in the California  
17 Supreme Court, which was summarily rejected on the merits without explanation. (CSC Order Den.  
18 Pet. Habeas Corpus.)

19 Petitioner cites to claim A and alleges that lead counsel Soria and initial second counsel  
20 Peterson did little work on this case prior to appointment of Mr. Cater as replacement second counsel  
21 in July 1990. (ECF No. 113 at 58-62; ECF No. 178 at 92-94.) Petitioner argues that Mr. Soria, who  
22 was engaged in another capital trial for the initial four months of his appointment in this case, did not  
23 do a complete guilt phase investigation. He complains that Mr. Soria used an incompetent  
24 investigator, Bruce Binns Investigations; that Mr. Soria did not have a trial strategy; that Mr. Soria  
25 did not consult necessary experts; that Mr. Soria did not test forensic evidence; and that Mr. Soria  
26 nonetheless did not request a continuance of trial.

27 Petitioner also alleges that when Mr. Cater was appointed, Mr. Soria told him the  
28 investigation for both phases of trial was virtually completed, even though that was not true, and that



1 Cater had no reason to believe otherwise. (SHCP Ex. 47; 2/25/91 RT at 11-12.) As a result,  
2 Petitioner alleges that Mr. Cater ended up cross-examining witnesses without investigative materials  
3 to rely upon.

4 The California Supreme Court could reasonably have denied this claim as lacking support in  
5 the evidentiary record. Claim A, to the extent re-alleged here, fails for the reasons stated therein,  
6 *ante*. As noted by the California Supreme Court, conclusory allegations of failure to investigate are  
7 insufficient to raise a cognizable claim of ineffective assistance of counsel. Bolin, 18 Cal. 4th at 332-  
8 34; see also Jones v. Gomez, 66 F.3d 199, 205 (9th Cir. 1995) (conclusory suggestions that counsel  
9 provided ineffective assistance “fall far short of stating a valid claim of constitutional violation”);  
10 United States v. Taylor, 802 F.2d 1108, 1119 (9th Cir. 1986) (petitioner’s “vague and speculative  
11 assertions” failed to satisfy his burden under Strickland).

12 Petitioner’s only specific allegations refer to investigator Binns, (ECF No. 113 at 59-61),  
13 whom he describes as drunk and ineffective during pretrial witness interviews. (Id.; SHCP Ex. 4;  
14 SHCP Ex. 5; 2/25/91 RT at 11.)

15 The California Supreme Court rejected this claim for the following reasons:

16 Without elaboration, defendant asserts the investigator employed on his case must have been  
17 inadequate because counsel’s performance was so deficient, also noting the investigator  
18 admitted stealing money from defendant. These assertions are entirely too vague and  
19 conclusory to demonstrate any lack of competence on the part of either. Absent such a  
20 demonstration, we will not speculate defendant received ineffective assistance.

21 Bolin, 18 Cal. 4th at 334. The California Supreme Court’s rejection of this claim was not  
22 unreasonable. As noted by that court, defense counsel had “few viable options” because “[w]ith two  
23 eyewitnesses to the killing, the defendant’s state of mind and intent were the only issues open to  
24 question. The forensic evidence bearing on those elements was straightforward, to the point, and not  
25 susceptible to much controversy. The guilt phase was matter-of-fact in tenor, and the penalty phase  
26 was presented and argued without inflammatory rhetoric or vilification.” Id. at 313. That court went  
27 on to describe the evidence against Petitioner as “overwhelming.” Id. at 334.

28 Petitioner points to the *ABA Guidelines*, which require a thorough capital case defense  
investigation, in support his ineffective assistance of counsel claims. (ECF No. 178 at 83-85.) But

1 the *ABA Guidelines* are “only guides.” Strickland, 466 U.S. at 688; Jeffries, 5 F.3d at 1198 (ABA  
2 Standards serve only as a ‘guide’ for determining whether an attorney’s performance is adequate”). It  
3 follows that a failure to follow the *ABA Guidelines* “does not necessarily make out a denial of the  
4 Sixth Amendment guarantee of assistance of counsel.” Nix v. Whiteside, 475 U.S. 157, 165 (1986).

5 This Court “need not determine the actual explanation for defense counsel’s strategic choices,  
6 so long as his [choices] fall[] within the range of reasonable representation.” Morris v. State of  
7 California, 966 F.2d 448, 456 (9th Cir. 1991). “The mere criticism of trial tactics is insufficient to  
8 establish ineffectiveness or prejudice.” United States v. Ferreira-Alameda, 815 F.2d 1251, 1254 (9th  
9 Cir. 1986). Here, counsel’s primary defense theory, to avoid a death sentence by showing the  
10 Huffstuttler and Mincy killings were not first degree murder, could be seen as reasonably furthered  
11 by the guilt phase investigation and presentation.

12 Counsel, individually or through investigator Binns, inspected the physical crime scene and  
13 viewed crime scene photos (see claims I8-I9, *post*); reviewed police reports and eye witness  
14 statements of Ramirez and Wilson (see claims I2-I3, *post*); reviewed the report of criminologist  
15 Laskowski (see claims I8-I9); interviewed witnesses Ms. Ward and Ms. Islas (see claims I4-I5, *post*);  
16 interviewed Petitioner’s daughter Paula and attempted to contact her common law husband, Jerry  
17 Halfacre and reviewed Petitioner’s threatening letter to Halfacre and Detective Williamson’s  
18 interview of Halfacre (see claim I6, *post*); contacted or attempted to contact potential witnesses Mr.  
19 Daser, Mr. Jones, Mr. Williams and Mr. (Brent) Wilson and reviewed related police reports (see  
20 claim I7, *post*); contacted Dr. Markman and investigated mental state defenses (see claim I10, *post*);  
21 traveled to the Los Angeles area to identify and interview potential witnesses and obtained Detective  
22 Nikkel’s report regarding Covina California potential witnesses including Ms. Hooten (see claim K,  
23 *post*); and traveled to Chicago, Illinois to identify and interview potential witnesses among  
24 Petitioner’s extended family (see claim W1, *post*; SHCP Ex. 47, 1/7/91 Marsden RT at 2304-11).

25 These efforts were to garner evidence that Petitioner acted in the heat of passion or by self-  
26 defense, including evidence that Petitioner feared Huffstuttler; that Petitioner’s mental state precluded  
27 premeditation; that Petitioner and Huffstuttler were scuffling at the time Huffstuttler was shot; that  
28 circumstances under which Petitioner shot Huffstuttler carried over to his shooting Mincy and

1 Wilson; that Petitioner may have been stabbed during the scuffle; and that one or more unidentified  
2 parties may have been involved in the murders.

3 To the extent Petitioner bases this claim on claims I2 through I17 (see ECF No. 178 at 93), for  
4 the reasons set forth in those claims, *post*, Petitioner fails to demonstrate any singular errors for this  
5 Court to aggregate. Thompson v. Calderon, 86 F.3d 1509, 1521 (9th Cir. 1996), amended by 109  
6 F.3d 1358, 1369 (9th Cir. 1997), rev'd, 120 F.3d 1045 (en banc), opinion reinstated, Calderon v.  
7 Thompson, 523 U.S. 538, 566 (1998) (“finding no prejudice from the errors considered separately,  
8 we also find no cumulative prejudice”); see also Rupe v. Wood, 93 F.3d 1434, 1445 (9th Cir. 1996)  
9 (holding that there was no reason to reverse for cumulative error because there was no violation of  
10 federal rights in the guilt phase).

11 For the reasons stated, a fair-minded jurist could have found that Petitioner failed to establish  
12 that he was denied a fair trial, or to the extent alleged, that defense counsel’s performance fell below  
13 an objective standard of reasonableness and that, but for counsel’s unprofessional errors, there is a  
14 reasonable probability the outcome of the proceeding would have been different. Strickland, 466  
15 U.S., at 687-98.

16 It does not appear that the California Supreme Court’s rejection of the claim was contrary to,  
17 or an unreasonable application of, clearly established federal law, as determined by the Supreme  
18 Court, or that the state court’s ruling was based on an unreasonable determination of the facts in light  
19 of the evidence presented in the state court proceeding. See 28 U.S.C. § 2254(d).

20 Claim II is denied.

21 **c. Review of Claim I2**

22 Petitioner alleges multiple failures by counsel to investigate and present evidence to impeach  
23 witness Eloy Ramirez, who was present during the crime and fled the scene with Petitioner to the  
24 home of Ramirez’s girlfriend, Patricia Islas, where they spent the night following the murders.

25 The state supreme court rejected this claim on direct appeal, stating that:

26 Defendant contends counsel’s investigation and review of discovery were inadequate  
27 because he failed to interview Patricia Islas or to anticipate her testimony about  
28 statements made by Ramirez. At trial, counsel made a hearsay objection to this  
testimony and also complained the statements had not been disclosed on discovery. In  
response, the prosecutor noted they were contained in a police report. On that basis,

1 defendant asserts counsel's review and preparation must have been deficient. The record  
2 reflects, however, that the "discovery" objection was predicated on a lack of detail in the  
3 report regarding Ramirez's statements, implying counsel had in fact reviewed what was  
4 provided. The record also suggests a defense investigator contacted Islas prior to trial.  
5 More importantly, even if he did not, defendant fails to establish additional investigation  
6 would have produced exculpatory or impeachment evidence.

7  
8 Petitioner raised this claim in his petition for writ of habeas corpus in the California Supreme  
9 Court, which was summarily rejected on the merits without explanation. (CSC Order Den. Pet.  
10 Habeas Corpus).

11 Mr. Ramirez, a friend of Petitioner's who is apparently blind in one eye and drinks heavily, was  
12 present at the crime scene when Petitioner shot and killed both victims. Bolin, 18 Cal. 4th at 310.  
13 Ramirez, who was arrested by Kern County Sheriff for the homicides (SHCP Ex. 13), testified to what  
14 he saw and heard of the events surrounding the killings. (Id.; RT at 1919-62.) Petitioner faults counsel  
15 on several fronts.

16  
17 ***1) Ramirez's Statement to Law Enforcement***

18 Petitioner first asserts that defense counsel failed to investigate the circumstances surrounding  
19 Ramirez's statement to the police and/or to investigate any mental and physical conditions that would  
20 have affected Ramirez's ability to perceive, recall, or testify about the events as an eye witness. (ECF  
21 No. 113 at 63-67.) More specifically, Petitioner asserts that defense counsel failed to interview  
22 Joseph Gutierrez, Ramirez's attorney, about Ramirez's condition at the time of Ramirez's interview  
23 with the police or any promises made in exchange for his statement. (Id.) Petitioner claims Gutierrez  
24 would have provided information showing that Ramirez was strongly motivated to exculpate himself  
25 and could have led to evidence of law enforcement inducement, and that the failure to interview him  
26 prevented any effective challenge of the testimony of Ramirez and Deputy Williamson. (Id.)

27 Petitioner also faults counsel for failure to interview Kern County Sheriff's Deputies Nickel  
28 and Williamson, who interviewed Ramirez after his arrest. (Id.)

Though the declaration of Mr. Gutierrez indicates that defense counsel did not contact him  
regarding Ramirez's "statement or the circumstances under which it was given" (SHCP Ex. 7 at 2),  
ex parte motions for funds filed by counsel indicate that the defense team made an unsuccessful  
attempt to contact Gutierrez on April 9, 1990 (SHCP Ex. 69A, 4/17/90 Binn's Invoice, at 9) and that

1 the defense team contacted Gutierrez on July 30, 1990, and drafted a letter to him on July 31, 1990.  
2 (SHCP Ex. 69B, 8/28/90 Binn's Invoice, at EMF Billing Statement at 1.) Nothing suggests that the  
3 defense team spoke to Gutierrez about anything other than Ramirez.

4 Documentary evidence indicates that Petitioner's counsel investigated Ramirez and prepared  
5 for his testimony. (See SHCP Ex. 69A, Binn's 3/13/90 Invoice, at 2 [reviewed Ramirez's taped  
6 statement]; SHCP Ex. 69A, 6/6/90 EMF Billing Statement at 2 [reviewed reports for information on  
7 Ramirez]; 6/6/90 EMF Billing Statement at 5 and 8/28/90 EMF Billing Statement at 2 [contacted  
8 Paula Bolin regarding Ramirez]; 7/18/90 EMF Billing Statement at 3 and 8/28/90 EMF Billing  
9 Statement at 1 [prepared letter to Paula Bolin regarding Ramirez]; 8/28/90 EMF Billing Statement at  
10 2-3 [attempted to locate Ramirez]; 8/28/90 EMF Billing Statement at 3 and 10/16/90 Billing  
11 Statement at 3 [contacted Frank Jones regarding Ramirez].)

12 Additionally, as discussed in claim K1, *post*, defense counsel was already aware of the only  
13 inducement made to Ramirez, i.e., that if he was uninvolved in the murders, he would be released  
14 without charges being filed. (RT at 1861.) Deputy Williamson testified at trial:

15 We felt that Mr. Ramirez knew a lot more than what he was telling us, because he wasn't  
16 telling us anything, and that basically if by [sic] were able to determine that he was involved,  
17 we would file charges; if we were able to determine that he was not involved, we would not  
file charges. But there was no promises other than we were trying to conduct an investigation.

18 (*Id.*) The California Supreme Court could reasonably have found that attorney Gutierrez allowed  
19 Ramirez to talk with authorities because Ramirez was uninvolved in the crime. (*Id.*; see SHCP Ex.  
20 13, Supplemental Report of Senior Deputy Nikkel dated 9/7/89.) Gutierrez admits "[i]t appeared to  
21 me at the time that the deputies did not really feel [Ramirez] was involved, but had arrested him  
22 solely to obtain his cooperation." (SHCP Ex. 7, ¶ 4.)

23 Petitioner has not demonstrated on the evidentiary record that further interviewing of  
24 Ramirez, Gutierrez, or Deputies Nickel or Williamson, other than that already done by counsel,  
25 would have provided any new helpful or useful information. The defense team was in possession of  
26 Ramirez's taped statement and the deputies' reports (see SHCP Ex. 69A, Binns' 3/13/90 Invoice, at  
27 2; SHCP Ex. 13; RT at 1850-55, 1935-38), and Petitioner has failed to set forth what additional  
28 information would have been obtained had the defense team personally interviewed Deputies Nickel

1 and Williamson.

2 Moreover, Gutierrez had an attorney-client privilege with Ramirez which, absent waiver,  
3 would have prevented him from discussing any privileged information with Petitioner's counsel.  
4 (See, e.g., RT at 1937; SHCP Ex. 7 at 3.) Since counsel were well-informed regarding the nature of  
5 the testimony to be presented by these individuals, and Petitioner presents only conjecture about  
6 alleged inducements which might be discovered had further investigation been done, his claim of  
7 ineffective assistance fails. Bragg v. Galaza, 242 F.3d 1082, 1088 (9th Cir. 2001); LaGrand v.  
8 Stewart, 133 F.3d 1253, 1274 (9th Cir. 1998) (defense counsel need not personally conduct  
9 interviews where he had transcripts of prosecution interviews).

10 Nor has Petitioner argued or established prejudice from any defense counsel failure to conduct  
11 further interviews. The "inducement" as noted above was presented during trial and argued during  
12 counsel's closing argument. (RT at 1861, 1962, 2163, 2170-71.)

13 Given the noted substantial evidence against Petitioner, (see claims O, R, S, *post*), any  
14 additional inducements which might have been uncovered likely would not have resulted in a  
15 different outcome. Bragg, 242 F.3d at 1088. Ramirez was not the only witness to the crime. Wilson  
16 also saw and heard Petitioner arguing with Huffstuttler before Petitioner killed Huffstuttler and  
17 Mincy, and then tried to kill him (Wilson). Bolin, 18 Cal. 4th at 310; RT at 1739-43, 1765-71.  
18 Wilson's testimony corroborated Ramirez's testimony in many important respects. Bolin, 18 Cal. 4th  
19 at 310-311. Likewise, Ramirez corroborated the significant events to which Wilson testified. (RT at  
20 1922-25, 1950-58.) Ramirez's testimony regarding various forensic aspects of the case, e.g., that  
21 Huffstuttler immediately fell to the ground after being shot only to be fired upon again and that  
22 Petitioner made the scene look like a drug deal gone bad, also was confirmed by other testimony and  
23 photographic and physical evidence. (See RT at 1792-96, 1806-10, 1818-24, 1834-36, 1843-55,  
24 1928-34, 1945-58, 1969-71, 1978-2013, 2015, 2017.) Additionally, Patricia Islas, Ramirez's  
25 girlfriend, to whom Ramirez first spoke about the murders, testified to Ramirez's statements to her,  
26 which were consistent with his testimony at trial and to the above detectives. (RT at 1969-73.)

27 **2) Ramirez's Physical and Mental Condition at the Time of the Crime**

28 Petitioner faults defense counsel' for failing to investigate Ramirez's physical and mental



1 condition at the time of the crime. (ECF No. 113 at 65-67.) Petitioner claims that this would have  
2 led to discovery of various facts about Ramirez’s vision and drug and alcohol use, (id.; RT 1912-19;  
3 SHCP Ex. 8), demonstrating that he was an incompetent and/or not credible witness.

4 Petitioner states Ramirez was an alcoholic (SHCP Ex. 3 at ¶ 7-8, Ex. 11 ¶ 25, Ex. 12 at ¶ 10-  
5 11) who had been drinking at the time of the crime and who may have had pre-existing memory and  
6 perception issues from a car accident the year before the crime. (SHCP Ex. 9 at ¶ 28.)

7 However, the record reflects that defense counsel was aware of, and presented to the jury,  
8 evidence of Ramirez’s vision problem. (SHCP Ex. 13 at 6; RT at 1834-35, 1912-13.) Similarly,  
9 defense counsel was aware that Ramirez had been drinking just prior to his arrest. (SHCP Ex. 13 at  
10 3.) Evidence of Ramirez’s alleged alcoholism and drinking the day of the murders was presented to  
11 the jury. (RT at 1726, 1850-51, 1917-19, 1942.)

12 Ramirez testified that, prior to the shooting, he had been drinking beer, (RT at 1918; see also  
13 RT at 1918, 1942), and that he felt the effects of the beer and was “feeling good.” (RT at 1918-19.)  
14 Deputy Williamson further testified that Ramirez had obviously been drinking when he was arrested  
15 shortly after the murders and was “an alcoholic type.” (RT at 1850:25-28.)

16 When counsel asked Ramirez if he got drunk the day after the murders, Ramirez testified that  
17 he did not remember. (RT at 1962.) The jury was presented with additional evidence that Ramirez  
18 had difficulty remembering events. (RT at 1914, 1918, 1925, 1931, 1938-42, 1944, 1948-49, 1951,  
19 1953, 1960; see also SHCP Ex. 13 at 2.) Any failure to present cumulative evidence of Ramirez’s  
20 alcoholism or inebriated status on the day of the murders could not have been prejudicial.

21 The record reflects that the jury also considered other evidence potentially impeaching  
22 Ramirez’s testimony. (See RT at 1850-1861 [inducements]; RT at 1956 [spontaneous denial of  
23 participation in the crimes]; RT at 1957 [admitted nervousness].) Here, again, the failure to present  
24 cumulative evidence would not be prejudicial.

### 25 **3) Impeachment with Inconsistent Statements**

26 Petitioner faults defense counsel for failing to present at the December 1990 trial Ramirez’s  
27 inconsistent tape recorded statements given to Kern County Sheriff’s deputies on September 6, 1989,  
28 several days after the crime, and at the March 1990 preliminary hearing. (ECF No. 113 at 67-70.)



1 Petitioner claims that defense counsel did not develop Ramirez’s alleged inconsistent  
2 statements whether Petitioner was surprised by the arrival of Huffstuttler and the victims at the cabin,  
3 i.e., Ramirez initially stated Huffstuttler told him and Bolin that Huffstuttler was going to stay with  
4 the victims for a couple days but this information was not adduced at trial (see SHCP Ex. 13 at 3-4;  
5 RT at 1944), thereby missing an opportunity to support the heat of passion defense. However,  
6 Ramirez did testify at trial that, though he was unsure what was said between Petitioner and the  
7 victims at the bar (RT at 1944), and that Petitioner was cordial in greeting the group at the cabin (RT  
8 at 1733-34), Petitioner nonetheless told Huffstuttler upon the latter’s arrival at the cabin that  
9 “bringing his friends up there” was a “no no” (RT at 1950).

10 Petitioner claims that defense counsel did not develop Ramirez’s inconsistent statements  
11 whether he saw Huffstuttler and the other victims go down to the marijuana field, i.e., Ramirez  
12 initially stated he did not see where the victims went upon arriving at the cabin, but at trial he stated  
13 the victims went down to the marijuana patch. (CT at 23-24, 36-39; RT 1922, 1949-52; see also  
14 SHCP Ex. 13 at 14, 16; CT at 23, 38-39, 41.) However, there is no material inconsistency in this  
15 regard. Ramirez’s statement that he was unsure whether he could see victims Mincy and Wilson at  
16 the time Huffstuttler was shot is not inconsistent with his subsequent statements that Mincy and  
17 Wilson went to the marijuana field. (Id.)

18 Petitioner claims that counsel did not develop Ramirez’s inconsistent statements regarding  
19 what Huffstuttler said and did just prior to being shot, i.e., prior to and at trial Ramirez stated he heard  
20 Huffstuttler say something to Petitioner like “what are you going to do, shoot me?” or “shoot me  
21 then” or “why don’t you shoot me” and raised his hands in the air (RT at 1922; CT at 25-26; SHCP  
22 Ex. 13 at 4, 6; see ECF No. 113 at 68), but at a point during his pretrial interview with Officer Nikkel  
23 the following colloquy took place:

24 Question: When [Petitioner] went in the house to get the gun, did he say he was gonna  
25 get the gun?

26 Answer: Um-hmm. No ...(?)

27 Question: Did he say anything?

28 Answer: No

Questions: To [Huffstuttler]?

Answer: (Unintelligible)

1 Question: And [Huffstutterl] said, “What are you gonna do, shoot me?”

2 Answer: I didn’t really know. I didn’t hear him ... nothing.

3 Question: He didn’t say anything? He didn’t say yes to [Huffstutter] or anything?

4 Answer: No.

5 (SHCP Ex. 13 at 16.) However, Ramirez’s noted answer to Nikkel’s question appears ambiguous  
6 when taken in the context of Nikkel’s questions about whether Petitioner said anything prior to  
7 shooting Huffstuttler. Ramirez may have been confused and his statement that he did not “hear ...  
8 nothing” was meant to be a response to Nikkel’s questions whether Petitioner said anything. Even if  
9 the response referred to Huffstuttler, it is incomplete and uncertain as to what Ramirez meant to say.

10 Because Ramirez’s noted statements to authorities prior to and at trial were not necessarily  
11 inconsistent there was nothing for defense counsel to impeach Ramirez with at trial. (RT at 1922-23;  
12 CT 25-26; SHCP Ex. 13 at 4-6, 16.)

13 Petitioner claims that counsel did not develop Ramirez’s inconsistent statements regarding  
14 whether Ramirez knew where Petitioner kept the rifle used in the crime, i.e., prior to trial Ramirez  
15 denied knowing where Petitioner kept the rifle (CT at 49; SHCP Ex. 13 at 5), but at trial Ramirez  
16 testified that Petitioner kept the rifle at his bedside (RT at 1955-56). However, Ramirez’s pretrial  
17 statements reflected that he did not know where the rifle came from immediately prior to the shooting  
18 (CT at 49) but that he previously had seen the rifle “in the cabin” (id.) and that he thought the rifle  
19 was kept “either in the lounge, or in – inside the house.” (SHCP Ex. 13 at 5.)

20 Here again, the state supreme court could reasonably have found no inconsistency. Ramirez’s  
21 initial statement that he did not know where the rifle was on the day before the shooting is not  
22 inconsistent with his later statement that Petitioner kept the rifle at his bedside. (Id.) Ramirez’s  
23 testimony regarding where the gun was also helped Petitioner because it supported Rebecca Ward’s  
24 testimony that the guns were kept there only to kill rattlesnakes. (RT at 1668.) It also supported  
25 Petitioner’s alternate defense that Ramirez knew where the gun was and could describe it because  
26 Ramirez actually participated in the murders. (RT at 1955, 2167.)

27 Petitioner claims that counsel did not develop Ramirez’s allegedly inconsistent statements  
28 regarding whether he saw Petitioner break bottles of hot sauce to make the scene look like a “bad

1 dope deal”, i.e., that Ramirez did not mention the bottles during his testimony at preliminary hearing  
2 (CT 31) or early in his interview with detective Nikkel (SHCP Ex. 13 at 7), but later in his interview  
3 with Nikkel stated that Petitioner broke bottles (id. at 16) and at trial Ramirez testified that Petitioner  
4 “broke bottles and poured stuff on them.” (RT at 1929.) However, these statements are not  
5 necessarily inconsistent. Any conflict between Ramirez’s testimony and his pretrial statements in this  
6 subject area was speculative, partly because different questions were asked at different times. The  
7 California Supreme Court reasonably could have found no material conflict. Where a witness is  
8 thoroughly examined, failure to impeach with minor inconsistencies between preliminary hearing and  
9 trial testimony does not establish ineffectiveness because “the decision to not use everything is  
10 preeminently a tactical decision best made by counsel.” Jaiceris, 290 F. Supp. 2d at 1082.

11 Petitioner argues that Ramirez gave conflicting testimony regarding whether Petitioner had  
12 gone in the cabin immediately before shooting Huffstuttler. Ramirez testified prior to trial that while  
13 Petitioner and Huffstuttler were arguing Petitioner went into the cabin and came out and he  
14 (Ramirez) then heard a shot. (SHCP Ex. 13 at 4; CT 19, 25, 41; RT 1923, 1950-52.) Ramirez  
15 initially confirmed this at trial, testifying that “[Petitioner] walked in, came back out and shot  
16 [Huffstuttler].” (RT at 1950:16.) But then Ramirez responded to a question whether Petitioner went  
17 into the cabin before shooting Huffstuttler by stating “I don’t remember.” (RT 1952:2-4.) The  
18 California Supreme Court could reasonably have concluded counsel’s failure to follow-up on this  
19 inconsistency to be a matter of trial tactics. As noted, prior to and at trial Ramirez testified that  
20 Petitioner went into and came out of the cabin prior to shooting Huffstuttler. His statement that he  
21 could not remember could be seen as transient and not necessarily inconsistent with his prior  
22 statements. Moreover, counsel could have determined that exploring the inconsistency might have  
23 led to further testimony contrary to the defense theory that the killing of Huffstuttler occurred in the  
24 cabin during an argument and was manslaughter, not murder. (ECF No. 113 at 79.) The mere  
25 criticism of trial tactics is insufficient to establish ineffectiveness or prejudice. Ferreira-Alameda,  
26 815 F.2d at 1254.

27 Petitioner argues that Ramirez gave conflicting testimony regarding his statement that  
28 Huffstuttler had his “hands raised up out from his side” just prior to being shot, i.e., prior to trial

1 Ramirez stated that Huffstuttler had his hands raised prior to being shot (SHCP Ex. 13 at 6), but did  
2 not so testify at trial (see RT at 1922-23, 1950-52). Trial tactics were seemingly implicated here as  
3 well. If Petitioner wanted to emphasize Ramirez's intoxication, poor vision and memory, getting  
4 Ramirez to describe specific movements might not have been helpful to the defense, especially given  
5 the absence of evidence that Huffstuttler ever had any weapons that day or fought Petitioner. (See RT  
6 at 1689-90, 1707, 1731, 1740-43, 1747, 1922-24, 1930, 1950-52, 1958.) Further, the California  
7 Supreme Court could reasonably have concluded that defense counsel was in a better position by  
8 simply arguing that Huffstuttler might have made threatening gestures, supporting their heat of  
9 passion defense, than allowing Ramirez to clarify that Huffstuttler did not do so.

10 Finally, an additional explanation for any alleged inconsistency regarding recorded statements  
11 made on September 6, 1989 (SHCP Ex. 13 at 1), is that the batteries in the tape recorder ran down  
12 during the interview and only a portion of the September 6, 1989 interview was taped. This could  
13 suggest that untaped portions of the interview might have resolved apparent inconsistencies.

#### 14 **4) Impeachment with Prior Misdemeanor Convictions**

15 Petitioner contends that his counsel rendered deficient performance by failing to impeach  
16 Ramirez with prior misdemeanor convictions for theft (1965 and 1967) and for resisting, delaying, or  
17 obstructing an officer (1973), convictions defense counsel presumptively knew about. (ECF No. 113  
18 at 70; SHCP Ex. 14.)

19 Here, again, trial tactics could reasonably have dictated counsel not pursue impeachment  
20 given the nature of these offenses, their age, and potential difficulties in garnering supporting  
21 evidence and witnesses to prove these crimes. People v. Wheeler, 4 Cal. 4th 284, 297-301 (1992)  
22 (misdemeanor conviction is inadmissible hearsay).

#### 23 **5) No Prejudice**

24 Petitioner claims that had Ramirez been impeached with the noted evidence in this claim, the  
25 jury might have discounted Ramirez's testimony which was key to the prosecution's theory that the  
26 killing of Huffstuttler was first degree murder; and instead credited statements of the other eye  
27 witness, Mt. Wilson, which Petitioner contends support the defense theory of voluntary manslaughter  
28 arising from a scuffle between Petitioner and Huffstuttler or Petitioner protecting himself upon being

1 threatened by Huffstuffer.

2 Even if counsel was deficient as alleged, for the reasons discussed above and those discussed  
3 in claim I3, *post*, the California Supreme Court could reasonably have found no Strickland prejudice  
4 arising from claim I2. Moreover, defense counsel questioned Ramirez about the circumstances under  
5 which he gave his statement to the police, his awareness of Petitioner's marijuana venture, his alcohol  
6 consumption on the day of the crimes, his poor memory of and inability to perceive the details of the  
7 crimes, and his apparent lack of participation in the crimes. (RT at 1935-62.) The jury was able to  
8 consider this information. Petitioner has not demonstrated prejudice under claim I2 by counsel's  
9 failure to further investigate and present evidence impeaching eye witness Ramirez. See e.g., Burger  
10 v. Kemp, 483 U.S. 776, 795 (1987) (failure to pursue fruitless investigation not unreasonable).

11 For the reasons stated, a fair-minded jurist could have found that Petitioner failed to establish  
12 that he was denied a fair trial, or to the extent alleged that defense counsel's performance fell below  
13 an objective standard of reasonableness and that, but for counsel's unprofessional errors, the outcome  
14 of this proceeding would have been different. Strickland, 466 U.S., at 687-98.

15 It does not appear that the California Supreme Court's rejection of the claim was contrary to,  
16 or an unreasonable application of, clearly established federal law, as determined by the Supreme  
17 Court, or that the state court's ruling was based on an unreasonable determination of the facts in light  
18 of the evidence presented in the state court proceeding. See 28 U.S.C. § 2254(d).

19 Claim I2 is denied.

20 **d. Review of Claim I3**

21 Petitioner faults counsel's failure to impeach victim witness Wilson regarding his alleged  
22 inconsistent statements about the shooting of Huffstuttler. (ECF No. 113 at 71-74.)

23 Petitioner raised this same claim in his petition for writ of habeas corpus in the California  
24 Supreme Court, which the California Supreme Court summarily rejected on the merits without  
25 explanation. (CSC Order Den. Pet. Habeas Corpus.)

26 Petitioner claims that Wilson's trial testimony was inconsistent with his pretrial statements on  
27 the issue of whether Huffstuttler was shot in the cabin. Petitioner argues that in his pretrial  
28 statements Wilson told authorities that Petitioner and Huffstuttler entered the cabin, but later testified

1 that it sounded as if one or both entered the cabin, but that he could not see the cabin. (SHCP Ex. 6 at  
2 7, 31; RT 1740-42; RT 1764-69; RT 1809.)

3 Petitioner claims prejudice in that impeachment on this issue would have called into question  
4 Ramirez's credibility, and supported Petitioner's argument for manslaughter, creating a reasonable  
5 likelihood of a totally different outcome.

6 The Court is not persuaded by this claim. Wilson's pretrial statements were not inconsistent  
7 with, but rather could be seen as clarifying of, his subsequent testimony. Wilson stated at the  
8 preliminary hearing and at trial that he could not see the entrance to the cabin. Deputy Layman, who  
9 had written in his police report that "Wilson said [Huffstuttler] and [Petitioner] went into the  
10 residence," clarified during his trial testimony that Wilson had told him that he could not see the front  
11 of the cabin. (RT at 1809-10.)

12 Moreover, even though Wilson testified at trial that he did not hear scuffling, (RT at 1767-68),  
13 but had told Kern County Deputy Layman that he had (RT at 1809-10), the state supreme court could  
14 reasonably have found no inconsistency. The term "scuffle" could refer to a verbal argument as  
15 suggested during the prosecution's closing argument. (RT 2154-55.) Wilson's testimony at trial was  
16 consistent with an ongoing argument of some sort between Petitioner and Huffstuttler. (RT at 1767-  
17 68.) Deputy Layman might have used "scuffle" to describe the argument, whether verbal or physical.

18 Accordingly, the state supreme court could reasonably have determined that Wilson's  
19 statements on this matter were substantially consistent and that impeachment would not have been  
20 successful. In that Wilson's statements were not clearly inconsistent, defense counsel was not  
21 necessarily deficient for failing to impeach on these points. Given Wilson's consistent testimony that  
22 he could not see the cabin, Wilson could have explained any alleged inconsistencies between what  
23 Deputy Layman had reported and what Wilson had told him. Defense counsel could have determined  
24 that the alleged inconsistencies were explainable based on the circumstances in the record and thus  
25 not a basis for impeachment.

26 For the reasons stated, a fair-minded jurist could have found that Petitioner failed to establish  
27 that he was denied a fair trial, or to the extent alleged, that defense counsel's performance fell below  
28 an objective standard of reasonableness and that, but for counsel's unprofessional errors, the outcome

1 of this proceeding would have been different. Strickland, 466 U.S. at 687-98.

2 Therefore, the California Supreme Court's rejection of the claim was not contrary to, or an  
3 unreasonable application of, clearly established federal law, as determined by the Supreme Court, or  
4 that the state court's ruling was based on an unreasonable determination of the facts in light of the  
5 evidence presented in the state court proceeding. See 28 U.S.C. § 2254(d).

6 Claim I3 is denied.

7 e. **Review of Claim I4**

8 In this claim, Petitioner alleges defense counsel was ineffective by failing to investigate or  
9 challenge the testimony of Rebecca Ward, victim Huffstuttler's girlfriend, who had previously lived  
10 at the cabin but was not present during the murders. (ECF No. 113 at 74-75.)

11 Petitioner raised this same claim in his petition for writ of habeas corpus in the California  
12 Supreme Court (SHCP at 113-15), which was summarily denied on the merits without explanation.  
13 (CSC Order Den. Pet. Habeas Corpus.)

14 Petitioner alleges that defense counsel failed to interview Ward and impeach her regarding  
15 how she and others were involved in the marijuana operation, and regarding prior threats of violence  
16 by Huffstuttler against Petitioner and Huffstuttler's financial interest in the marijuana operation. He  
17 claims these failures by defense counsel were not tactical because her testimony damaged Petitioner's  
18 manslaughter defense.

19 Ward testified regarding the weapons kept at the cabin. (RT at 1660-69, 2143.) She also  
20 testified regarding Petitioner's partnership with Huffstuttler in the marijuana growing operation. (RT  
21 at 1660-69, 2142-43.) Petitioner claims the prosecutor argued that Petitioner had a financial motive  
22 for killing Huffstuttler, undermining the defense manslaughter theory.

23 Petitioner claims that defense counsel should have asked Ward on cross-examination whether  
24 she had a financial interest in the marijuana farm or whether she used marijuana or any other drugs.  
25 But even if Petitioner could demonstrate the relevance of such questions, the California Supreme  
26 Court reasonably could have found it unlikely Ward would take the stand and inculcate herself in this  
27 fashion. That court could also have found trial tactics in play. Should Ward have responded  
28 negatively to such questions, it could have bolstered her credibility. Defense counsel had



1 investigated Ward and presumptively aware that she had admitted knowledge of the marijuana crop  
2 and helped to water it on occasion, (RT at 1664), but stated that the marijuana venture was between  
3 Petitioner and Huffstuttler. (RT at 1667; SHCP, Ex. 18b, 9/7/89 Nikkel Supp. Report at 13.)

4 Petitioner also claims that defense counsel failed to investigate and to interview Ward prior to  
5 the trial, thereby missing crucial information. However, the record belies these allegations. (See  
6 SHCP Ex. 69B, 10/16/90 EMF Billing Statement at 3 [contacted Ward in Pineville Oregon]; see also  
7 3/20/90 EMF Billing Statement at 5 [contacted Barbara Ward regarding Rebecca Ward]; 4/26/90  
8 EMF Billing Statement at 4 [searched court files for information regarding Ward]; 6/6/90 EMF  
9 Billing Statement at 2 [reviewed discovery regarding Ward]; 8/28/90 EMF Billing Statement at 6  
10 [attempted to locate and serve subpoena on Ward]; 10/16/90 EMF Billing Statement at 2-3, 5  
11 [attempted to locate Ward, attempted to contact Ward's ex-husband, spoke with bar owner regarding  
12 Ward].)

13 Even if counsel should have done more to obtain information from Ward prior to trial, nothing  
14 supports Petitioner's theory that Ward would have provided information favorable to the defense.  
15 Petitioner cites to the declaration of Paula Bolin and claims that Ward might have been able to  
16 provide information that Jerry Halfacre had a financial interest in the marijuana plantation. (See  
17 SHCP Ex. 9 at ¶ 10.) But nowhere in Paula Bolin's declaration does she indicate Ward or her  
18 boyfriend, Huffstuttler, was aware of any alleged financial interest of Halfacre. (Id.) Petitioner has  
19 not demonstrated that defense counsel reasonably could have expected to get this information from  
20 Ward.

21 Petitioner suggests that Ward could have provided information helpful to a self-defense theory  
22 relating to an alleged fight between Petitioner and Huffstuttler that occurred shortly before the  
23 shootings. It appears that, when authorities interviewed Ward shortly after the shootings, she  
24 referenced a confrontation of some sort between Petitioner and Huffstuttler:

25 [Ward] said one time, when [Ward, Petitioner, and Huffstuttler] were at the cabin,  
26 [Huffstuttler] had gone out to get their pillows out of the van. She said when  
27 [Huffstuttler] closed the door to the van, he slammed it. She said that [Petitioner] came  
28 into the bedroom where they were at and stuck the .45 into [Huffstuttler's] mouth,  
telling him that he should not slam the door to his van. She said she and two (2) other  
people, who were friends of [Petitioner's], named Sandra and Dennis, from Covina,

1 pulled [Petitioner] off of [Huffstuttler].

2 (SHCP, Ex. 18b, 9/7/89 Nikkel Supp. Report at 13.)

3 However, the California Supreme Court could reasonably have determined that defense counsel  
4 may have been tactically motivated in not further investigating Ward's knowledge of this confrontation.  
5 The jury was unlikely to believe that Petitioner feared Huffstuttler as a result of this incident, (SHCP  
6 Ex. 15 at ¶ 8), but was more likely to focus on Petitioner's violent temper and display of the weapon.  
7 Sondra Hooten, who apparently witnessed the fight, does not mention Ward was present during the  
8 fight, (SHCP Ex. 15 at ¶ 7-8), suggesting a basis to discount such testimony by Ward. Additionally, it  
9 appears that Ward was a minor witness given the testimony of Ramirez and Wilson, eyewitnesses to the  
10 shooting of Huffstuttler.

11 Relying upon a remark from the prosecutor's closing argument (RT at 2142-43), Petitioner also  
12 asserts that his counsel was ineffective because they failed to question Ward about her drug use, which  
13 was allegedly apparent during her testimony. The Court finds the allegation unavailing. During  
14 closing argument, the prosecutor made the following statement about Ward: "Becky probably uses  
15 drugs. We don't have any evidence of that other than what you could see on the witness stand, and I  
16 think you could all see that she was not all there." (RT at 2142-43.) However, the California Supreme  
17 Court could reasonably have found that the prosecutor's statement was not evidence that Ward was  
18 intoxicated when testifying, but rather a reference to how drug use had affected Ward and her  
19 credibility as a witness: her demeanor, appearance, and ability to communicate and recall.

20 Petitioner does not cite to any evidence supporting the contention that Ward was intoxicated  
21 while testifying. Even if Ward's demeanor did suggest obvious intoxication, defense counsel might  
22 have made a tactical decision to not question her on the subject, reserving this "obvious" information  
23 about her demeanor for argument, only to have the prosecutor mention it first.

24 Even if counsel did unreasonably fail to investigate or challenge Ward's testimony, Petitioner  
25 has not demonstrated prejudice. Any further information from Ward about the alleged confrontation  
26 between Petitioner and Huffstuttler could be seen as duplicative of Ms. Hooten's testimony regarding  
27 that confrontation. See e.g., Foster v. Delo, 39 F.3d 873, 880 (8th Cir. 1994) (no ineffectiveness for  
28 failure to investigate minor witness whose testimony was consistent with other witnesses).

1 Additionally, the substantial evidence cited by the prosecution in closing could reasonably have  
2 supported the prosecution theory that Petitioner had murdered Huffstuttler, not due to fear of  
3 Huffstuttler or self-defense, but because Huffstuttler had brought strangers to the marijuana farm.  
4 (RT at 2154:11-14.)

5 For the reasons stated, a fair-minded jurist could have found that Petitioner failed to establish  
6 that he was denied a fair trial, or to the extent alleged, that defense counsel's performance fell below  
7 an objective standard of reasonableness and that, but for counsel's unprofessional errors, the outcome  
8 of this proceeding would have been different. Strickland, 466 U.S. at 687-98.

9 It does not appear that the California Supreme Court's rejection of the claim was contrary to,  
10 or an unreasonable application of, clearly established federal law, as determined by the Supreme  
11 Court, or that the state court's ruling was based on an unreasonable determination of the facts in light  
12 of the evidence presented in the state court proceeding. See 28 U.S.C. § 2254(d).

13 Claim I4 is denied.

14 **f. Review of Claim I5**

15 In this claim, Petitioner alleges defense counsel was ineffective by failing to adequately  
16 investigate or impeach the testimony of Patricia Islas, Ramirez's girlfriend, who gave testimony  
17 corroborating that of Ramirez. (ECF No. 113 at 75-76.)

18 Petitioner raised this same claim in his petition for writ of habeas corpus in the California  
19 Supreme Court, and in his direct appeal, both of which were denied on the merits. (CSC Order Den.  
20 Pet. Habeas Corpus; Bolin, 18 Cal. 4th at 333.)

21 Petitioner alleges that counsel or defense investigator Binns "attempted to question Islas prior  
22 to trial without success." (ECF No. 113 at 75-76.) Petitioner concludes this interview was  
23 unsuccessful because investigator Binns was incompetent. (ECF No. 113 at 76.) Petitioner also  
24 alleges that Islas was a heavy drinker and drug user (id.; SHCP Ex's 3, 11, 12) whose competency  
25 and credibility could have been challenged on such basis. He claims her testimony supported that of  
26 Ramirez and was prejudicial, and that impeaching her would have significantly supported his  
27 voluntary manslaughter defense.

28 The California Supreme Court considered and rejected this claim on direct appeal, noting that:

1 Defendant contends counsel's investigation and review of discovery were inadequate  
2 because he failed to interview Patricia Islas or to anticipate her testimony about  
3 statements made by Ramirez. At trial, counsel made a hearsay objection to this  
4 testimony and also complained the statements had not been disclosed on discovery. In  
5 response, the prosecutor noted they were contained in a police report. On that basis,  
6 defendant asserts counsel's review and preparation must have been deficient. The record  
7 reflects, however, that the "discovery" objection was predicated on a lack of detail in the  
report regarding Ramirez's statements, implying counsel had in fact reviewed what was  
provided. The record also suggests a defense investigator contacted Islas prior to trial.  
More importantly, even if he did not, defendant fails to establish additional investigation  
would have produced exculpatory or impeachment evidence.

8 Bolin, 18 Cal. 4th at 333.

9 The record reflects that Islas did speak to a member of the defense team, but it appears that she  
10 did not speak about the events she testified to at trial. (RT at 1972-73; SHCP Ex. 69B, 6/6/90 EMF  
11 Billing Statement at 2, 4; Bolin, 18 Cal. 4th at 333.) Petitioner does not state what favorable or  
12 exculpatory facts Islas would have provided had she been interviewed. Petitioner suggests, but points  
13 to no evidence that Islas would have told counsel that she abused drugs and "thus might not have  
14 accurately recalled the events to which she testified." (ECF No. 113 at 76.) See U.S. v. Schaflander,  
15 743 F.2d 714, 721 (1984) (claim of failure to interview witness rejected because the defendant did "not  
16 produce[] affidavits or sworn statements from . . . the witness[] or from counsel.").

17 Petitioner cites to declarations from Joyce Sophie Balsamico (SHCP Ex. 3 at 2) stating that "I  
18 also knew Eloy's girlfriend, Pat Islas. Pat drank a lot, too"; and from Richard Brogden (SHCP Ex. 11  
19 at 7-8) stating that Islas was a "very heavy drinker" and "did a lot of drugs. Pat used marijuana,  
20 cocaine, and various narcotics"; and from Richard Balsamico (SHCP Ex. 12 at 2-3) stating that Islas  
21 was a "drinker."

22 However, none of these declarations suggests Islas was abusing drugs or alcohol at or near the  
23 time period that she testified, or that she had difficulty remembering things. Her interview with  
24 Detective Nikkel, which was available to defense counsel (SHCP Ex 18b, 9/7/89 Nikkel Supp. Report  
25 at 7-8), and her testimony at trial (RT at 1963-73) suggest that Islas had no trouble remembering  
26 details about the relevant information she knew about the crime. Moreover, one of Petitioner's  
27 exhibits corroborates Islas's testimony that Petitioner went to her house the day after the murders.  
28 (SHCP Ex. 15 at 3.)

1 Petitioner cannot show prejudice relating to this claim. Islas's testimony was minor given the  
2 eyewitness testimony of Ramirez and Wilson, and corroborated only in general terms Ramirez's  
3 testimony that Petitioner had murdered Huffstutler because he had brought strangers to his marijuana  
4 farm. (RT at 1963-73.)

5 For the reasons stated, a fair-minded jurist could have found that Petitioner failed to establish  
6 that he was denied a fair trial, or to the extent alleged, that defense counsel's performance fell below  
7 an objective standard of reasonableness and that, but for counsel's unprofessional errors, the outcome  
8 of this proceeding would have been different. Strickland, 466 U.S., at 687-98.

9 It does not appear that the California Supreme Court's rejection of the claim was contrary to,  
10 or an unreasonable application of, clearly established federal law, as determined by the Supreme  
11 Court, or that the state court's ruling was based on an unreasonable determination of the facts in light  
12 of the evidence presented in the state court proceeding. See 28 U.S.C. § 2254(d).

13 Claim I5 is denied.

14 **g. Review of Claim I6**

15 Petitioner claims that defense counsel did not investigate Jerry Halfacre, who had been living  
16 with Petitioner's daughter, Paula Bolin, was the father of Paula's child, Ashley, and who provided a  
17 threatening letter he received from Petitioner to authorities, through his probation officer Georgia  
18 O'Connor, that was used by the prosecution in aggravation as alleged in claim R, *post*. (ECF No. 113  
19 at 76-77.)

20 Petitioner raised this same claim in his petition for writ of habeas corpus in the California  
21 Supreme Court, which was summarily denied on the merits without explanation. (CSC Order Den.  
22 Pet. Habeas Corpus.)

23 Petitioner faults counsel's failure to interview Halfacre about various matters, claiming that, if  
24 they had done so, they "would have learned that Halfacre was an active partner in the marijuana  
25 venture himself and perhaps in the crime itself" as suggested by Paula Bolin. (ECF No. 113 at 77:12-  
26 14; see also SHCP Ex. 9 at ¶ 10-12; SHCP Ex. 16.)

27 The record is uncertain regarding whether counsel interviewed Halfacre. It appears that  
28 defense investigators contacted Halfacre (SHCP Ex. 18b, 4/26/90 EMF Billing Statement at 4, 7), and

1 later attempted further contact with him. (6/6/90 EMF Billing Statement at 4.) Petitioner has not  
2 demonstrated that counsel failed to interview Halfacre. See e.g., Schaflander, 743 F.2d at 721  
3 (without the necessary factual showing, defendant’s allegations remain mere conclusory statements.)

4 Counsel could reasonably have discounted Paula Bolin’s sworn and unsworn statements that  
5 Halfacre had a business interest in the marijuana farm (SHCP Ex. 9 at ¶¶ 10-11) as well as her  
6 suggestion that Halfacre may have been at the cabin on the day of the shooting because “the day of  
7 the shooting [she] was not with Jerry [Halfacre]” (SHCP Ex. 9 at ¶ 12). Significantly, Paula was a  
8 self-acknowledged drug user who was then estranged from Halfacre. (RT at 2490-93; SHCP Ex. 9 at  
9 1-5; SHCP Ex. 16 at 2.)

10 Counsel apparently were aware of the contents of Deputy Williamson’s September 7, 1989  
11 interview of Halfacre. (See SHCP Ex. 18b, 3/20/90 EMF Billing Statement at 6 indicating that  
12 defense counsel investigator reviewed the tape.) Deputy Williamson also testified at trial as to details  
13 of this interview. (RT at 1836-37.) For instance, counsel was presumably aware that Halfacre,  
14 through his probation officer, assisted police in locating Petitioner’s van, used to flee the scene of the  
15 crime. Halfacre also turned over to authorities the threatening letter written to him by Petitioner  
16 which was used in the penalty phase. (RT at 1868, 2442-44; SHCP Ex. 18b at 8-10; SHCP Ex. 6 at  
17 33-35; Bolin, 18 Cal. 4th at 336 & n.11.) Although Halfacre did not testify at trial, this information  
18 came in through the testimony of other witnesses. (RT at 1836-37, 1867-68, 2442-44.)

19 Halfacre was on probation around the time of trial. (RT at 1866.) It is likely that he would  
20 not have admitted any of these allegations for fear of facing a probation violation. Paula’s conjecture  
21 that Halfacre might have been involved in the crimes reasonably could be accorded little if any  
22 weight. The weight of evidence was to the contrary. In his interview with law enforcement, Halfacre  
23 stated that he had not been up to the cabin where the murders had occurred in about nine months.  
24 (SHCP Ex. 18b, 9/7/89 Halfacre Interview at 5.)

25 Given the foregoing and Halfacre’s seemingly poor relationship with his former common law  
26 wife, Petitioner’s daughter Paula, counsel could have determined that they had enough information  
27 about Halfacre and that additional information would not have been helpful to their theory of defense.  
28 (See e.g., SHCP Ex. 6 at 33-35); United States v. Farr, 297 F.3d 651, 658 (7th Cir. 2002) (counsel “is

1 not obligated to . . . personally investigate every conceivable lead”). Moreover, Halfacre indicated in  
2 his interview with police that he did not “want to be involved,” (SHCP Ex. 18b 9/7/89 interview with  
3 Jerry Halfacre, at 6), suggesting he would not have cooperated with defense counsel. Given the  
4 likelihood that Halfacre would have provided only unfavorable information, counsel could have made  
5 a reasonable tactical decision not to pursue an interview of Halfacre.

6 Additionally, Petitioner cannot show prejudice relating to this claim. Even if Petitioner could  
7 have shown that Halfacre had an interest in the marijuana farm, it likely would not have impacted the  
8 verdict. The prosecution did not argue that Petitioner’s motive for killing Huffstuttler was to avoid  
9 profit sharing, but that rather the motive was Huffstuttler’s showing the marijuana to the victims,  
10 (RT at 2152-54), as otherwise apparent in the record. (See e.g., RT at 2492-93, 2578.)

11 For the reasons stated, a fair-minded jurist could have found that Petitioner failed to establish  
12 that he was denied a fair trial, or to the extent alleged, that defense counsel’s performance fell below  
13 an objective standard of reasonableness and that, but for counsel’s unprofessional errors, there is a  
14 reasonable probability of a different outcome. Strickland, 466 U.S., at 687-98.

15 It does not appear that the California Supreme Court’s rejection of the claim was contrary to,  
16 or an unreasonable application of, clearly established federal law, as determined by the Supreme  
17 Court, or that the state court’s ruling was based on an unreasonable determination of the facts in light  
18 of the evidence presented in the state court proceeding. See 28 U.S.C. § 2254(d).

19 Claim I6 is denied.

20 **h. Review of Claim I7**

21 Petitioner claims defense counsel did not investigate or interview other possible guilt phase  
22 witnesses who may have been involved in the crime. (ECF No. 113 at 77-79.)

23 Petitioner raised this same claim in his petition for writ of habeas corpus in the California  
24 Supreme Court, which was summarily denied on the merits without explanation. (CSC Order Den. Pet.  
25 Habeas Corpus.)

26 Petitioner argues that defense counsel did not investigate or interview other possible guilt  
27 phase witnesses, friends of Petitioner, who may have been involved in the crime, specifically Mark  
28 Daser, Frank Jones, Ulysses Williams, and Brent Wilson.



1                                    *1) Mark Daser*

2                    Petitioner claims that he described the crime and how he acted in self-defense to Daser, telling  
3 him that Huffstuttler had pulled a knife on him and stabbed him before Petitioner shot him. (ECF No.  
4 113 at 78; SHCP Ex. 4.) Petitioner alleges that he also showed fresh wounds to Daser. (*Id.*)

5                    The record reflects that Daser was contacted by the defense team. (SHCP Ex. 4 at ¶ 19;  
6 SHCP Ex. 69B, 4/26/90 EMF Billing Statement at 9; 8/28/90 EMF Billing Statement at 2.) Counsel  
7 was also aware of Daser’s statement to local law enforcement. (SHCP Ex. 18b, Supplemental Report  
8 of Deputy Williamson dated 1/29/90.) Defense counsel clearly considered calling Daser as a witness  
9 but made a reasonable tactical decision not to, determining it would be “counterproductive” given the  
10 opinion of Dr. Markman regarding the scars:

11                    [A]nd we felt if Dr. [Markman] after two hours of talking to [Petitioner] and seeing him and  
12 felt that [the scars] went the wrong way, that that would look like fabricated evidence, and  
that was my opinion.

13 (RT at 2289.) The record reflects that counsel contacted “Dr. Markowitz (sic),” who interviewed  
14 Petitioner and inspected the wounds. (RT at 2288-89.) Petitioner alleges that Dr. Markowitz was  
15 actually Dr. Ronald Markman, the psychiatrist who evaluated Petitioner for trial competency. (ECF  
16 No. 113 at 111 n.22.) As noted, Dr. Markman advised defense counsel that the wounds “went the  
17 wrong way” (RT at 2289) i.e., appeared self-inflicted rather than inflicted by Huffstuttler as Petitioner  
18 suggested. (SHCP Ex. 20 at 3.) Petitioner’s subsequent argument that Dr. Markman was unqualified  
19 to opine on the nature of the scars appears unsupported in the record. *See e.g., Affinito v. Hendricks*,  
20 366 F.3d 252, 258-59 (3d Cir. 2004) (where defendant has failed to show that the expert selected is  
21 unqualified, selection of expert is a matter of strategy and tactics).

22                    Furthermore, the prosecutor argued at closing that no witness saw Huffstuttler with a knife  
23 and no blood was on the knife found at the crime scene. (RT at 2175-76.) Witness Ramirez  
24 suggested that Petitioner went to see Daser to get a “solid alibi.” (SHCP Ex. 13 at 9.) Significantly,  
25 witness Wilson did not testify as to any limp or injury to Petitioner following the shooting of  
26 Huffstuttler. (RT at 1770-71.)

27                    Defense counsel also considered Daser’s statements regarding what Petitioner had told him  
28 about the alleged knife fight to be inadmissible hearsay. (RT at 2289.) Furthermore Daser’s

1 credibility was likely in issue. Mr. Daser was “one of [Petitioner’s] closest friends” (SHCP Ex. 4 at  
2 1) and the knife fight statements, helpful to Petitioner, were contrary to the noted testimony of the  
3 witnesses present during the crimes, and unsupported by Daser’s own statements to Deputy  
4 Williamson shortly after the crimes. (SHCP Ex. 18b, 1/29/90 Williamson Supp. Report at 2.)

5 Given the foregoing, it is unlikely that Petitioner could have suffered prejudice from his  
6 counsel’s failure to further investigate Daser and present his testimony about the knife fight. The  
7 California Supreme Court could reasonably have determined that defense counsel made a tactical  
8 choice not to further investigate the knife fight scenario and call Daser about the knife wounds.

9 **2) Frank Jones**

10 Petitioner next argues that defense counsel failed to interview Jones, another friend of  
11 Petitioner who allegedly saw him after the crime and before he fled California for Chicago. (ECF  
12 No. 113 at 78:2-4.) He claims that Jones had knowledge of Halfacre’s involvement in the marijuana  
13 farm and could have provided impeachment about Ramirez. (ECF No. 113 at 78:9-11.) However,  
14 Petitioner does not specify the nature of Halfacre’s involvement nor of Jones’ knowledge thereof. In  
15 any event, as explained in claim I6, *ante*, even if Halfacre had also been Petitioner’s partner in the  
16 marijuana venture, Halfacre’s involvement was not relevant to the “voluntary manslaughter” defense  
17 theory.

18 Moreover, the record reflects that Jones was contacted by the defense team; he was  
19 interviewed numerous times both in person and over the telephone. (SHCP Ex. 69B, 3/20/90 EMF  
20 Billing Statement at 5; 6/6/90 EMF Billing Statement at 4; 8/28/90 EMF Billing Statement at 3; see  
21 also SHCP Ex. 24 at 11.) Defense counsel also had a police report concerning an interview of Jones.  
22 (SHCP Ex. 6 at 32-33.)

23 Petitioner does not specify what impeachment information Jones had about Ramirez.  
24 Ramirez’s taped interview with Deputy Nikkel indicates that Jones could have corroborated Ramirez  
25 in much the same way that Islas did. (SHCP Ex. 13 at 10-12.) “Speculation that [a] missing witness[]  
26 would have been helpful. . . . is insufficient to carry the burden of a habeas corpus petitioner.”  
27 Johnson v. Alabama, 256 F.3d 1156, 1187 (11th Cir. 2001) (quoting Aldrich v. Wainwright, 777 F.2d  
28 630, 636 (11th Cir. 1985)). Petitioner does not explain what other information Jones had that would

1 have assisted the defense. Jaiceris, 290 F. Supp. 2d at 1081-82 (finding no ineffectiveness or  
2 prejudice for counsel’s failure to call various witnesses where the “[p]etitioner’s explanation is  
3 incoherent as to who they were, where they could be found, and what they could testify to, and lacks  
4 any indication that he informed his counsel any more clearly about them than he did the court.”).

5 Given the foregoing, it is unlikely that Petitioner could have suffered prejudice from his  
6 counsel’s failure to further investigate Jones and present his testimony regarding Halfacre and  
7 Ramirez. The California Supreme Court could reasonably have determined that defense counsel  
8 made a tactical choice not to further investigate these allegations.

9 **3) *Ulysses Williams***

10 Petitioner argues that defense counsel were ineffective in their investigation of Ulysses  
11 Williams, a Kern County Sheriff’s Department narcotics officer who “might have been involved in  
12 the crime.” (ECF No. 113 at 78; see also RT at 2279-80.)

13 It appears that defense counsel was aware of Petitioner’s belated contention that Williams was  
14 involved in the crime and tried to locate Williams without success. (RT at 2288.)

15 Petitioner does not state what information Williams might have provided and how he was  
16 prejudiced without it. As noted, “speculation that [a] missing witness[] would have been helpful. . . .  
17 is insufficient to carry the burden of a habeas corpus petitioner.” Johnson, 256 F.3d at 1186-87.  
18 Petitioner does not explain how information Williams had would have assisted the defense. See  
19 Jaiceris, 290 F. Supp. 2d at 1081-82.

20 Given the foregoing, it is unlikely that Petitioner could have suffered prejudice from his  
21 counsel’s failure to further investigate Williams and present his testimony regarding the shootings.  
22 The California Supreme Court could reasonably have determined that defense counsel made a tactical  
23 choice not to further investigate these allegations.

24 **4) *Brent Wilson***

25 Petitioner argues that defense counsel was deficient for failing to locate or interview Brent  
26 Wilson, a man allegedly mentioned in police reports obtained by trial counsel as being near the crime  
27 scene and arrested for “suspicious activities.” (ECF No. 113 at 78.)

28 The record indicates that defense counsel attempted to locate and interview Wilson based on

1 information in discovery provided by Kern County law enforcement, but was unsuccessful. (See  
2 SHCP Ex. 69B 10/16/90 EMF Billing Statement at 6; 2/8/91 EMF Billing Statement at 1-2; 10/16/90  
3 EMF Billing Statement at 2.) Petitioner suggests trial counsel was deficient in this regard, but does  
4 not point to facts showing counsel's efforts were unreasonable, or what evidence, if any, Brent  
5 Wilson could or would have provided about the murders.

6 Given the foregoing, it is unlikely that Petitioner could have suffered prejudice from his  
7 counsel's failure to further investigate Brent Wilson and present his testimony regarding the crimes.  
8 The California Supreme Court could reasonably have determined that defense counsel made a tactical  
9 choice not to further investigate these allegations.

### 10 **5) Conclusions**

11 Accordingly, the California Supreme Court was not unreasonable in finding that defense  
12 counsel was not deficient in foregoing further investigation of Daser, Jones, Williams and Brent  
13 Wilson. Petitioner was not prejudiced by defense counsel's doing so. For the reasons stated, a fair-  
14 minded jurist could have found that Petitioner failed to establish that he was denied a fair trial, or to  
15 the extent alleged, that defense counsel's performance fell below an objective standard of  
16 reasonableness and that, but for counsel's unprofessional errors, the outcome of this proceeding  
17 would have been different. Strickland, 466 U.S., at 687-98.

18 In sum, it does not appear that the California Supreme Court's rejection of the claim was  
19 contrary to, or an unreasonable application of, clearly established federal law, as determined by the  
20 Supreme Court, or that the state court's ruling was based on an unreasonable determination of the  
21 facts in light of the evidence presented in the state court proceeding. See 28 U.S.C. § 2254(d).

22 Claim I7 is denied.

### 23 **i. Review of Claims I8 and I9**

24 Petitioner in these next claims alleges that defense counsel, apart from visiting the crime  
25 scene, did not conduct any significant forensic investigation; failed to consult any forensic expert in  
26 order to show the shooting of Huffstuttler was in the heat of passion or self-defense, and that Mincy  
27 was not running away from the shooter when he was shot; and failed to challenge the qualifications of  
28 and inadequately cross-examined criminologist Gregory Laskowski regarding the Huffstuttler and

1 Mincy shootings. (ECF No. 113 at 79-83.) He supports this argument with the habeas declaration of  
2 criminologist Peter Barnett. (See SHCP Ex. 17.)

3 Petitioner raised these same claims in his petition for writ of habeas corpus in the California  
4 Supreme Court, which were summarily denied on the merits without explanation. (CSC Order Den.  
5 Pet. Habeas Corpus.)

### 6 **1) Crime Scene Photographs**

7 Petitioner claims generally that defense counsel failed to obtain a complete set of crime scene  
8 photographs taken by the Kern County Sheriff's Department during the post-crime investigation.  
9 (ECF No. 113 at 79.) He claims this was crucial because, by the time counsel was appointed, the  
10 crime scene had been altered by the weather, the media, and vandalism, and might have yielded  
11 evidence that the shootings occurred at different times and with different weapons, suggesting more  
12 than one shooter was involved. (ECF No. 113 at 82.)

13 However, Petitioner does not demonstrate, by citation to facts in the record, that the defense  
14 had less than all of the crime scene photographs taken by the Kern County Sheriff's Department. Nor  
15 does he explain or make a proffer as to what photographs were missing and how they might have  
16 supported his defense.

17 The state supreme court reasonably could have rejected Petitioner's unsupported suggestion  
18 that unspecified crime scene photographs might have helped the defense in unspecified ways. See  
19 e.g., Wacht v. Cardwell, 604 F.2d 1245, 1247 (9th Cir. 1979) (petitioner must demonstrate  
20 entitlement to habeas relief through specific allegations that "state facts that point to a 'real possibility  
21 of constitutional error'").

### 22 **2) Failure to Consult a Forensic Expert**

23 Petitioner faults defense counsel for failure to consult with a forensic expert.

24 The state supreme court denied this claim on direct appeal, stating that:

25 Defendant faults counsel's . . . failure to call defense experts to counter the ballistics  
26 and blood-spatter evidence presented by the prosecution.) ... Defendant identifies no  
27 exculpatory or impeachment evidence that counsel could have revealed by further  
28 questioning of prosecution witnesses [or examination of defense experts] and that would  
have produced a more favorable result at trial. [¶] ... Such claims must be supported by  
declarations or other proffered testimony establishing both the substance of the omitted  
evidence and its likelihood for exonerating the accused. [Citations] We cannot evaluate

1 alleged deficiencies in counsel's representation solely on defendant's unsubstantiated  
2 speculation." [Citation] Whether to call certain witnesses is also a matter of trial tactics,  
3 unless the decision results from unreasonable failure to investigate. [Citation] The record  
4 does not establish defense experts would have provided exculpatory evidence if called,  
5 and we decline to speculate in that regard as well.

6 Bolin, 18 Cal. 4th at 333-35.

7 Petitioner claims that "[a] qualified forensic expert would have cast significant doubt on the  
8 prosecution's reconstruction of the crime, that Huffstuttler was shot outside the cabin where he was  
9 found and that Mincy was shot while running from the shooter [SHCP Ex.'s 17, 18; RT at 2054-59],  
10 and would have provided evidence to support the defense theory that the killing of Vance Huffstuttler  
11 occurred in the cabin during an argument, and was manslaughter, not murder." (ECF No. 113 at 79.)

12 *Mr. Huffstuttler*

13 Petitioner, pointing to the declaration of his habeas criminalist, Mr. Barnett, faults defense  
14 counsel for failing to retain a forensic expert who could have testified that the prosecution's forensic  
15 case supporting first degree murder was insubstantial and inconclusive. (ECF No. 113 at 81:22-24.)  
16 Barnett concludes Huffstuttler may have been shot once during an argument with Petitioner inside the  
17 cabin, and then dragged outside over the dirt and later shot three more times with the intent to show a  
18 "drug deal that had gone bad." (ECF No. 113 at 81:16-21; SHCP Ex. 17.)

19 Barnett notes that Huffstuttler was wearing only socks which had no dirt on them, but only hot  
20 sauce (ECF No. 113 at ¶ 324; SHCP Ex. 17); the dirt found on Huffstuttler's pants and shirt suggests he  
21 was dragged to where he was found (*id.*); the trajectory of the bullets suggests three of the four shots  
22 were fired from the same angle causing Barnett to conclude that one shot was fired while Huffstuttler  
23 was standing in the cabin and three were fired after he had fallen to the ground (*id.*); the .45 caliber  
24 bullet and pistol found near Huffstuttler's body were not linked to the murders by ballistics analysis or  
25 fingerprints (*id.*); and the crime scene photographs suggest two sets of footprints around HuffStuttler's  
26 body (*id.*).

27 However, the state supreme court could reasonably have concluded that Barnett provides only  
28 minimal support for a manslaughter defense. Firstly, Barnett's conclusion of two different bullet  
trajectories is not inconsistent with that of prosecution criminologist Laskowski; Barnett in fact

1 concedes that Huffstuttler may have been shot once while standing and then three times while on the  
2 ground as the prosecution argued. (See SHCP Ex. 17 at 6-7, Ex. 18 at 1-3.)

3 According to Barnett, the gunshot trajectory suggest Huffstuttler could have been shot during an  
4 argument in the cabin and then dragged outside where he was found. But this seems speculative.  
5 Barnett ignores the trial testimony of eyewitnesses Ramirez and Wilson supporting the prosecution case  
6 that the shooting occurred outside the cabin and that Huffstuttler, when shot, was not fighting with or  
7 threatening Petitioner. (See claims I2 and I3, *ante*.) Significantly, Petitioner has not pointed to facts in  
8 the record suggesting Huffstuttler's blood was found in the cabin. Petitioner chose not to testify.

9 Barnett appears to provide little if any support for the alternative defense theory that Petitioner  
10 acted out of self-defense when he shot Huffstuttler. (See ECF No. 113 at 80-81.) Nothing in the record  
11 before the state supreme court suggests that Huffstuttler attacked Petitioner or that Huffstuttler  
12 possessed any weapons. (See RT at 1689-90, 1707, 1731, 1740-43, 1747, 1922-24, 1930, 1950-52,  
13 1958.)

14 The state supreme court could reasonably have determined that the noted evidence of bullet  
15 trajectory and stains on Huffstuttler's clothing were consistent with the prosecution theory that  
16 Petitioner attempted to make the murder look like a drug deal gone bad by shooting into Huffstuttler's  
17 body while it was on the ground and changing the scene to make it appear a scuffle had taken place.  
18 (See SHCP Ex. 13 at 7, 16; Ex. 17 at 4-6.) Moreover, there apparently were no drag marks at the  
19 murder scene. As Respondent notes, there was testimony at trial that the dirt stains could have been  
20 caused when Huffstuttler fell to the ground after being shot. (ECF No. 194, at 169:10-13, citing RT at  
21 1923-24, 1958, 2061); Bolin, 18 Cal. 4th at 310.

22 Petitioner's observation that the Laskowski's report suggests the rifle connected to Petitioner  
23 may not have been the weapon that killed Huffstuttler (see SHCP Ex. 18) is not inconsistent with the  
24 prosecution theory that Petitioner used the rifle to shoot Huffstuttler after the latter was on the ground  
25 and not moving. (RT at 1928.) Nor is it inconsistent with the trajectory evidence noted by Bennett.  
26 (See SHCP Ex. 17 at 4-9.)

27 Barnett notes the two sets of footprints around Huffstuttler's body could suggest more than one  
28 shooter. (SHCP Ex. 17 at 4-5, 9.) However, the jury was already aware of the multiple shoeprints



1 found at the scene by the evidence presented at trial. (RT at 1829-30, 1848-49.) The evidentiary  
2 record before the state court demonstrated that a total of five people were at the scene, the three  
3 victims, Ramirez and Petitioner. The presence of more than one person at the scene of Huffstuttler's  
4 murder does not necessarily suggest multiple shooters were involved. Barnett does not dispute that  
5 "[t]he absence of complete documentation" regarding the shoe impressions made "the paths of the  
6 various individuals present during the incident impossible to reconstruct." (SHCP Ex. 17 at 5.)

7 Barnett does not suggest Petitioner was not the shooter; nor does he opine that there was more  
8 than one shooter. (See Id. at 9.) The jury heard Laskowski's testimony that he could not positively link  
9 the .45-caliber bullet and .45-caliber pistol found at the crime scene (RT at 2048-49), and that there  
10 were no fingerprints found on the .45 pistol. (Id.) Barnett himself concludes that there was "little  
11 significance" to the failure to recover "useable latent fingerprints" from the .45-caliber pistol. (SHCP  
12 Ex. 17 at 4.) The jury had before it evidence that Petitioner removed prints from the gun. (RT at 1930,  
13 1958-59.) Counsel did argue, albeit unsuccessfully, a possible multiple shooter theory for the jury to  
14 consider. (See e.g., RT at 2164, 2167-69.)

15 Accordingly, the state supreme court could have concluded there was no reasonable probability  
16 of a more favorable result even with additional forensic analysis of the crime scene regarding the  
17 Huffstuttler shooting. That court could reasonably have discounted Barnett's testimony as not adding  
18 anything of more than minor probative value. See Ainsworth v. Calderon, 138 F.3d 787, 792-93 (9th  
19 Cir. 1998) (finding no ineffectiveness because proffered defense expert affidavits "are consistent with  
20 and add no new evidence to the evidence that was already before the jury.").

21 For the reasons stated, the state supreme court could reasonably have found that defense counsel  
22 was not ineffective regarding forensic investigation of the Huffstuttler shooting. "Counsel for the  
23 defense is not required to present expert testimony on all possible defenses in a case." Hall v. Sumner,  
24 512 F. Supp. 1014, 1021 (1981).

25 *Mr. Mincy*

26 Petitioner faults counsel for not challenging Laskowski's conclusion, based in part upon blood  
27 splatter and bullet trajectory analysis, that Mincy was shot while running, dropped to the ground, and  
28 was shot again (SHCP Ex. 18; RT at 2050-59), a conclusion the prosecution used in arguing the killing

1 of Mincy was first degree murder. Petitioner points to Barnett's conclusion that Mincy was not  
2 involved in a struggle because the body shows no abrasions or lacerations; and that Mincy was shot  
3 where he was found because no blood stains were found in the area leading up to where Mincy's body  
4 was found. (SHCP Ex. 17 at 7.) However, Barnett's conclusions could be seen as conflicted and based  
5 on conjecture.

6 Barnett states that bullet trajectory analysis suggests one of the shots occurred when Mincy was  
7 in some position other than his final resting position and that multiple shots occurred when Mincy was  
8 on the ground in his final resting position. (Id.) Yet Barnett seems to contradict himself by stating that  
9 "[b]lood smears and spatters on Mincy's body all appear consistent with [the] victim being in  
10 essentially the position where found when all of the gunshot wounds occurred." (Id. at 8.)

11 Barnett states that blood splatter near Mincy's body "seems unlikely to have resulted from the  
12 position in which the body was found" and that "blood splatter on the trucks (*sic*) and on the right thigh  
13 could all have originated from Mincy when he was scrambling around after having been shot in the  
14 arm." (Id.) Barnett concludes that the blood splatter could have occurred when Mincy "mov[ed] his  
15 [wounded] arm around in a rapid manner while in a position near the rock . . . ." (Id.)

16 But Petitioner ignores that Barnett's findings could be seen as supportive of Laskowski's  
17 conclusion that Mincy was initially shot in the back and the right arm while erect and running and then  
18 shot again when on the ground. (SHCP Ex. 18 at 4-5; RT at 2050-59.) Moreover, Barnett fails to  
19 arrive at any conclusion based on his noted findings. (SHCP Ex. 17 at 9.)

20 The state supreme court could have concluded there was no reasonable probability of a more  
21 favorable result even with additional forensic analysis of the crime scene regarding the Mincy  
22 shooting. That court could reasonably have discounted Barnett's testimony as not adding anything of  
23 more than minor probative value. See Ainsworth, 138 F.3d at 792-93 (finding no ineffectiveness  
24 because proffered defense expert affidavits "are consistent with and add no new evidence to the  
25 evidence that was already before the jury.").

26 For the reasons stated, the state supreme court could reasonably have found that defense  
27 counsel was not ineffective regarding forensic investigation of the Huffstuttler shooting. "Counsel  
28 for the defense is not required to present expert testimony on all possible defenses in a case." Hall,

1 512 F. Supp. at 1021.

2 **3) Failure to Challenge Criminologist Laskowski’s Qualifications**

3 Petitioner faults counsel for failing to cross-examine prosecution criminologist Laskowski  
4 regarding Laskowski’s alleged lack of knowledge, skill, education, experience and training in the  
5 analysis of blood splatter evidence (ECF No. 113 at 83-87), claiming that Laskowski did not qualify  
6 as a blood splatter expert under state law. (Id.)

7 The California Supreme Court rejected Petitioner’s challenge of Laskowski’s qualifications as  
8 an expert, observing that:

9 Utilizing photographs of the crime scene, Criminalist Laskowski testified regarding the  
10 various positions of Mincy's and Huffstuttler's bodies when they were shot. Based on  
11 blood spatters and drips depicted in the photos, he indicated one shot was to Mincy's  
12 body while in a “fetal-like” position on its left side; as to the others, his body was in a  
13 vertical position. Laskowski also concluded Mincy “was moving at a relatively rapid  
14 pace” after being initially wounded. With respect to Huffstuttler, he determined that for  
15 several shots the body was prone and not moving. Defendant now contends this  
16 evidence was inadmissible because the witness was not qualified to render an expert  
17 opinion [Citation] and because he did not personally investigate the crime scene.

18 ...

19 [A]ny objection would have been properly overruled. Evidence Code section 720  
20 provides that a person may testify as an expert “if he has special knowledge, skill,  
21 experience, training, or education sufficient to qualify him,” [Citation] which “may be  
22 shown by any otherwise admissible evidence, including his own testimony.” [Citation]  
23 The trial court’s determination of whether a witness qualifies as an expert is a matter of  
24 discretion and will not be disturbed absent a showing of manifest abuse. [Citation]  
25 ““Where a witness has disclosed sufficient knowledge of the subject to entitle his  
26 opinion to go to the jury, the question of the degree of his knowledge goes more to the  
27 weight of the evidence than its admissibility.” [Citation]

28 The record establishes Laskowski was fully qualified to testify based on his educational  
background in biochemistry and serology and his training as a criminalist for 13 years,  
including attending and giving seminars in blood-spatter analysis and crime scene  
investigation. He had also testified as an expert witness on numerous prior occasions.  
Given his expertise, Laskowski’s testimony was not cumulative. Utilizing his knowledge  
of blood spatters and drips, he was better able to describe the particulars of what  
occurred during the shooting of Huffstuttler and Mincy than any photographic depiction  
of their bodies. For example, he concluded from the spatter evidence that Mincy was  
moving around after he was first shot and before he fell into a fetal position, where he  
was shot one more time. He also explained that the large pool of blood around  
Huffstuttler’s body indicated he was prone and not moving when he received the final  
shots. As discussed in other contexts, this evidence was relevant to the issues of intent  
and premeditation and deliberation. The photographs Laskowski referred to adequately

1 illustrated his testimony; therefore, the fact he did not personally examine the crime  
2 scene was a matter of evidentiary weight. Since his testimony was admissible on all  
grounds, counsel had no basis for objecting.

3 Bolin, 18 Cal. 4th at 321-22; see also RT at 2040-43.

4 The record reflects that Laskowski, a thirteen-year employee of the Kern County Regional  
5 Criminalistics Laboratory, testified that he attended seminars “essentially having to do with . . . blood  
6 splatter analysis” (RT at 2041-42) and that he had given “papers and lectures at these same type of  
7 seminars.” (RT at 2042.) Petitioner cites to People v. Hogan, 31 Cal. 3d 815, 852 (1982), disapproved  
8 on other grounds by People v. Cooper, 53 Cal. 3d 771, 836 (1991) (the qualifications of an expert must  
9 be related to the particular subject upon which he is giving expert testimony). He argues that this  
10 testimony is ambiguous and that Laskowski may have received minimal or no blood splatter training  
11 and given few if any papers and lectures. (See ECF No. 113 at 85 n.17.) He argues that Laskowski did  
12 not clearly testify as to the topics upon which he had given seminars.

13 However, the following colloquy between the prosecutor and Laskowski at trial suggests  
14 otherwise:

15 Q What are the nature of those seminars that you have attended?

16 A They are all essentially having to do with the field of criminalistics and the varied  
17 disciplines in criminalistics that would include hair and fiber examination, shoe track,  
18 tire track analysis, firearms and tool mark analysis, blood spatter analysis, crime scene  
19 investigation, collection and preservation of physical evidence and arson and explosive  
analysis.

20 Q And you yourself, Mr. Laskowski, have also given papers and lectures at these same  
types of seminars, have you not?

21 A That is correct.

22  
23 (RT at 2041-42.)

24 Laskowski testified that he had qualified as an expert in blood spatter analysis on “several  
25 hundred occasions.” (RT at 2042.) Petitioner’s speculation that Laskowski’s training “may have”  
26 encompassed only “a ten or fifteen minute lecture” on blood spatter evidence, or that Laskowski  
27 “could have attended a seminar where [blood spatter analysis] was supposed to have been addressed,  
28 but never was” (ECF No. 113 at 85) is not sufficient to demonstrate that the state supreme court’s

1 finding based on evidence in the record was objectively unreasonable. See 28 U.S.C. §  
2 2254(d)(2)(e)(1). Nor is it necessarily probative of the issue that Petitioner can conceive of  
3 alternatives to the conclusions drawn by Laskowski. (ECF No. 178 at 109:19-110:4.)

4 Respondent points out that defense counsel Soria was familiar with Laskowski's  
5 qualifications, both from discovery in this matter and from work on other cases. (See EH Ex. 69B at  
6 10/16/90 EMF Billing Statement at 3); see also Berryman v. Ayers, No. 95-CV-05309-AWI, 2007  
7 WL 1991049, at \*\*3, 5-7 (E.D. Cal. July 10, 2007) [a prior capital case in which Soria was counsel  
8 and Laskowski testified].) Soria could reasonably have believed that Laskowski, a thirteen-year  
9 criminalist with Kern County who had qualified as an expert hundreds of times (RT at 2041-42), was  
10 sufficiently qualified to testify regarding blood-spatter and tactically chose not to question him further  
11 because doing so would only stress his qualifications to the jury. This being the case, counsel could  
12 reasonably have determined the better argument was to suggest to the jury that little weight should be  
13 accorded Laskowski's allegedly unqualified opinions. See e.g., RT at 2064 [counsel highlights  
14 Laskowski's disagreement with defense forensic pathologist and that unlike the pathologist,  
15 Laskowski was not "a doctor"].)

16 Defense counsel also may have made a tactical decision not to object to Laskowski's  
17 testimony, reserving objection for the gruesome photographs upon which Laskowski relied in  
18 forming his opinions, photographs which defense counsel viewed as cumulative, inflammatory and  
19 prejudicial. (See RT at 2084-85.) The extent and nature of cross-examination is a matter of trial  
20 tactics entrusted to the judgment of defense counsel. Dows v. Wood, 211 F.3d, 480, 487 (9th Cir.  
21 2003); United States v. Murray, 751 F.2d 1528, 1535 (9th Cir. 1985). Decisions about cross  
22 examination "are given great deference and must . . . meet only objectively reasonable standards."  
23 Dows, 211 F.3d at 487. Even if a witness could have been subjected to more vigorous examination,  
24 no prejudice lies where evidence of guilt is strong. Murtishaw v. Woodford, 255 F.3d 926, 953 (9th  
25 Cir. 2001). Furthermore, failure to object -- such as to a witness's expertise -- is not ineffectiveness  
26 where an objection would have lacked merit. Aguon, 851 F.2d at 1172.

27 Petitioner citation to Hogan (see ECF. 113 at 84-85; Doc. 178 at 138-40) in support of the  
28 argument Laskowski was unqualified is of no assistance on these facts. In Hogan, the California

1 Supreme Court found the prosecution's otherwise qualified criminalist to be unqualified in blood  
2 splatter because he admitted he had no formal education or training in this area. 31 Cal. 3d at 852-53.  
3 But here Laskowski's qualifications included "attending and giving seminars in blood-spatter  
4 analysis." Id. at 322. As discussed above, Laskowski's qualifications were supported by the record.  
5 (RT at 2040-43.)

6 Petitioner claims that Laskowski was unqualified as a pathologist because the prosecution's  
7 pathologist, Dr. Holloway, disagreed with Laskowski's interpretation of gunshot wounds, i.e., the  
8 number of Huffstuttler's gunshot wounds which demonstrated a "shoring" or "buttress" effect."  
9 (ECF No. 113 at 86:14-16; RT at 2065.) Dr. Holloway found possible buttress effect with only one  
10 of Huffstuttler's wounds (SHCP Ex. 19 at 5.) Laskowski, in his September 10, 1990 report, noted Dr.  
11 Holloway's finding. (SHCP Ex. 18 at 3.) In his subsequent trial testimony, Laskowski stated his  
12 opinion that at least three of Huffstuttler's wounds showed buttress effect (RT at 2064), consistent  
13 with the prosecution theory that Huffstuttler was shot three times while on the ground. (RT at 2065.)  
14 However, the California Supreme Court reasonably could have discounted any such difference of  
15 opinion as mere disagreement among experts which alone does not demonstrate that one expert is  
16 unqualified. See e.g., Toler v. Troutt, 2015 WL 1408490 at \*9 (W.D. Okla., Feb. 20, 2015) (medical  
17 difference of opinion not actionable under the Eighth Amendment).

18 Petitioner also claims in passing that counsel Soria must have been ineffective in cross-  
19 examining Laskowski because co-counsel Cater stepped in to lodge an objection (see ECF No. 113 at  
20 83 [citing RT at 2072].) The California Supreme Court could reasonably have found this claim  
21 speculative, or a reflective of trial tactics. Petitioner has not shown how and why an objection by co-  
22 counsel necessarily rises to the level of prejudicial deficient performance under Strickland.

23 Additionally, Petitioner has not demonstrated prejudice. Laskowski seems properly qualified  
24 as an expert and had been qualified by courts as such on several hundred prior occasions. The failure  
25 to cross-examine him on this basis could not have been prejudicial. (See claim N, *post*; see also  
26 Lochart v. Fretwell, 506 U.S. 364, 374 (1992) (counsel's failure to make a meritless objection is not  
27 prejudicial under Strickland). Petitioner's argument that without Laskowski's testimony there would  
28 have been no sufficient forensic evidence showing Petitioner's intent, premeditation, and planning



1 (ECF No. 178 at 143-44; Respondent's Brief on Appeal at 126), is unavailing for reasons stated by  
2 the California Supreme Court, as follows (see also claim O, *post*):

3 [Petitioner] correctly notes the killings took place within a few minutes of the victims'  
4 arrival at his cabin. What occurred within those few minutes, however, is particularly  
5 telling with respect to his state of mind. According to both Wilson and Eloy Ramirez,  
6 [Petitioner] began arguing with Huffstuttler when Mincy and Wilson were shown the  
7 marijuana plants. [Petitioner] continued berating Huffstuttler as the two walked back  
8 toward the cabin. [Petitioner] went inside, retrieved a revolver, and shot Huffstuttler at  
9 close range. He proceeded back across the creek and confronted Wilson and Mincy.  
10 After apologizing that he had "nothing against" them, he opened fire. As a wounded  
11 Wilson fled the scene, he heard Mincy plead for his life. More shots were fired.  
12 [Petitioner] returned to Huffstuttler and fired several rifle rounds into his motionless  
13 body. The autopsy report indicated at least three shots were inflicted before he died,  
14 although according to Ramirez he did not move after the first shot. After the shootings,  
15 [Petitioner] told Ramirez he was going to make the scene look like a bad dope deal had  
16 occurred and scattered marijuana, broke bottles, and poured chili sauce around  
17 Huffstuttler's body. None of the victims were armed; nor did they engage in any  
18 provocative conduct. From this evidence, a reasonable trier of fact could infer  
19 [Petitioner] had a motive for the killings, both to punish Huffstuttler for revealing the  
20 marijuana operation to strangers and to protect his crop from theft or exposure to law  
21 enforcement. He also may have wanted to eliminate Mincy and Wilson as witnesses to  
22 the Huffstuttler shooting. In conjunction with these possible motives, the manner of  
23 killing supports a finding of premeditation and deliberation. Both victims died of  
24 multiple gunshot wounds, several of which would have been fatal individually. While  
25 [Petitioner] fired some shots at Mincy as he was attempting to flee, at least one shot  
26 entered his body as he lay in a fetal position. This forensic evidence indicates  
27 [Petitioner] did not want merely to wound either victim; he wanted to make certain they  
28 died. The trial testimony also suggests rapid but purposeful planning activity once  
[Petitioner] realized the potential consequences of his partner's carelessness. While  
chastising Huffstuttler, he walked back to the cabin where he got a gun. Rather than seek  
reconciliation, he shot Huffstuttler without warning. He then shot Mincy and Wilson and  
made good his escape after attempting to conceal his own involvement in the crimes.  
Viewing the record in its entirety, we find sufficient evidence to support the jury's  
finding of first degree murder. [Citation] [Petitioner]'s argument simply asks this court  
to reweigh the facts.

23 Bolin, 18 Cal. 4th at 331-33.

24 The state supreme court's prejudice analysis also noted that:

25 [Petitioner] identifies no exculpatory or impeachment evidence that counsel could have  
26 revealed by further questioning of prosecution [expert] witnesses . . . and that would  
27 have produced a more favorable result at trial. [¶] ... Such claims must be supported by  
28 declarations or other proffered testimony establishing both the substance of the omitted  
evidence and its likelihood for exonerating the accused. [Citations] We cannot evaluate  
alleged deficiencies in counsel's representation solely on defendant's unsubstantiated



1 speculation.” [Citation]

2 Bolin, 18 Cal. 4th at 333-35. Apart from Laskowski’s testimony, the noted evidence against Petitioner  
3 that was before the state court was substantial. (See claims O, R and S.)

4 For the reasons stated, a fair-minded jurist could have found that Petitioner failed to establish  
5 that he was denied a fair trial, or to the extent alleged, that defense counsel’s performance fell below an  
6 objective standard of reasonableness and that, but for counsel’s unprofessional errors, the outcome of  
7 this proceeding would have been different. Strickland, 466 U.S. at 687-98.

8 It does not appear that the state supreme court’s rejection of these claims was contrary to, or an  
9 unreasonable application of, clearly established federal law, as determined by the Supreme Court, or  
10 that the state court’s ruling was based on an unreasonable determination of the facts in light of the  
11 evidence presented in the state court proceeding. See 28 U.S.C. § 2254(d).

12 Claims I8 and I9 are denied.

13 **j. Review of Claim I10**

14 In this claim, Petitioner alleges that defense counsel did not conduct an adequate investigation  
15 into Petitioner’s mental health. (ECF No. 113 at 87-94.)

16 This claim was presented on state habeas corpus and summarily rejected on the merits without  
17 explanation by the California Supreme Court. (CSC Order Den. Pet. Habeas Corpus.)

18 Petitioner alleges that defense counsel was ineffective by not conducting a sufficient social,  
19 life and mental health investigation, which led to an inadequate mental defense evaluation. As a  
20 result, defense forensic psychiatrist, Dr. Markman, who conducted a single, brief pre-trial evaluation  
21 of Petitioner, based his report on insufficient life and social history, insufficient background and  
22 insufficient investigative information. (See SHCP Ex. 20.) Petitioner also points to the circa 2000  
23 habeas declarations of his experts, Drs. Khazanov and Matthews (see SHCP Ex.’s 10, 22), who  
24 opined that Dr. Markman’s diagnosis was not sufficiently supported in the evidence and professional  
25 protocols.

26 Petitioner relies upon Drs. Khazanov and Matthews in complaining that Dr. Markman’s  
27 September 22, 1990 pre-trial competency evaluation failed to address Petitioner’s serious head injuries  
28 including brain damage; neuropsychological impairment affecting his ability to assist in his defense;

1 extended exposure to neurotoxins; chronic alcohol abuse; military career including combat in Vietnam;  
2 and a life of significant trauma, abuse and stress, (SHCP Ex.’s 10 and 22), each of which could have  
3 negated malice aforethought and supported his manslaughter defense.

4 According to Dr. Markman’s November 20, 1990 assessment letter:

5 Mental status examination revealed [Petitioner] to be fully oriented in all spheres, alert,  
6 cooperative, and above normal intelligence with an excellent fund of knowledge.  
7 Responses were relevant and coherent, memory and concentration were not impaired  
8 and affect was appropriate, though detached. There was no evidence of a major mental  
9 disorder, thought disorder or psychosis, judgment was not impaired and insight into his  
status was adequate. He was able to provide a coherent narration of his version of the  
events of September 2, 1990 and their sequelae.

10 In broad terms and without reviewing the specifics of the events, [Petitioner] emphasizes  
11 that he acted in self-defense. He goes into great detail about the circumstances and  
12 attributes everything to a “dope deal that went bad,” a series of events when “someone  
13 comes walking into the cabin with a .44 caliber gun in his waistband.” He reports that he  
acted offensively only after “Vance [one of the victims] cut me across my legs.” (He  
demonstrated scars on both anterior thighs, the left higher than the right.)

14 [¶ . . . ¶]

15 There is no history of previous psychiatric treatment or hospitalization. He does admit to  
16 poly-drug abuse “years ago—you name it,” to include intravenous heroin and cocaine.  
There is also an extended history of daily alcohol use.

17 [¶ . . . ¶]

18 In summation, [Petitioner] demonstrates no current evidence of a major mental disorder.  
19 Treatment, hospitalization or medication on a mandatory basis is not indicated and the  
20 prognosis for change remains guarded. His psychiatric status exhibits long-term  
21 behavioral patterns, difficult to alter or treat. His story narration is not a function of  
fantasy, but rather a presentation based on self-protective grounds. If fabricated, he is  
fully aware that he is doing so.

22 He is clearly competent to stand trial within the meaning of Section 1368, P.C. He is  
23 fully oriented, aware of the nature and the purpose of the proceedings pending and can  
24 cooperate rationally in presenting a defense. There is no data to support an insanity plea  
25 under M’Naughten criteria. Furthermore, I find no evidence that would point to  
diminished actuality for the crime of murder.

26 (SHCP Ex. 20 at 1-3.) Dr. Markman’s letter to counsel specifically stated that his opinion would not  
27 support an insanity or diminished capacity defense. (Id. at 3.)

28 The California Supreme Court was not unreasonable in finding that defense counsel

1 appropriately retained the services of an expert and investigated whether to present evidence supporting  
2 a mental defense. That expert, Dr. Markman, reviewed Kern County Sheriff reports, “past records and  
3 probation reports,” the preliminary hearing transcript, and the coroner’s report. (SHCP Ex. 20.) He  
4 also personally examined Petitioner and consulted with counsel. (ECF No. 113 at 87:21-88:4; SHCP  
5 Ex. 20.) Nothing in Dr. Markman’s report appears to suggest that further mental defense investigation  
6 or examination was necessary or warranted. Petitioner argues in isolation that additional investigation  
7 and testing should have been done, but does not support this argument with the evidentiary record then  
8 before the state court. That a subsequently retained expert such as Dr. Matthews suggests a more  
9 comprehensive mental examination and neuropsychological assessment could have been done (ECF  
10 No. 113 at 89:6-90:14; SHCP Ex. 22) is not evidence such reasonably should have been done, or that  
11 facts otherwise related by Petitioner to counsel or known to counsel reasonably warranted further  
12 investigation or examination.

13 Here, defense counsel could reasonably have made a tactical choice not to conduct further  
14 investigation, in reliance upon the qualified expert’s opinion that there was no basis to support such a  
15 mental defense. Because that choice was not unreasonable, counsel’s assistance was not ineffective.  
16 See Harris v. Vasquez, 949 F.2d 1497, 1525 (9th Cir. 1990) (“It is certainly within the ‘wide range of  
17 professionally competent assistance’ for an attorney to rely on properly selected experts.”); see also  
18 Williams v. Woodford, 384 F.3d 567, 611 (9th Cir. 2004) (holding counsel’s decision not to  
19 investigate mental defense further was reasonable in light of conclusions of mental health experts).

20 The decision not to call Dr. Markman as a witness also could have been a matter of tactics.  
21 See Strickland, 466 U.S. at 690-91; see also Lord v. Wood, 184 F.3d 1083, 1095 (9th Cir. 1999)  
22 (observing that “few decisions draw so heavily on professional judgment as whether or not to proffer  
23 a witness at trial”). For the reasons stated, Dr. Markman’s testimony likely would have supported the  
24 charges, not a mental defense to them. “Rare are the situations in which the ‘wide latitude counsel  
25 must have in making tactical decisions’ will be limited to any one technique or approach.” Richter,  
26 562 U.S. at 106-08 (quoting Strickland, 466 U.S. at 689); see also Williams, 529 U.S. at 415 (defense  
27 counsel conducted a reasonable investigation into Petitioner’s troubling background and unique  
28 personal circumstances and developed a coherent and organized strategy, proffered evidence, and

1 presented a case for mitigation); Wiggins, 539 U.S. at 521 (citing Strickland, 466 U.S. at 688) (“the  
2 proper measure of attorney performance remains simply reasonableness under prevailing professional  
3 norms.”). As the Supreme Court noted in Van Hook,

4 This is not a case in which the defendant’s attorney [] failed to act while potentially  
5 powerful mitigating evidence stared [him] in the face [Citation] or would have been  
6 apparent from documents any reasonable attorney would have obtained, [Citation]. It is  
7 instead a case, like Strickland itself, in which defense counsel’s “decision not to seek  
8 more” mitigating evidence from the defendant’s background “than was already in hand”  
9 fell “well within the range of professionally reasonable judgments.”

10 558 U.S. at 11-12 (quoting Strickland, 466 U.S. at 699).

11 Petitioner also claims that in 1989 and 1990, he suffered from substance abuse, trauma-  
12 induced stress disorder, impairment of brain function, and organic brain damage, citing to his decade-  
13 later neuropsychological evaluation by Dr. Khazanov (SHCP Ex. 10, at ¶ 41), and assessment by Dr.  
14 Matthews (SHCP Ex. 22 at 42), who concluded that:

15 [T]o a reasonable degree of medical certainty that the shooting of Vance Huffstuttler  
16 was “the result of trigger responses to perceived dangers to [Petitioner] himself.”  
17 Petitioner’s exaggerated perceptions and reactions were the result of “[Petitioner’s]  
18 many deficits, his organic brain damage, the stress he was under at the time of the crime  
19 and his ingestion of alcohol and cocaine.

20 (ECF No. 178 at 355-56.)

21 The Court is unconvinced by this claim. The California Supreme Court could reasonably have  
22 found unpersuasive these mental defense allegations based on evaluations made ten years after Dr.  
23 Markman’s evaluation, allegations that were contradicted by a record which included substantial  
24 evidence that Petitioner functioned and communicated at a high level and assisted in his own defense.  
25 (See claim O, *post*; 7/18/90 RT at 5-14 [re Petitioner’s participation in hearing on motion to withdraw];  
26 12/13/90 RT at 2270-72, 2275-76, 2278-87, 2295 [re Petitioner’s participation in Marsden hearing].)  
27 There was testimony that Petitioner shot Mincy several times when he was lying in a creek bed curled  
28 in the fetal position and begging for his life, (RT at 1741, 1743, 1792, 2054-58), and that Petitioner  
removed the wires from Wilson’s car to ensure that he bled to death before finding help. (RT at 1738,  
1863-64, 1929, 1957, 1959, 1961, 1975.)

Petitioner’s cited authority, Jacobs, 395 F.3d at 102-04 does not suggest otherwise. See e.g.,

1 Boyde v. Brown, 404 F.3d 1159, 1168-69 (9th Cir. 2004), amended by 421 F.3d 1154 (9th Cir. 2005)  
2 (holding that if new mental health evidence, obtained after the trial, were sufficient to establish the  
3 petitioner's innocence, the petitioner could "always provide a showing of factual innocence by hiring  
4 psychiatric experts who would reach a favorable conclusion").

5 The Court finds similarly unpersuasive Petitioner's argument that *ABA Guidelines* and related  
6 commentary and unspecific general practices required that counsel further investigate and present life  
7 history and mental health defenses on the facts of this case. Petitioner has not demonstrated that the  
8 *ABA Guidelines* require further investigation where counsel makes a reasonable tactical decision  
9 based on the available information. See Williams, 384 F.3d at 611 (holding counsel's decision not to  
10 investigate mental defense further was reasonable in light of conclusions of mental health experts).  
11 Counsel is entitled to rely on the expert consulted, and the consultation may support a limitation on  
12 further investigation. See Moran v. Godinez, 57 F.3d 690, 699-700 (9th Cir. 1994). Allowing "battles  
13 of psychiatric opinions during successive collateral challenges to a death sentence would place  
14 federal courts in a psycho-legal quagmire resulting in the total abuse of the habeas process." Harris,  
15 949 F.2d at 1518.

16 Petitioner claims that defense counsel was deficient in choosing Dr. Markman because his  
17 expertise was in serial killers and he was known to advocate tougher sentencing in order to keep  
18 society safe. (SHCP Ex. 21.) Yet nothing in the evidentiary record suggests Dr. Markman was  
19 unqualified, or that counsel's selection was objectively unreasonable given the facts of this case. Dr.  
20 Markman was apparently well-known in the field of forensic psychiatry and had been retained as a  
21 mental health expert in other criminal cases, including other murder cases, by both the prosecution  
22 and defense. (Id.) Furthermore, Dr. Markman had both law and medical degrees and, like Petitioner,  
23 Dr. Markman had served in the armed forces. (Id.) Moreover, selection of experts is generally at  
24 counsel's discretion. See Ake v. Oklahoma, 470 U.S. 68, 84-85 (1985) (counsel under no obligation  
25 to seek out an expert that would render an opinion, or to use tests, that he now figures would have  
26 better withstood the prosecutor's cross-examination).

27 Even if defense counsel's investigation and presentation of mental defenses was deficient, the  
28 state supreme court could reasonably have found unaffected the jury's imposition of the death

1 penalty, given the noted substantial evidence against Petitioner. (See claim O, *post.*)

2 For these reasons, Petitioner has failed to overcome the strong presumption that counsel made  
3 decisions in the exercise of professional judgment. Strickland, 466 U.S. at 690. Even if defense  
4 counsel had discovered this evidence and still chose to proceed with his strategy as opposed to the  
5 strategy Petitioner now advocates, a fair-minded jurist could conclude that counsel's decision was  
6 reasonable. "Counsel was entitled to formulate a strategy that was reasonable at the time and to  
7 balance limited resources in accord with effective trial tactics and strategies." Richter, 562 U.S. at  
8 107. "[T]he Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with  
9 the benefit of hindsight." Yarborough, 541 U.S. at 8.

10 For the reasons stated, a fair-minded jurist could have found that Petitioner failed to establish  
11 that he was denied a fair trial, or to the extent alleged, that defense counsel's performance fell below  
12 an objective standard of reasonableness and that, but for counsel's unprofessional errors, the outcome  
13 of this proceeding would have been different. Strickland, 466 U.S. at 687-98.

14 It does not appear that the state supreme court's rejection of the claim was contrary to, or an  
15 unreasonable application of, clearly established federal law, as determined by the Supreme Court, or  
16 that the state court's ruling was based on an unreasonable determination of the facts in light of the  
17 evidence presented in the state court proceeding. See 28 U.S.C. § 2254(d).

18 Claim I10 is denied.

19 **k. Review of Claim I11**

20 In this next claim, Petitioner alleges that defense counsel was ineffective by failing to object  
21 to introduction of evidence of weapons unrelated to the crimes, i.e., a shotgun and suspected, albeit  
22 unloaded pipe bombs, all found at the murder scene. (ECF No. 113 at 94-96.)

23 Petitioner raised this same claim in his petition for writ of habeas corpus in the California  
24 Supreme Court, which the California Supreme Court summarily denied on the merits without  
25 explanation. (CSC Order Den. Pet. Habeas Corpus.)

26 Petitioner claims the shotgun introduced into evidence at trial, (RT at 1823-30; 1903), and  
27 testimony regarding the pipe bombs given at trial (RT at 1863, 1885, 1887-90), was irrelevant and  
28 prejudicial under state law and deficient and prejudicial under Strickland depriving him of rights

1 under the Sixth Amendment. However, the state supreme court was not unreasonable in rejecting this  
2 claim.

3 Petitioner has not demonstrated this evidence was admitted in violation of state evidentiary  
4 requirements. In this case, the prosecution had the burden of proving that Petitioner was knowingly  
5 cultivating marijuana, one of the charged offenses. (RT at 2212.) The state supreme court could  
6 reasonably have found the presence of a shotgun and suspected pipe bombs near the marijuana patch  
7 was relevant to this issue and therefore admissible under California law and that counsel's failure to  
8 object was not deficient performance. There was testimony at trial that these types of weapons are  
9 often found on property where illicit substances are being cultivated. (RT at 1885.) In particular,  
10 evidence of pipe bombs on the property assisted the prosecution in meeting that burden because Kern  
11 County Sheriff's Sergeant Glen Johnson specifically testified, without objection, that he often finds  
12 bombs in illicit cultivation areas (RT at 1885-86) and that the pipes quickly could have been loaded to  
13 explode using gunpowder and a car battery located nearby. (RT at 1862-65, 1884-90.)

14 These weapons also could be seen as relevant to the parties' respective theories regarding the  
15 shootings. The weapons could support the prosecution's theory that Petitioner's motive for the  
16 murders was to protect his marijuana crop. (See ECF No. 113 at 96.)

17 The shotgun, which was recovered from under the mattress in the bedroom (RT at 1825),  
18 could have supported the Petitioner's defense theory that he was afraid of Huffstutler and acted in  
19 self-defense. (See e.g., ECF No. 113 at 79-83.)

20 Even if the evidence was errantly admitted, Petitioner has not demonstrated that the error rose  
21 to the level of a constitutional violation. Petitioner may not raise an issue of state law as a basis for  
22 habeas relief. "[F]ederal habeas corpus relief does not lie for errors of state law." Lewis v. Jeffers,  
23 497 U.S. 764, 780 (1990); see also Pulley, 465 U.S. at 41. This evidence was not highlighted by the  
24 prosecution, (RT at 1824, 1885, 1888, 2030); it was not mentioned in the prosecution's closing  
25 argument (RT at 2142-2144). Federal courts may not interfere with a state evidentiary ruling unless  
26 the evidence was so prejudicial that its admission violated fundamental due process and the right to a  
27 fair trial. Jeffries, 5 F.3d at 1192; Butcher v. Marquez, 758 F.2d 373, 378 (9th Cir. 1985). Such was  
28 not the case here.



1 Furthermore, defense counsel successfully objected to portions of the testimony meant to link  
2 marijuana cultivation and pipe bombs, obviating any need for curative instruction in that regard. (RT at  
3 1888; see also ECF No. 113 at 96.) The jury was properly instructed to disregard the testimony. (RT at  
4 2184.) Defense counsel could reasonably have determined not to call further attention these matters for  
5 the reasons stated and to avoid giving the jury additional harmful detail. In any event, the noted  
6 evidence otherwise against Petitioner was substantial. (See claims O, R and S, *post*.)

7 For the reasons stated, a fair-minded jurist could have found that Petitioner failed to establish  
8 that he was denied a fair trial, or to the extent alleged, that defense counsel's performance fell below  
9 an objective standard of reasonableness and that, but for counsel's unprofessional errors, the outcome  
10 of this proceeding would have been different. Strickland, 466 U.S. at 687-98.

11 It does not appear that the state supreme court's rejection of the claim was contrary to, or an  
12 unreasonable application of, clearly established federal law, as determined by the Supreme Court, or  
13 that the state court's ruling was based on an unreasonable determination of the facts in light of the  
14 evidence presented in the state court proceeding. See 28 U.S.C. § 2254(d).

15 Claim I11 is denied.

16 **I. Review of Claim I12**

17 Petitioner alleges in this claim that defense counsel was ineffective by not objecting to  
18 admission of irrelevant, cumulative, gruesome color photographs, depicting the deceased victims at  
19 the crime scene, and two autopsy photographs, denying him due process and a fair and reliable  
20 penalty determination. (ECF No. 113 at 96-98.)

21 Petitioner raised this same claim in his petition for writ of habeas corpus in the California  
22 Supreme Court, which was summarily denied on the merits without explanation. (CSC Order Den.  
23 Pet. Habeas Corpus.)

24 Additionally this claim was raised to, and rejected by the California Supreme Court on direct  
25 appeal. Bolin, 18 Cal. 4th at 318-19.

26 Petitioner complains that the prosecution was allowed to introduce thirteen gruesome and  
27 inflammatory photographs, eleven color photographs of Mincy and Huffstuttler as they were found at  
28 the crime scene, and two autopsy photographs. Prior to trial, defense counsel objected to all thirteen

1 photographs. (CT at 214-24.) The trial court deferred ruling. (11/1/90 RT at 28-30). At trial,  
2 defense counsel objected only to four of the photographs, and then only on state law grounds. (RT at  
3 2083-88; Bolin, 18 Cal. 4th 319, n.4.) A total of eleven photographs were admitted into evidence.  
4 (People's Ex.'s. 3-4, 10, 17, 35, 40, 42-44, 72-73; RT at 2079-88.) Petitioner claims all of these  
5 photographs were prejudicial and cumulative and that consistent with *ABA Guidelines*, should have  
6 been objected to and excluded under state law as more prejudicial than probative. He claims that  
7 admission of these photographs caused the penalty trial to be fundamentally unfair, that there was no  
8 tactical reason not to object to these photographs, and that had these photographs not been admitted,  
9 there is a reasonable probability Petitioner would not have suffered a capital conviction. (RT at 2083-  
10 84.)

11 A due process claim can be stated where graphic photos of victims make the trial  
12 fundamentally unfair. Jammal v. Van de Kamp, 926 F.2d 918, 919 (9th Cir. 1991). Photographs that  
13 are relevant to the crime charged are generally admissible. See Villafuerte v. Lewis, 75 F.3d 1330,  
14 1343 (1996). Under California law, "photographs which disclose the manner in which the victim was  
15 wounded are relevant on the issues of malice and aggravation of the crime and the penalty." People  
16 v. Thompson, 50 Cal. 3d 134, 182 (1990).

17 The California Supreme Court considered and rejected Petitioner's allegations on direct  
18 appeal, noting that:

19 Over defense objection, the trial court admitted into evidence three photographs of  
20 Mincy's body, which Criminalist Gregory Laskowski utilized to illustrate his testimony  
21 about blood spatters and drips found at the crime scene. Defendant renews his  
22 contention these photos were cumulative and more prejudicial than probative due to  
23 their "gruesome" nature. [Citation]

24 The admission of photographs of a murder victim lies within the sound discretion of the  
25 trial court, exercise of which will not be disturbed on appeal absent a showing of abuse,  
26 i.e., that their probative value is clearly outweighed by their prejudicial effect. [Citation]  
27 In overruling the objection, the court here characterized the evidence as "highly  
28 relevant" because Laskowski used all three pictures to explain how he concluded from  
the blood spatters and drips that Mincy had been in motion when defendant fired some  
of the shots. In the court's view, "it certainly goes to the issue of intent and  
premeditation and planning ...." These conclusions reflect a proper exercise of the  
court's discretion. Since identity was not at issue, defendant's state of mind was critical  
to the charge of first degree murder [Citation], and firing at a fleeing victim reasonably  
reflects an intention to kill. [Citation] Moreover, even though the pictures served to

1 corroborate a testimonial witness, they were not cumulative since the photographic  
2 evidence could assist the jury in understanding and evaluating that testimony. [Citation]  
3 Indeed, Laskowski's testimony may have made little sense without appropriate  
4 illustration. We have examined the exhibits and also do not find them unduly gruesome.

4 Bolin, 18 Cal. 4th at 318-19.

5 For these reasons, the state supreme court could reasonably have found that Petitioner was not  
6 prejudiced by introduction of the photos or failure of defense counsel to further object to them. The  
7 photographs could be relevant and probative of the charges and their elements, including intent to kill,  
8 aggravation and penalty.

9 Significantly, Laskowski relied upon People's Exhibits 42 through 44, 72, and 73 to support his  
10 testimony and conclusions that Huffstuttler was shot and died where he was found and that he was shot  
11 after he was no longer moving. (RT at 2055-65.) The other photographs were not close-ups and not  
12 particularly bloody or gruesome and were reasonably probative of the manner of death and the crime  
13 scene and the victims in relation to it. (RT at 1661-62, 1671, 1683, 1732, 1790-92, 1817, 1946-47.)

14 Defense counsel could reasonably have recognized the probative value of these photographs  
15 (see, e.g., RT at 2083), which the trial court found "highly relevant" (RT at 2084), and, as a matter of  
16 tactics, determined that it would have been pointless to argue for their exclusion.

17 Petitioner also faults defense counsel for objecting to the photographs at trial on only state  
18 evidentiary grounds. Petitioner argues that counsel should have also objected on federal constitutional  
19 grounds. (ECF No. 113 at 97.) However, the "admissibility of evidence in a state trial is matter of state  
20 law," which is binding on the federal court unless there is a due process violation. Clark, 16 F.3d at  
21 963-64. Only if no permissible inferences can be drawn from admitted evidence will due process be  
22 violated. Jammal, 926 F.2d at 920; cf. Estelle, 502 U.S. at 67 (Ninth Circuit erroneously "relied in part  
23 on its conclusion that the [prior injury] evidence was 'incorrectly admitted . . . pursuant to California  
24 law' in ruling that McGuire's due process rights were violated by admission of the evidence.").

25 Here, the California Supreme Court also could reasonably have found that the Petitioner did  
26 not show prejudice relating to admission of the photographs. Even without these photographs, it is  
27 not reasonably probable the jury would have returned a sentence less than death given the substantial  
28 evidence against Petitioner. (See claims O, R and S, *post*.)

1 For the reasons stated, a fair-minded jurist could have found that Petitioner failed to establish  
2 that he was denied a fair trial, or to the extent alleged, that defense counsel's performance fell below  
3 an objective standard of reasonableness and that, but for counsel's unprofessional errors, the outcome  
4 of this proceeding would have been different. Strickland, 466 U.S. at 687-98.

5 It follows that the state supreme court's rejection of the claim was not contrary to, or an  
6 unreasonable application of, clearly established federal law, nor based on an unreasonable  
7 determination of the facts in light of the evidence presented in the state court proceeding. See 28  
8 U.S.C. § 2254(d).

9 Claim I12 is denied.

10 **m. Review of Claim I13**

11 In this claim, Petitioner alleges defense counsel was ineffective because of irregularities and  
12 improprieties that occurred during the jury's view of the crime scene and related locations. (ECF No.  
13 113 at 98-100.)

14 Petitioner raised this same claim in his petition for writ of habeas corpus in the California  
15 Supreme Court, which the California Supreme Court summarily denied on the merits without  
16 explanation. (CSC Order Den. Pet. Habeas Corpus.)

17 Related allegations were also raised and rejected on direct appeal. Bolin, 18 Cal. 4th at 323-  
18 26.

19 Petitioner faults defense counsel for agreeing to the jury view, and for not objecting "to the  
20 taking of testimony during the jury view, the absence of [Petitioner] while testimony was being taken,  
21 the admission of evidence when the entire jury was not present, and/or media coverage of the view."  
22 (ECF No. 113 at 98; see also claims L1-L4, *post*.)

23 The California Supreme Court, on direct appeal, stated that:

24 At the prosecutor's request and with the express agreement of the defense, the jury was  
25 taken to defendant's cabin to view the scene of the crimes accompanied by the court,  
26 counsel, a court stenographer, and Sheriff's Deputies Layman and Williamson, who  
acted as bailiffs . . .

27 When the jury arrived at the scene, the court indicated "we are not going to take any  
28 testimony at this time." The jurors were then permitted to walk around the area,  
including where the marijuana plants had been growing, but were admonished not to

1 discuss the case. After the jurors had looked around for an unspecified time, the court  
2 inquired, “Do any of you have any questions?” One juror asked for the location of the  
3 trailer where Huffstuttler had lived, which defense counsel indicated. Thereafter, on  
4 inquiry primarily from the court, Layman and Williamson, who had originally  
5 investigated the crime scene, pointed out the location of Wilson’s truck, Huffstuttler’s  
6 body, a woodpile, and the main road into the cabin area, all of which had been testified  
7 to in court. Williamson also described the foliage as taller at the time of the  
8 investigation, obscuring the view of the marijuana plants from the cabin. . . .

6 In putting certain questions to the ‘shower,’ the trial judge intended to clarify and  
7 expedite the proceedings; as to any other alleged irregularity at the scene of the view ...,  
8 there can be no contention on appeal that there was error, for the silence of the  
9 defendant’s counsel in those circumstances constitutes a waiver. [Citations]

9 [T]he trial court conducted the jury view in full conformance with the provisions of  
10 [Penal Code] section 1119, which expressly provides that when the court determines a  
11 jury view of the scene is proper, the place or property must be shown to them by a  
12 person appointed by the court for that purpose .... For more than a century, courts have  
13 consistently applied this interpretation, implicitly recognizing that the admonition that  
14 “no person ... speak or communicate with the jury” (§ 1119) is plainly directed to  
15 insulating the jury from extraneous contact and potential tampering. [Citations]

14 In this case, Layman and Williamson investigated the crime scene; the trial court  
15 therefore reasonably designated them as “showers” to explain how the actual physical  
16 conditions related to their trial testimony. The record establishes that their involvement  
17 was limited to that end, i.e., “showing” the jury what their words had described and the  
18 photographs had depicted. [Citations] Given the court’s broad discretion in these  
19 matters, we find no abuse in having the deputies respond to specific questions rather  
20 than proceeding in some other manner. [Citation] Williamson’s statement that the  
21 foliage differed in height from the time of the crime was also proper “to account for any  
22 change in [the] condition between [its] state as shown by the evidence and [its]  
23 appearance at the time the jury inspected [it].” [Citation]

20 We also find no violation of defendant’s constitutional rights by virtue of his absence  
21 during the view. Prior to the excursion, defendant expressly waived his presence and  
22 acknowledged he did so voluntarily. The record reflects that before making this decision  
23 he had discussed the matter with counsel. We have repeatedly rejected the argument that  
24 the Sixth Amendment confrontation clause of the United States Constitution or the due  
25 process clause of the California Constitution (art. I, § 15) prevents a criminal defendant  
26 from waiving the right of presence at a critical stage of a capital trial. [Citation] We have  
27 no reason to reconsider that conclusion, particularly when no additional testimony was  
28 taken in conjunction with the view. [Citation]

26 We also find no prejudicial error with respect to defendant’s statutory rights. In *People*  
27 *v. Jackson* (1996) 13 Cal. 4th 1164, 1211, this court held “that a capital defendant may  
28 not voluntarily waive his right to be present during the proceedings listed in section 977,  
including those portions of the trial in which evidence is taken [before the trier of fact]  
....” [Citation] Although a jury view is not among the designated proceedings in section

1 977, we have long held that “in so viewing the premises the jury was receiving  
2 evidence” even if nontestimonial. [Citation] Thus, it comes within the purview of  
3 section 977. Nevertheless, in this case it is not reasonably probable that a more favorable  
4 result would have been reached had defendant, in addition to his counsel, been present.  
5 [Citation] On this record, we find “no sound basis to question the contemporaneous  
6 judgment of defense counsel, with which defendant then agreed, that defendant’s trial  
7 interests would be better served by *not* attending the jury view.” [Citation]

8 Bolin, 18 Cal. 4th at 323-26.

9 Petitioner complains that, under California law, the jury view should not have taken place at all  
10 because it was uncertain whether and the extent to which, in the months intervening between the crime  
11 and the jury view, the crime scene had been altered by *America’s Most Wanted*, the media, weather and  
12 seasonal changes, defense investigator Bruce Binns, and vandals. See People v. Pompa, 192 Cal. 412,  
13 421 (1923) (trial court is to consider changed physical conditions in making decision whether to allow a  
14 jury view of crime scene). He claims that there had been “many significant changes” to the crime  
15 scene: potential evidence trampled, plastic marijuana leaves strewn about, the cabin ransacked, items  
16 removed from the scene, bullet holes from Binns’s target practice, and changed vegetation and lighting  
17 conditions. (See ECF No. 178 at 127:24-25.)

18 It was not unreasonable for defense counsel to believe that the crime scene viewing would assist  
19 the jury (11/1/90 RT at 46-48) and support Petitioner’s defense. (RT at 2164, 2168.) Petitioner’s  
20 primary theories of voluntary manslaughter and self-defense related in part to claimed inconsistencies  
21 in eye-witness testimony. These inconsistencies implicated consideration of the crime scene layout  
22 including location, topography and visual obstructions, improvements, and the location of forensic  
23 evidence discussed in court. Furthermore, defense counsel was present to represent Petitioner during  
24 the entire jury viewing.

25 Counsel apparently had tactical reasons not to object to the jury view. Petitioner, having  
26 waived his presence at the jury view, avoided potentially prejudicing the jury by seeing Petitioner in  
27 full restraints. Bolin, 18 Cal. 4th at 325-26; (RT at 1776-79.) Counsel apparently believed the crime  
28 scene view might cause the jury to discredit the testimony of prosecution witnesses. A court “need not  
determine the actual explanation for defense counsel’s failure to object, so long as his failure to do so  
falls within the range of reasonable representation.” Morris, 966 F.2d at 456; see also Pop v.



1 Yarborough, 354 F. Supp. 2d 1132, 1144 n.11 (C.D. Cal. 2005).

2 Beyond tactical reasons not to object to the jury view, the record clearly demonstrates that  
3 defense counsel believed that viewing the scene of the shootings would assist the jury. (See, e.g.,  
4 11/1/90 RT at 46-48.) As to the condition of the crime scene, the jurors were aware of the passage of  
5 time and seasonal change and presumably took that into account. (See e.g., RT at 1788-89, 1929-30.)  
6 Moreover, the jury was aware from voir dire and trial proceedings that the case and the crime scene had  
7 received publicity and would continue to receive publicity. Significantly, the jury was aware the  
8 *America's Most Wanted* program was staged at the crime scene, possibly altering it.

9 Petitioner has not demonstrated that the jury view violated state law. The California Supreme  
10 Court could reasonably have determined that no additional testimony was taken as such during the jury  
11 view. Furthermore, the Supreme Court has confirmed that “showing,” which is what actually occurred  
12 at the jury’s view of the crime scene (see claim L, *post*) is historically based and does not offend due  
13 process. Snyder v. Massachusetts, 291 U.S. 97, 110-11 (1934) (overruled in part on other grounds by  
14 Malloy v. Hogan, 378 U.S. 1, 16 (1964) (“statements to the jury pointing out the specific objects to be  
15 noted have been a traditional accompaniment of a view for about two centuries, if not longer. The  
16 Fourteenth Amendment has not displaced the procedure of the ages.”). Even if Petitioner had  
17 demonstrated a violation of California law regarding the jury view, as noted a federal habeas court may  
18 not examine questions of state law; it “is limited to deciding whether a conviction violated the  
19 Constitution, laws, or treaties of the United States.” Estelle, 502 U.S. at 67-68.

20 The state court could reasonably have determined that Petitioner’s presence during the jury  
21 view was unnecessary. Due process does not require a defendant be present during a jury view of a  
22 crime scene “when presence would be useless, or the benefit but a shadow.” Kentucky v. Stincer, 482  
23 U.S. 730, 745 (1987) (quoting Snyder, 291 U.S. at 106-07); see also Rice v. Wood, 77 F.3d 1138, 1140  
24 n.2 (9th Cir. 1996) (there is a strong presumption that any errors are subject to harmless error analysis if  
25 defendant had counsel and was tried by an impartial adjudicator). Petitioner has not made a showing  
26 that his presence at the crime scene was necessary - defense counsel was present throughout the  
27 viewing. Petitioner’s waiver of attendance at the jury view suggests as much. (11/1/90 RT at 46-48).

28 Petitioner argues, but does not support in the record, that the presence of the media at the jury



1 view was unavoidable and affected the jurors' view of the crime scene. (ECF No. 113 at 100.) His  
2 conclusion that media presence detracted from the "remoteness of the scene," presumably because  
3 they were able to travel there with all their equipment, (*id.*) is similarly unsupported. Moreover, the  
4 court also specifically told the jury about the possible media presence at the jury view and that "they  
5 are ordered not to talk, and you are ordered not to talk to them." (RT at 1892-93, 1976-77). The court  
6 also admonished the jury numerous times to avoid any and all contact with the media. (RT at 25,  
7 228, 235, 249, 326, 1642-43, 1892-93, 1976-77, 2090.) Jurors are presumed to follow the court's  
8 instructions. Therefore, an objection to the presence of the media at the jury view on such a basis  
9 would have lacked merit.

10 As to juror Barnes's request to drive separately to the jury view, Petitioner does not demonstrate  
11 a basis for objection. He does not cite to facts in the record showing how and why allowing juror  
12 Barnes to drive separately impacted his defense. Furthermore, in light of the amount of miles juror  
13 Barnes already had to drive each day just to get to court, and the additional miles he would have to  
14 drive to go to the courthouse before seeing the crime scene, it was unlikely the court would have  
15 sustained any objection. (RT at 2033-34, 2089-90.) The state court also could reasonably have found  
16 that, had juror Barnes traveled with the other jurors, it is not reasonably probable that the result of  
17 Petitioner's proceeding would have been different.

18 Petitioner complains the jury improperly viewed the Sand Canyon Store without juror Barnes.  
19 The jurors were told they would drive past the Sand Canyon Store, but not stop and inspect it, without  
20 juror Barnes. (RT at 2121.) However, the record is unclear whether the jury did in fact drive past it  
21 or receive any information about the Sand Canyon Store, without juror Barnes present. Even if they  
22 had, Petitioner has not demonstrated that the trial testimony of eyewitnesses Ramirez and Wilson was  
23 dependent upon or related to the location and structure of the Sand Canyon Store or that the Sand  
24 Canyon Store had some material relationship to other locations and events described in the trial  
25 testimony. Again, Petitioner, at all times during the jury view, was represented by defense counsel.

26 Moreover, all jurors, including juror Barnes, saw photographs of the Sand Canyon Store. (RT  
27 at 1724-25; CT at 390.) Even if juror Barnes was absent from an exterior viewing of it, the California  
28 Supreme Court could reasonably have found this had only a minor, if any, impact on the jury's

1 determinations. See e.g., Olano, 62 F.3d at 1188 (finding no error where juror missed an afternoon  
2 of testimony but reviewed a written transcript of what he missed; cf. Tanner v. United States, 483  
3 U.S. 107, 126 (1987) (jurors falling asleep during testimony are not incompetent). Petitioner  
4 speculates that the credibility of witnesses Ramirez and Wilson could have been impugned to the  
5 extent their testimony describing the Store varied from what the jurors saw when driving past it. (See  
6 claim L3, *infra*.) But Petitioner does not point to any facts showing such inconsistency or related  
7 credibility issues.

8 For all the reasons stated above and in claim L, *post*, the California Supreme Court could have  
9 reasonably concluded that no prejudicial errors occurred in the jury's view of the crime scene.  
10 Petitioner could not have been prejudiced by any actions of counsel in this regard. A fair-minded  
11 jurist could have found that Petitioner failed to establish that he was denied a fair trial, or to the extent  
12 alleged, that defense counsel's performance fell below an objective standard of reasonableness and  
13 that, but for counsel's unprofessional errors, the outcome of this proceeding would have been  
14 different. Strickland, 466 U.S. at 687-98.

15 It follows that the state supreme court's rejection of the claim was not contrary to, or an  
16 unreasonable application of, clearly established federal law, nor based on an unreasonable  
17 determination of the facts in light of the evidence presented in the state court proceeding. See 28  
18 U.S.C. § 2254(d).

19 Claim I13 is denied.

20 **n. Review of Claim I14**

21 In this next claim, Petitioner alleges defense counsel did not notice and object to the trial  
22 court's misreading of guilt phase instructions, omitting elements, misstating the law, and failing to  
23 instruct the jury on its function, as alleged in claims P1, P2, P3, P6, P7, P8, and P9, *post*. (ECF No.  
24 113 at 100-01.)

25 Petitioner raised this claim in his petition for writ of habeas corpus in the California Supreme  
26 Court, which was summarily denied on the merits without explanation. (CSC Order Den. Pet. Habeas  
27 Corpus.)

28 Petitioner complains that defense counsel failed to object to the trial court's misreading of

1 CALJIC 2.22, 3.31.5, 8.20, 8.30, 8.67, 8.80, 17.40, or 17.41 as discussed in claims P1, P2, P3, P6,  
2 P7, P8 and P9, *post*. (ECF No. 113 at 101:1-4.) He claims that even though these instructions had  
3 been agreed to by counsel and the trial court (RT at 2097, 2100-03, 2107), defense counsel failed to  
4 catch instances where the court's oral instructions added to or omitted from the written instructions.

5 In this case, the trial court provided the jury with copies of the correctly worded instructions,  
6 which the jury had during deliberations. Moreover, for the reasons set forth in claims P1, P2, P3, P6,  
7 P7, P8, and P9, *post*, even if defense counsel's performance was deficient, it is not reasonably  
8 probable that the jury verdict would have been affected by it. As discussed in those claims, in light of  
9 the jury instructions as a whole, it is also not reasonably probable that the jury misunderstood the  
10 burden of proof as to any element of the case, particularly premeditation and deliberation as it related  
11 to counts I, II, and III.

12 Defense counsel is not ineffective by failing to make meritless objections. Aguon, 851 F.2d at  
13 1172. These alleged errors, singly and cumulatively, are not persuasive. Calderon, 523 U.S. at 566  
14 (“finding no prejudice from the errors considered separately, we also find no cumulative prejudice”);  
15 see also Rupe, 93 F.3d at 1445 (holding that there was no reason to reverse for cumulative error  
16 because there was no violation of federal rights in the guilt phase).

17 For the reasons stated, a fair-minded jurist could have found that Petitioner failed to establish  
18 that he was denied a fair trial, or to the extent alleged, that defense counsel's performance fell below  
19 an objective standard of reasonableness and that, but for counsel's unprofessional errors, the outcome  
20 of this proceeding would have been different. Strickland, 466 U.S., at 687-98.

21 It follows that the California Supreme Court's rejection of the claim was not contrary to, or  
22 an unreasonable application of, clearly established federal law, nor based on an unreasonable  
23 determination of the facts in light of the evidence presented in the state court proceeding. See 28  
24 U.S.C. § 2254(d).

25 Claim I14 is denied.

26 o. **Review of Claim I15**

27 In this next claim, Petitioner alleges defense counsel was ineffective by failing to request the  
28 use of “not guilty” in place of “innocent,” as the former term is used in CALJIC Nos. 1.00

1 (“Respective Duties of Judge and Jury”), 2.51 (“Motive”), and 2.52 (“Flight After Crime”), as more  
2 specifically alleged in claim P5, *post*. (ECF No. 113 at 101-02.)

3 Petitioner raised this claim in his petition for writ of habeas corpus in the California Supreme  
4 Court, which was summarily denied on the merits without explanation. (CSC Order Den. Pet. Habeas  
5 Corpus.)

6 Petitioner complains that the trial court’s use of “innocent” instead of “not guilty” misled the  
7 jury regarding the prosecution’s burden of proving guilt beyond a reasonable doubt, depriving  
8 Petitioner of his rights to due process and trial by jury.

9 Respondent argues, correctly, that at the time of trial, the instructions given were the standard  
10 instructions on the issues as approved by the California Supreme Court. See People v. Wade, 39 Cal.  
11 App. 4th 1487, 1491-92 (1995) (determining that use of “innocent” instead of “not guilty” did not  
12 mislead the jury regarding the prosecution’s burden of proof).

13 For this reason and those explained in claim P5, *post*, defense counsel was not ineffective in  
14 failing to object to the noted instructions. Pelmer v. White, 877 F.2d 1518, 1522 (11th Cir. 1989)  
15 (holding assistance not ineffective where counsel failed to object to instructions approved by state  
16 appellate court). Nor was Petitioner prejudiced by counsel’s failure to request instructions deviating  
17 from the standardized approved CALJIC instructions at the time of his trial.

18 For the reasons stated, a fair-minded jurist could have found that Petitioner failed to establish  
19 that he was denied a fair trial, or to the extent alleged, that defense counsel’s performance fell below  
20 an objective standard of reasonableness and that, but for counsel’s unprofessional errors, the outcome  
21 of this proceeding would have been different. Strickland, 466 U.S. at 687-98.

22 It follows that the California Supreme Court’s rejection of the claim was not contrary to, or an  
23 unreasonable application of, clearly established federal law, nor based on an unreasonable  
24 determination of the facts in light of the evidence presented in the state court proceeding. See 28  
25 U.S.C. § 2254(d).

26 Claim I15 is denied.

27 **p. Review of Claim I16**

28 Petitioner claims defense counsel was ineffective by failing to make adequate objections to

1 the trial court's reading of CALJIC 2.06 and 2.52, regarding consciousness of guilt. (ECF No. 113 at  
2 102-103; Bolin, 18 Cal. 4th at 326-27.)

3 Petitioner raised this same claim in his petition for writ of habeas corpus in the California  
4 Supreme Court, which was summarily denied on the merits without explanation. (CSC Order Den.  
5 Pet. Habeas Corpus.)

6 Additionally, the California Supreme Court considered and rejected these allegations on direct  
7 appeal. Bolin, 18 Cal. 4th 297, 326-27.

8 Petitioner complains that use of these instructions was not supported by the evidence and  
9 improperly suggested his alleged conduct was an admission of guilt. He alleges that counsel Soria,  
10 who objected to CALJIC 2.52 but not CALJIC 2.06, did not state adequate grounds for objecting to  
11 these instructions and "admitted" facts that were in dispute when discussing instruction 2.06 with the  
12 trial court and the district attorney (RT at 2096), as more specifically alleged in claims P4 and P5,  
13 *post*. He claims there was no tactical advantage in doing so and that he was prejudiced both by  
14 waiver of objection and because there is a reasonable probability the jury's determination would have  
15 been different absent the instructions.

16 The trial court gave these instructions as follows:

17 CALJIC No. 2.06 (5th ed. 1988) - "If you find that a defendant attempted to suppress  
18 evidence against himself in any manner such as by destroying evidence or by concealing  
19 evidence, such attempt may be considered by you as a circumstance tending to show a  
20 consciousness of guilt. However, such conduct is not sufficient by itself to prove guilt,  
and its weight and its significance, if any, are matters for your consideration."

21 CALJIC No. 2.52 (5th ed. 1988) - "The flight of a person immediately after the  
22 commission of a crime or after being accused of a crime is not sufficient in itself to  
23 establish guilt, but it is a fact which, if proved, may be considered by you in light of all  
the other proved facts in deciding the question of his guilt or his innocence. [¶] The  
weight to be given such a circumstance is entirely up to the jury."

24  
25 (CT at 440, 450.)

26 The California Supreme Court, in rejecting these allegations, stated that:

27 At the time the court discussed jury instructions, defense counsel agreed the evidence  
28 supported CALJIC No. 2.06 and did not object to the court's proposed wording. Any  
claim of error is therefore waived. [Citation] Regardless, no error occurred. Sufficient

1 evidence supported the instruction in light of Ramirez’s testimony defendant attempted  
2 to make the murder scene “look like a bad dope deal” by breaking bottles, scattering  
3 loose marijuana, and shooting the body several more times with a rifle after the initial  
4 revolver shot. Defendant wiped his fingerprints off the handgun, put the weapon in  
5 Huffstutler’s hand, placed a knife near the body, and poured chili sauce around it. He  
6 then fled south before leaving the state for Chicago. Along the way he threw away some  
7 wires he had taken to disable Wilson’s truck.

8 CALJIC Nos. 2.06 and 2.52 do not impermissibly emphasize noncriminal activity as  
9 “consciousness of guilt.” On the contrary, these instructions “made clear to the jury that  
10 certain types of deceptive or evasive behavior on a defendant’s part could indicate  
11 consciousness of guilt, while also clarifying that such activity was not of itself sufficient  
12 to prove a defendant’s guilt, and allowing the jury to determine the weight and  
13 significance assigned to such behavior. The cautionary nature of the instructions benefits  
14 the defense, admonishing the jury to circumspection regarding evidence that might  
15 otherwise be considered decisively inculpatory. [Citations] Moreover, section 1127c  
16 requires a flight instruction when the prosecution relies on such conduct as tending to  
17 show guilt.

18 As in past decisions, we find no merit in the contention the instructions improperly  
19 allow the jury to draw inferences about defendant’s state of mind and equate evidence of  
20 suppression or concealment with a confession. “A reasonable juror would understand  
21 ‘consciousness of guilt’ to mean ‘consciousness of some wrongdoing’ rather than  
22 ‘consciousness of having committed the specific offense charged.’ The instructions  
23 advise the jury to determine what significance, if any, should be given to evidence of  
24 consciousness of guilt, and caution that such evidence is not sufficient to establish guilt,  
25 thereby clearly implying that the evidence is not the equivalent of a confession and is to  
26 be evaluated with reason and common sense. The instructions do not address the  
27 defendant’s mental state at the time of the offense and do not direct or compel the  
28 drawing of impermissible inferences in regard thereto.” [Citation] For cognate reasons  
they do not violate the proscription of *Griffin v. California* (1965) 380 U.S. 609, 615  
against referring to the defendant’s exercise of his Fifth Amendment right not to testify  
as evidence of guilt. The instructions in no respect implicated defendant’s failure to  
testify or directed the jury to draw negative inferences from it.

22 Bolin, 18 Cal. 4th at 326-27.

23 The Court finds Petitioners allegations to be unpersuasive. (See also claims P4 and P5, *post.*)  
24 As reasoned by the state supreme court, these instructions appear to unequivocally state that the  
25 conduct described therein is not sufficient to prove guilt, but instead that it “may be considered.” The  
26 California Supreme Court could reasonably have found that these instructions did not improperly  
27 reduce the prosecution’s burden of proof. See County Court of Ulster County v. Allen, 442 U.S. 140,  
28 167 (1979) (prosecution may rely on all the evidence in the record to meet the reasonable doubt

1 standard where the state presumption is permissive rather than mandatory).

2 The trial record supported giving these instructions. See Bolin, 18 Cal. 4th at 327. The crime  
3 scene was remote and secluded. (RT at 1731, 1760-61.) Petitioner told Huffstuttler, just prior to  
4 shooting him, that it was a “no-no” to bring people to see the marijuana farm. (RT at 1739, 1922,  
5 1950.) Petitioner also told Huffstuttler that he did not know Mincy and Wilson and could not  
6 understand Huffstuttler’s reasons for bringing them to see the marijuana plants. (RT at 1739-40.)  
7 Immediately after shooting Huffstuttler, Petitioner approached Mincy and Wilson with a gun, told  
8 them that he had nothing against them, and then shot them. (RT at 1741.) Petitioner re-arranged the  
9 crime scene to make it look like a failed drug transaction and fled to Los Angeles and then Chicago.  
10 Bolin, 18 Cal. 4th at 331-33. Counsel did not admit disputed facts precluding these instructions. (See  
11 RT at 2096.) This Court finds no basis to discount these facts in the record. See e.g., Miller-El, 537  
12 U.S. at 340; 28 U.S.C. § 2254 (e)(1).

13 At the time of trial, these instructions were the standard instructions on these issues, approved  
14 by the California Supreme Court. See People v. Crandell, 46 Cal. 3d 833, 871 (1988) (abrogated on  
15 other grounds by People v. Crayton, 28 Cal. 4th 346, 364-65; see also Pelmer, 877 F.2d at 1522  
16 (holding assistance not ineffective where counsel failed to object to instructions approved by state  
17 appellate court). Here, the state supreme court could reasonably have found defense counsel not to be  
18 ineffective by failing to object to these instructions given the evidence in the record supporting their  
19 use.

20 Additionally, to the extent Petitioner argues that the language of the instructions violated his  
21 constitutional rights, the Ninth Circuit has upheld the use of a very similar consciousness of guilt  
22 instruction. See United States v. Perkins, 937 F.2d 1397, 1401-02 & n.2 (9th Cir. 1991). As long as  
23 the instruction does not convey that inconsistent statements constitute evidence of guilt, but merely  
24 that the jury may consider them as indicating a consciousness of guilt, the instruction does not violate  
25 constitutional rights. See Id. CALJIC No. 2.06 and 2.52 are not constitutionally infirm under this  
26 standard. Bolin, 18 Cal. 4th at 327.

27 For the reasons stated, a fair-minded jurist could have found that Petitioner failed to establish  
28 that he was denied a fair trial, or to the extent alleged, that defense counsel’s performance fell below



1 an objective standard of reasonableness and that, but for counsel's unprofessional errors, the outcome  
2 of this proceeding would have been different. Strickland, 466 U.S. at 687-98.

3 It follows that the state supreme court's rejection of the claim was not contrary to, or an  
4 unreasonable application of, clearly established federal law, nor based on an unreasonable  
5 determination of the facts in light of the evidence presented in the state court proceeding. See 28  
6 U.S.C. § 2254(d).

7 Claim II6 is denied.

8 **q. Review of Claim II7**

9 In this final claim, Petitioner alleges counsel Soria was ineffective by making an incoherent  
10 guilt phase closing argument that was too short, misstated the law and his defense theories and  
11 conceded Petitioner's guilt for criminal behavior without his consent. (ECF No. 113 at 103-109; RT  
12 at 2162-69.)

13 Petitioner raised this same claim in his petition for writ of habeas corpus in the California  
14 Supreme Court, which was summarily denied on the merits without explanation. (CSC Order Den.  
15 Pet. Habeas Corpus.)

16 The California Supreme Court also considered and rejected on direct appeal Petitioner's  
17 allegation that his counsel was ineffective for admitting his culpability during guilt phase closing  
18 argument. Bolin, 18 Cal. 4th at 334-35.

19 **1) *Abbreviated Closing***

20 Petitioner alleges that Soria, without consulting co-counsel or Petitioner, delivered a shorter  
21 and less detailed version of his originally prepared closing argument. Petitioner alleges Soria did this  
22 in order to force the prosecutor to give her final summation prior to the lunch break, i.e., without  
23 extra time for her to prepare over the lunch break. Petitioner alternatively argues that Mr. Soria  
24 shortened the closing argument as a practical joke on the prosecutor. (ECF No. 113 at 103; RT at  
25 2178.)

26 Petitioner alleges the failure to give a sufficient closing was especially prejudicial because the  
27 defense presented no evidence during the guilt phase.

28 The state supreme court reasonably could have found these arguments to be mere conjecture,

1 lacking support in the evidentiary record. To the extent the closing argument was of short duration,  
2 Petitioner failed to show that “a longer or more passionate closing argument would have resulted in  
3 an alternative” verdict. Griffin v. Delo, 33 F.3d 895, 903 (1994).

4 The California Supreme Court could reasonably have found that “defense counsel had few  
5 viable options, but made reasonable efforts to negate first degree murder despite considerable factual  
6 impediments.” Bolin, 18 Cal. 4th at 313, 334-35. The record reasonably supports this determination,  
7 as discussed below.

8 **2) Conceding Guilt**

9 Petitioner alleges that Soria, without Petitioner’s consent, conceded guilt as to some of the  
10 charges, (ECF No. 113 at 103-05, 108), as follows:

11 Good morning, ladies and gentlemen. There is no doubt that the events that happened on  
12 Labor Day weekend with my client has some liability for, some responsibility for. We  
13 are not going to say not guilty on all counts. That is just not what happened. But you  
14 have to assess the responsibility. You have to determine from the facts and the law that  
the Court gives you what his responsibility is, and I think the facts to some extent are not  
as clear as the prosecutor presented to you.

15 Certainly on Count 4, the count of cultivation of marijuana, the defense will simply ask  
16 you to review the evidence, apply the law the Court gives to you and render a verdict.  
We will not present any argument on that.

17 With regards to what happened in the creek bed, certainly [Petitioner] is responsible for  
18 some of it. Once again, you have to decide the liability based on the law the Court gives  
19 you and you have to determine from the facts and that’s interesting because you have  
two parallel stories where they intersect at some point, but you have two storytellers.

20 (RT at 2162.)

21 Petitioner also alleges that Mr. Soria went on to vouch for the credibility of victim witness Jim  
22 Wilson:

23 Let’s take up the negative thing regarding Jim Wilson. If he is lying, why is he lying? I  
24 think looking at the evidence the only thing he is probably lying about is what he knew  
25 or didn’t know about the marijuana going up the hill or when or when he didn’t see it. I  
26 don’t think he is lying about being shot. There is physical evidence he got shot, and I  
don’t think his evidence is unreliable regarding what he heard Mr. Mincy say or what he  
observed.

27 (RT at 2163.)

28 Petitioner faults Soria for breaching his duty of loyalty by essentially conceding guilt as to the

1 three shootings and marijuana cultivation without Petitioner's consent, citing United States v. Swanson,  
2 943 F.2d 1070, 1074 (9th Cir. 1991) (attorney who informs the jury that there is no reasonable doubt  
3 about factual issues in dispute fails to act as adversary to prosecution). Particularly prejudicial, he  
4 claims, was the concession that Wilson heard Mincy begging Petitioner not to shoot. According to  
5 Petitioner, Soria ended up advocating for the prosecution, not the defense. He cites in this regard  
6 United States v. Cronin, 466 U.S. 648, 659, 666 (1984) (complete failure to subject prosecution case to  
7 meaningful adversarial testing denies sixth amendment rights).

8 The California Supreme Court considered and rejected the allegation that Soria was  
9 ineffective by acknowledging some culpability during closing, stating that:

10 Defendant asserts defense counsel was ineffective for acknowledging some culpability  
11 on defendant's part in closing argument: "There is no doubt that the events that  
12 happened on Labor Day weekend with my client has some liability for [*sic*], some  
13 responsibility for. We are not going to say not guilty on all counts. That is just not what  
14 happened."

15 We find no incompetence in these remarks. Given the overwhelming evidence of  
16 defendant's guilt, including the testimony of two eyewitnesses, the concession appears  
17 to be a reasonable trial tactic by which counsel could urge the jury to return verdicts on  
18 the lesser included offenses of second degree murder or voluntary manslaughter. Since  
19 counsel could also reasonably anticipate having to conduct a penalty phase, it also  
20 allowed him to preserve his credibility in arguing mitigation. [Citation] In resolving  
21 these claims, "we must 'assess counsel's overall performance throughout the case'  
22 [citation], evaluating it 'from counsel's perspective at the time of the alleged error and in  
23 light of all the circumstances. [Citations] Moreover, when read in context, the argument  
24 in no respect reflects a breakdown of the adversarial process. [Citation] Counsel noted  
25 discrepancies between the testimony of Wilson and Ramirez, suggested the jury could  
26 infer Ramirez was more involved in the crimes than claimed, and pointed to other  
27 evidence defendant was guilty of less than first degree murder. The multiple-murder  
28 special circumstance would be triggered even if the jury found only one of the killings  
was first degree murder (§ 190.2, subd. (a)(3)); therefore, counsel reasonably focused his  
guilt phase argument on reducing that possibility. Conceding some measure of  
culpability was a valid tactical choice under these restrictive circumstances.

24 Bolin, 18 Cal. 4th at 334-35.

25 This Court finds that, based on the evidentiary record, the state supreme court could reasonably  
26 have found the noted conduct to be tactically motivated and consistent with the defense strategy of  
27 arguing for manslaughter in order to avoid death sentence eligibility. Petitioner had certain liability for  
28 the crimes and only limited evidence in defense. (RT at 2162-69.) Defense counsel argued that

1 Petitioner was less than fully culpable for the crimes, variously focusing on Ramirez and the inference  
2 he might have been involved in the Huffstuttler shooting, (RT at 2166-69), and heat of passion and  
3 imperfect self-defense theories.

4       Regarding the shooting of Mincy, in the absence of direct evidence of heat of passion or self-  
5 defense, counsel could and did reasonably argue that Petitioner was still acting under heat of passion  
6 from the Huffstuttler shooting when he shot and killed Mincy, in an attempt to reduce Petitioner's  
7 culpability for that offense. (RT at 2175.) On the facts of this case, the California Supreme Court  
8 reasonably could have found such a tactical decision to admit some liability, even in the absence of  
9 consent by the accused, not to be ineffective assistance. See Florida v. Nixon, 543 U.S. 175, 190-91  
10 (2004) (counsel in capital case where guilt is clear may reasonably focus on penalty phase).

11       It was not unreasonable for the California Supreme Court to discount Petitioner's contention  
12 that Soria's noted tactic was not based upon an adequate investigation. The guilt phase investigation  
13 was constitutionally sufficient for the reasons discussed in claims I1-I16, *ante*. The same can be said  
14 of the penalty phase investigation (see claim W, *post*), even if it was incomplete at the time of the  
15 guilt phase. Significantly, Petitioner has not provided any declaration of counsel relating to trial  
16 tactics or the absence of tactics, in these regards.

17       Unsuccessful trial strategies are not alone ineffective assistance. Sloan v. Delo, 54 F.3d 1371,  
18 1384 (8th Cir. 1995) ("Although the [defense] closing apparently was not persuasive, a strategy need  
19 not be successful to be reasonable."). "The mere criticism of trial tactics is insufficient to establish  
20 ineffectiveness or prejudice." Ferreira-Alameda, 815 F.2d at 1254.

### 21                   **3)       Misstating Law and Defense Theories**

22       Petitioner alleges that Soria's abbreviated closing statement, to the extent it was intelligible,  
23 included the following prejudicial misstatements of law regarding the elements of voluntary  
24 manslaughter (Pen. Code § 192) and second degree murder (Pen. Code § 189):

25               Now, [Petitioner] is part of the scuffle, is part of an argument, heat of passion,  
26 unreasonable self-defense and if you find that acceptable regarding the initial shooting  
27 of Vance Huffstuttler, you don't believe that he shot him a second time, he is only guilty  
28 of voluntary manslaughter which isn't intentional killing, but it is not without malice  
aforethought, it is not without premeditation, it is not with intent. It is basically a  
homicide we can't excuse, but there is an excuse.

1 (RT at 2169.)

2 The California Supreme Court summarily rejected this allegation on the merits without  
3 explanation. (See CSC Order Den. Pet. Habeas Corpus.)

4 Petitioner argues the deficient closing had its genesis in a breakdown in the adversarial process,  
5 resulting in an actual conflict of interest adversely affecting Soria's performance and giving rise to a  
6 presumption of prejudice. Petitioner contends that the trial court acknowledged as much when,  
7 following the guilt phase, it found irreconcilable differences between Soria and Petitioner and removed  
8 Soria from the case. Furthermore, even if prejudice is not presumed, Petitioner claims it is reasonably  
9 probable that a more favorable result would have obtained had Soria presented a competent closing  
10 argument.

11 Petitioner also argues that Soria's closing argument confused defense theories: a heat of passion  
12 or unreasonable self-defense theory in which Petitioner shot Huffstuttler, and an alternative theory  
13 under which Ramirez fired the shots that killed Huffstuttler. (RT at 2163-69.) However, Soria's  
14 strategy of presenting alternate theories need not be seen as unreasonable given that Ramirez's  
15 participation in Huffstuttler's death was not established by any direct evidence. Even if the jury had  
16 chosen to believe such theory without evidence, Ramirez's participation would not have exculpated  
17 Petitioner, but simply made him an accomplice to it. That these strategies were not ultimately  
18 successful does not make them unreasonable. Sloan, 54 F.3d at 1384.

19 The jury was aware of the primary defense theory that the killings were not first degree murder,  
20 even if this theory was misstated during Soria's closing. (See e.g., RT at 2166-67.) The jury would  
21 have understood that Soria's closing focused on Petitioner's reduced culpability and responsibility for  
22 the killings.

23 Furthermore, as the Respondent notes, Soria told the jury that the court would be providing  
24 instructions regarding heat of passion and self-defense, and suggested that the jury should listen to and  
25 consider the instructions carefully along with the evidence in reaching its verdict. (RT at 2166.) The  
26 court did provide those instructions as well as instructions regarding intent for murder and  
27 manslaughter (RT at 2195-2211), and also told the jury that it should follow the court's instructions  
28 over the arguments of counsel if they conflicted. (RT at 2182-83). The jury is presumed to have

1 followed these instructions.

2 Given the weight of the noted evidence against Petitioner, the California Supreme Court  
3 reasonably could have found that Petitioner did not show prejudice relative to this claim. See U.S. v.  
4 Johnson-Wilder, 29 F.3d 1100, 1105 (7th Cir. 1994) (where evidence of guilt is “very substantial . . .  
5 there is no reason to conclude that a defense free of the alleged errors would have brought about a  
6 different result.”)

7 While “[t]he right to effective assistance extends to closing arguments,” Gentry, 540 U.S. at 5  
8 (citing Bell, 535 U.S. at 701-02, and Herring v. New York, 422 U.S. 853, 865 (1975)), “counsel has  
9 wide latitude in deciding how best to represent a client, and deference to counsel’s tactical decisions  
10 in his closing presentation is particularly important because of the broad range of legitimate strategy  
11 at that stage.” Id. at 5-6. Judicial review of defense counsel’s closing argument “is therefore highly  
12 deferential - and doubly deferential when it is conducted through the lens of federal habeas.” Id. at 6.  
13 The arguments of counsel, like the instructions of the court, must be judged in the context in which  
14 they are made. Boyde, 494 U.S. at 384-85.

15 Finally, Petitioner’s suggestion that prejudice should be presumed based on actual conflict of  
16 interest arising from a breakdown in the attorney-client relationship fails for reasons discussed in  
17 claims J and W1, *post*.

18 For the reasons stated, a fair-minded jurist could have found that Petitioner failed to establish  
19 that he was denied a fair trial, or to the extent alleged, that defense counsel’s performance fell below  
20 an objective standard of reasonableness and that, but for counsel’s unprofessional errors, the outcome  
21 of this proceeding would have been different. Strickland, 466 U.S. at 687-98.

22 It follows that the California Supreme Court’s rejection of the claim was not contrary to, or an  
23 unreasonable application of, clearly established federal law, nor based on an unreasonable  
24 determination of the facts in light of the evidence presented in the state court proceeding. See 28  
25 U.S.C. § 2254(d).

26 Claim I17 is denied.

27 **2. Review of Claim J**

28 Petitioner next claims that Soria’s divided loyalties caused Petitioner to distrust him, resulting

1 in a breakdown of the relationship and an actual conflict of interest, denying Petitioner effective  
2 representation and due process under the Fifth, Sixth and Fourteenth Amendments. (ECF No. 113 at  
3 109-112.)

4 Petitioner raised this same claim in his petition for writ of habeas corpus in the California  
5 Supreme Court. The California Supreme Court ruled that Petitioner's claim was procedurally barred  
6 because this claim could have been, but was not, raised on direct appeal. (CSC Order Den. Pet.  
7 Habeas Corpus [citing In re Harris, 5 Cal. 4th at 825 n.3 and In re Dixon, 41 Cal. 2d at 759].) The  
8 California Supreme Court also summarily rejected Petitioner's habeas claim on the merits without  
9 explanation. (CSC Order Den. Pet. Habeas Corpus.)

10 **a. Clearly Established Law**

11 The Sixth Amendment provides that a criminal defendant shall have the right to "the  
12 Assistance of Counsel for his defense." As a general matter, a defendant alleging a Sixth  
13 Amendment violation must demonstrate "a reasonable probability that, but for counsel's  
14 unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S.  
15 at 694.

16 However, an exception exists for cases in which counsel actively represents conflicting  
17 interests. Mickens v. Taylor, 535 U.S. 162, 166 (2002); Cuyler, 446 U.S. at 345-50. In such a case,  
18 prejudice is presumed. Id. However, Petitioner must establish that "an actual conflict of interest  
19 actually affected the adequacy of [defense counsel's] representation."

20 **b. Analysis of Claim J**

21 Petitioner alleges Soria's desire to withdraw to seek other employment caused a loss of  
22 loyalty to and inadequate representation of Petitioner and a breakdown in the attorney-client  
23 relationship resulting in an actual conflict of interest. (ECF No. 113 at 109-112; claim I17; see RT at  
24 2268, 2271-96.) Petitioner also alleges Soria had a personal conflict because, the evening before a  
25 crucial point in the guilt phase, Soria was out celebrating a new job offer. (ECF No. 113 at 110.)

26 **1) *Actual Conflict of Interest***

27 Petitioner alleges Soria had an actual conflict of interest. As previously discussed, following  
28 the guilt phase, the trial court considered ex parte Petitioner's Marsden motion including his



1 complaints about Soria's guilt phase performance. That court found that:

2 [A]s a result of the disagreement between Mr. Soria and [Petitioner] there has been a  
3 complete breakdown in that relationship to the point that I don't think they are talking to  
each other

4 (RT at 2298:19-22.) As a result, on December 14, 1990, the trial court appointed Cater to take over for  
5 the penalty phase. However, the trial court did not make a finding that Mr. Soria had an actual, or any,  
6 conflict of interest. Instead the trial court found a breakdown in communication and "estrangement,"  
7 pointing to Petitioner's stated refusal to accept a visit from Mr. Soria. (RT at 2298-99); Bolin, 18 Cal.  
8 4th at 347.

9 Petitioner supports his actual conflict claim by pointing to Soria's decision not to present  
10 evidence relating to his leg wounds. As discussed more fully in claim I7, *ante*, petitioner contends  
11 scars on his legs were incurred while he defended himself during the Huffstuttler shooting. But Soria  
12 was aware Dr. Markman had examined the scars and opined they were self-inflicted. (RT at 2289.)  
13 Soria's concern this evidence appeared fabricated and based upon inadmissible and uncorroborated  
14 hearsay suggests his decision not to present it was a matter of trial strategy rather than a result of an  
15 "actual conflict" with petitioner. (See 12/13/90 RT at 2288-89; claim I7, *ante*.)

16 Counsel Soria was entitled to make tactical decisions, "even in the face of his client's  
17 incomprehension or even explicit disapproval." Schell, 218 F.3d at 1017, 1026 and n.8. Soria  
18 explained his reasons for not informing Petitioner of this tactical decision. (12/13/90 RT at 2289.) A  
19 conflict of interest is not created every time an attorney responds to an accusation from a client for to  
20 do so would create in the client a unilateral power to create a conflict by expressing dissatisfaction.  
21 United States v. Moree, 220 F.3d 65, 71 (2d Cir. 2000).

22 Petitioner cannot create a conflict of interest predicated solely on his expressed dissatisfaction  
23 with counsel. United States v. John Doe #1, 272 F.3d 116, 126 (2d Cir. 2001). At the time of Soria's  
24 request to withdraw, the record reflects that Petitioner wanted Soria to represent him. (7/18/90 RT at  
25 10-12); see Garcia v. Bunnell 33 F.3d 1193, 1198 (9th Cir. 1994) (no actual conflict where record  
26 discloses no active representation of competing interest).

27 Any re-allegation of ineffective assistance, discussed in claim I, fails for the reasons stated  
28 therein.

1                                   **2)      Personal Conflict of Interest**

2           A conflict of interest claim cannot be based on an alleged conflict between the client's interests  
3 and the lawyer's personal interests. Earp v. Ornoski, 431 F.3d 1158, 1184 (2005) (finding that the  
4 Cuyler line of cases is limited to conflicts involving joint representation). Earp specifically noted the  
5 case upon which Petitioner relies, Mannhalt v. Reed, 847 F.2d 576, 580 (9th Cir. 1988), and found  
6 argument relying on it to be futile under AEDPA. Id. at 1183 n.23.

7           The California Supreme Court could reasonably have found that Soria did not suffer from a  
8 personal conflict of interest and perform deficiently by virtue thereof.

9                                   **3)      Prejudice – Actual Conflict**

10          Petitioner argues that no showing of prejudice is required because Soria had an actual conflict  
11 of interest. Cuyler, 446 U.S. at 348. He claims that the trial court found as much. However,  
12 petitioner's argument for the less stringent standard of Cuyler (regarding presumed prejudice in cases  
13 of actual conflict of interest) is unavailing. (See ECF No. 113 at 109); Cuyler, 446 U.S. at 348-49.  
14 "Until a defendant shows that his counsel *actively represented* conflicting interests, he has not  
15 established the constitutional predicate for his claim of ineffective assistance." Cuyler, 446 U.S. at 350.  
16 Petitioner has not made such a showing, for the reasons stated.

17                                   **4)      Prejudice – Personal Conflict**

18          Petitioner's claim that counsel's personal conflict of interest violated his Sixth Amendment  
19 right to the assistance of counsel is governed by Strickland. See Mickens, 535 U.S. at 174-75  
20 (explaining that clearly established Supreme Court precedent does not permit application of a  
21 prejudice standard less stringent than Strickland unless the alleged conflict results from joint  
22 representation, a situation which involves both a high probability of prejudice and inherent difficulty  
23 in proving that prejudice).

24          Petitioner has not shown a reasonable probability the outcome of his trial would have been  
25 different if counsel had taken some action that was not taken because of the alleged personal conflict  
26 of interest. See Bolin, 18 Cal. 4th at 347; United States v. Perry, 857 F.2d 1346, 1350-51 (9th Cir.  
27 1988) ("mere possibility of an actual conflict of interest created by service of a grand jury subpoena  
28 upon a target's counsel is insufficient to disturb a conviction" absent proof of actual prejudice).

1 Petitioner also contends that the breakdown in his attorney client relationship mandated a  
2 mistrial. (ECF No. 113 at 109.) For the reasons stated, the California Supreme Court reasonably  
3 could have found otherwise. Furthermore, the record does not demonstrate that Petitioner moved for  
4 a new trial or that he was dissatisfied with Cater's continuing representation. (12/13/90 Marsden  
5 RT at 2292, 2295-99.)

### 6 **5) Conclusions**

7 For the reasons stated, a fair-minded jurist could have found that Petitioner failed to establish  
8 that he was denied a fair trial, or to the extent alleged, that defense counsel had an actual conflict of  
9 interest, Cuyler, 446 U.S. at 348, or that defense counsel's performance fell below an objective  
10 standard of reasonableness and that, but for counsel's unprofessional errors, the outcome of this  
11 proceeding would have been different. Strickland, 466 U.S. at 687-98.

12 It follows that the California Supreme Court's rejection of the claim was not contrary to, or an  
13 unreasonable application of, clearly established federal law, nor based on an unreasonable  
14 determination of the facts in light of the evidence presented in the state court proceeding. See 28  
15 U.S.C. § 2254(d).

16 Claim J is denied.

### 17 **3. Review of Claim K**

18 Petitioner next claims that during discovery, the prosecution withheld from the defense certain  
19 material exculpatory evidence discussed below. (ECF No. 113 at 112-17.)

20 Petitioner raised this claim in his petition for writ of habeas corpus in the California Supreme  
21 Court, which was summarily denied on the merits without explanation. (CSC Order Den. Pet. Habeas  
22 Corpus.)

#### 23 **a. Clearly Established Law**

##### 24 **1) *Brady***

25 The Supreme Court held that if the state fails to disclose exculpatory evidence in violation of  
26 Brady v. Maryland, 373 U.S. 83 (1963), the conviction cannot stand if there is a reasonable  
27 probability that the evidence, considered cumulatively, would have produced a different result at trial.  
28 Kyles v. Whitley, 514 U.S. 419, 434 (1995). If a habeas petitioner establishes the "reasonable

1 probability” of a different result, the error cannot subsequently be found harmless. Id. at 436. In  
2 Brady, the Supreme Court held that the suppression by the prosecution of evidence favorable to an  
3 accused violates due process where the evidence is material either to guilt or to punishment,  
4 irrespective of the good faith or bad faith of the prosecution. Brady, 373 U.S. at 87.

5 There are three components to a Brady violation: (1) the evidence at issue must be favorable  
6 to the accused either because it is exculpatory or because it is impeaching; (2) the evidence must have  
7 been suppressed by the State either willfully or inadvertently; and (3) prejudice must have ensued.  
8 Banks v. Dretke, 540 U.S. 668, 691 (2004); Strickler v. Greene, 527 U.S. 263, 281–82 (1999). “Such  
9 evidence is material if there is a reasonable probability that, had the evidence been disclosed to the  
10 defense, the result of the proceeding would have been different.” Strickler, 527 U.S. at 280 (quoting  
11 Bagley, 473 U.S. at 682). “[T]here is never a real Brady violation unless the nondisclosure was so  
12 serious that there is a reasonable probability that the suppressed evidence would have produced a  
13 different verdict.” Id. at 281.

## 14 2) *Due Process*

15 A petitioner is entitled to habeas corpus relief if the prosecutor’s misconduct “so infected the  
16 trial with unfairness as to make the resulting conviction a denial of due process.” Donnelly, 416 U.S.  
17 at 643. To constitute a due process violation, the prosecutorial misconduct must be “of sufficient  
18 significance to result in the denial of the defendant’s right to a fair trial.” Greer, 483 U.S. at 765  
19 (quoting Bagley, 473 U.S. at 667).

20 Any claim of prosecutorial misconduct must be reviewed within the context of the entire trial.  
21 See Greer, 485 U.S. at 765-66; Weitzenhoff, 35 F.3d at 1291. A court must keep in mind that “[t]he  
22 touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the  
23 trial, not the culpability of the prosecutor” and “the aim of due process is not punishment of society  
24 for the misdeeds of the prosecutor but avoidance of an unfair trial to the accused.” Phillips, 455 U.S.  
25 at 219. “Improper argument does not, per se, violate a defendant’s constitutional rights.” Thompson,  
26 74 F.3d at 1576 (quoting Jeffries, 5 F.3d at 1191).

## 27 b. Analysis of Claim K

### 28 1) *Inducements to Ramirez*

1 Petitioner alleges that the prosecution withheld evidence that charges pending against  
2 prosecution witness Ramirez were dropped in exchange for his testimony against Petitioner. (ECF  
3 No. 113 at 113.) Petitioner claims this information had significant impeachment value for reasons  
4 discussed in claim I2, *ante*, and that withholding it had a substantial and injurious effect in  
5 determining the jury's verdict. Brecht, 507 U.S. 619 (1993).

6 Petitioner argues that there must have been such an agreement because Ramirez's attorney,  
7 Gutierrez, declared that he would not have advised Ramirez to speak to the authorities if he  
8 (Gutierrez) did not believe that Ramirez would be released as a result. (SHCP Ex. 7 at 2.) He argues  
9 that even a tacit agreement must be disclosed. United States v. Shaffer, 789 F.2d 682, 690 (9th Cir.  
10 1986) (facts which imply an agreement regarding material evidence must be disclosed).

11 However, the record could reasonably suggest that the alleged incentive was the promise by  
12 law enforcement that if Ramirez was uninvolved in the crime then he would be released upon giving  
13 a statement to authorities, and that this incentive was disclosed to the defense. (See RT at 1850-61,  
14 1934-38.) Petitioner's proffer of the Gutierrez declaration is not evidence otherwise. The inference  
15 which Petitioner draws from the Gutierrez declaration is not supported by facts stated in that  
16 declaration.

17 The California Supreme Court could reasonably have found such allegations to be  
18 unsupported in the evidentiary record. Surmise alone is not sufficient to show entitlement to habeas  
19 relief under § 2254(d).

## 20 **2) *Inducements to Halfacre***

21 Petitioner alleges that the prosecution withheld evidence that its witness, Jerry Halfacre,  
22 received inducements from the prosecution to provide information used at the penalty phase. This  
23 allegation is briefly discussed here because Petitioner includes it in his guilt phase claims. (See ECF  
24 No. 113 at 113:24-114:18.) However, this allegation relates primarily to the penalty phase and is  
25 discussed at length in claim R, *post*.

26 As noted, Halfacre had been living with Petitioner's daughter, Paula Bolin, and was the father  
27 of Paula's child, Ashley. Halfacre gave his probation officer Georgia O'Connor a threatening letter  
28 he had received from Petitioner. As discussed more specifically in claim R, *post*, in the letter

1 Petitioner threatened, among other things, to have Halfacre “permanently removed from the face of  
2 this Earth.” (RT at 2390-93, 2442-43); Bolin, 18 Cal. 4th at 336 n.11.

3 The letter was used by the prosecution at Petitioner’s penalty trial as aggravating evidence of  
4 “criminal activity which involved the use or attempted use of force or violence or the express or  
5 implied threat to use force or violence” pursuant to Pen. Code § 190.3(b). (ECF No. 113 at 113:27-  
6 28.) At that time, Halfacre was on probation for vehicular manslaughter. Petitioner alleges Halfacre  
7 was released from probation and allowed to leave the state in exchange for giving his probation  
8 officer the letter. (See ECF No. 113 at 114:4-5; RT at 2442-43.) Petitioner alleges the prosecution’s  
9 failure to disclose this inducement prevented him challenging admission of the letter on grounds it did  
10 not satisfy the elements of a threat under Penal Code § 422. That is, Halfacre turned the letter over to  
11 authorities not because of he was in fear of immediate harm, but solely to receive concessions from  
12 the prosecution. Petitioner alleges this prosecutorial wrongdoing had a substantial and injurious  
13 effect in determining the jury’s verdict. Brecht, 507 U.S. at 637.

14 Petitioner states that Penal Code § 422 provided in pertinent part:

15 Any person who willfully threatens to commit a crime which will result in death or great  
16 bodily injury to another person, with the specific intent that the statement is to be taken  
17 as a threat, even if there is no intent of actually carrying it out, which, on its face and  
18 under the circumstances in which it is made, is so unequivocal, unconditional,  
19 immediate, and specific as to convey to the person threatened, a gravity of purpose and  
20 an immediate prospect of execution of the threat, and thereby causes that person  
reasonably to be in sustained fear for his or her own safety or for his or her immediate  
family’s safety, shall be punished by imprisonment in the county jail not to exceed one  
year, or by imprisonment in the state prison.

21 (ECF No. 113 at 154:18-23); see also Bolin, 18 Cal. 4th at 337.

22 The state supreme court was not unreasonable in denying this allegation. Preliminarily, the  
23 alleged inducement does not appear to be Brady information because it was not exculpatory of  
24 Petitioner and could not have impeached or impugned the credibility of Halfacre because Halfacre did  
25 not testify at Petitioner’s trial. (RT at 1867-69, 2442-44; SHCP Ex. 6 at 34.)

26 Petitioner has not demonstrated the undisclosed inducement denied him a fair trial. He does  
27 not deny that he wrote the letter. He does not support with facts in the record his allegation the letter  
28 was provided by Halfacre in exchange for Halfacre’s release from probation and travel restrictions.

1 That allegation could be seen as merely speculative. See Mayle v. Felix, 545 U.S. 644, 655 (2005)  
2 “[P]etition[er] is expected to state facts that point to a real possibility of constitutional error.”).

3 Finally, for the reasons discussed in claim R1, *post*, the state court could reasonably have  
4 concluded that the letter threatened force or violence within § 422, placing Halfacre in sustained fear  
5 that Petitioner would follow-through on the threats in the letter; and that the letter was not otherwise  
6 improperly admitted at Petitioner’s penalty phase.

7 In any event, Petitioner has not demonstrated prejudice. The California Supreme Court,  
8 reviewing the admissibility of the letter on direct appeal, stated that:

9 Although some of the language in the letter is menacing, it also reflects [Petitioner’s]  
10 concern for his daughter’s and granddaughter’s well-being, a point stressed by the  
11 defense in mitigation. Moreover, the nature and circumstances of the threats would not  
12 necessarily provoke serious concern, especially considering [Petitioner] was incarcerated  
13 and would at least have to make outside arrangements to effect them. Halfacre waited  
14 four months before giving the letter to his probation officer, during which time  
15 apparently nothing had happened.

16 More importantly, the letter paled compared to other aggravating evidence, which the  
17 prosecutor focused on in closing argument. In particular, the guilt phase testimony  
18 revealed [Petitioner] as a calculating and callous individual, willing to kill defenseless  
19 victims, including his friend and partner Huffstutler, in cold blood to protect his drug  
20 enterprise. In addition, the assault with great bodily injury against Matthew Spencer and  
21 attempted manslaughter against Kenneth Ross confirmed [Petitioner’s] pattern of  
22 resorting to violence in dealing with problems. Given this history, it is unlikely the jury  
23 accorded the letter much, if any, weight in fixing the penalty at death.

24 Bolin, 18 Cal. 4th at 340-41. This Court finds that California Supreme Court’s conclusions to be  
25 reasonable, especially given the noted substantial evidence against Petitioner. (See claims O, R, and  
26 S, *post*.)

### 27 **3) Police Contacts with Wilson**

28 Petitioner alleges that the prosecution withheld information regarding the disposition of  
Wilson’s truck and further communications between him and authorities or the prosecution. (ECF  
No. 113 at 114-16.) Petitioner points to Wilson’s testimony at trial that at some later date he returned  
to the property to retrieve his truck, (RT at 1738), and infers that Wilson must have been escorted by  
law enforcement to the crime scene to obtain his truck and that law enforcement must have  
documented these events. (ECF No. 113 at 114-15.)



1           However, Petitioner knew from Wilson's above noted testimony that Wilson picked up the  
2 truck. It appears that Petitioner had enough information to obtain this evidence, if it existed, on his  
3 own. See Raley v. Ylst, 470 F.3d 792, 804 (9th Cir. 2006) (finding no Brady error since the  
4 petitioner knew of the existence of medical records and "his counsel could have sought the  
5 documents through discovery."). Petitioner does not demonstrate that the government had a duty to  
6 turn it over to him. Accordingly, the California Supreme Court could reasonably have found no  
7 Brady error.

8           Petitioner's further allegation that there must have been an inducement because Wilson's trial  
9 testimony was more consistent with witness Ramirez than had been Wilson's pretrial statements, (see  
10 claim I3, *ante*), is similarly unpersuasive. Petitioner does not point to anything in the evidentiary  
11 record showing that Wilson had any contact with law enforcement during this time in the nature of an  
12 inducement or otherwise.

13           Even if there was such a withholding of information, the California Supreme Court could  
14 reasonably have found it harmless. Nothing in the record suggests that any information relating to  
15 Mr. Wilson's retrieval of his truck would have resulted in a different outcome. The jury was already  
16 aware that Wilson had returned to the crime scene from his own testimony. (RT at 1738.) The state  
17 court could reasonably have found the result of proceedings would not have been different absent the  
18 alleged Brady error. Brecht, 507 U.S. at 637.

19                           **4) Police Interviews Regarding Threats by Huffstuttler against Petitioner**

20           Petitioner alleges that the prosecution withheld evidence that, a week before the shootings,  
21 Petitioner had assaulted Huffstuttler and placed the barrel of a gun in Huffstuttler's mouth (see CT at  
22 225-26; RT at 2363-70), in response to which Huffstuttler threatened violence against Petitioner,  
23 causing Petitioner to fear Huffstuttler. (SHCP Ex. 15.) Specifically, Petitioner alleges that the  
24 prosecution withheld law enforcement interviews with Petitioner's friends and neighbors in Los  
25 Angeles County, including Sondra Hooten and her boyfriend Dennis Dademasch, who apparently  
26 witnessed the alleged confrontation and consequent threats while guests at the cabin. (ECF No. 113  
27 at 116-17.) Petitioner claims this undisclosed evidence would have supported a defense of  
28 unreasonable or imperfect self-defense, and that withholding it had a substantial and injurious effect

1 in determining the jury's verdict.

2 The record suggests that defense counsel had discovery on the incident in question; defense  
3 counsel Cater apparently admitted as much. (See RT at 2363-65; see also SHCP Ex. 69B 6/6/90  
4 EMF Billing Statement at 2.) For example, as discussed in claim I4, *ante*, Deputy Nikkel's report  
5 clearly includes his interview with Huffstuttler's girlfriend, Ms. Ward, about this confrontation of  
6 sorts between Petitioner and Huffstuttler, as follows:

7 [Ward] said one time, when [Ward, Petitioner, and Huffstuttler] were at the cabin,  
8 [Huffstuttler] had gone out to get their pillows out of the van. She said when  
9 [Huffstuttler] closed the door to the van, he slammed it. She said that [Petitioner] came  
10 into the bedroom where they were at and stuck the .45 into [Huffstuttler's] mouth,  
11 telling him that he should not slam the door to his van. She said she and two (2) other  
12 people, who were friends of [Petitioner's], named Sandra and Dennis, from Covina,  
13 pulled [Petitioner] off of [Huffstuttler].

14 (SHCP, Ex. 18b, 9/7/89 Nikkel Supp. Report at 13.)

15 Petitioner has not shown the existence of additional law enforcement interviews with  
16 Petitioner's friends and neighbors in Los Angeles County. The declaration of Sondra Hooten  
17 included with his habeas proffer does not suggest that at the time of trial she had talked to authorities  
18 or the prosecution team about the alleged confrontation. (See SHCP Ex. 15 at 2-3.) Absent from  
19 Petitioner's habeas proffer is any declaration from Mr. Dademasch.

20 Since Petitioner had the police report concerning this incident, it appears that there could be  
21 no Brady error.

22 The California Supreme Court could reasonably have found that Petitioner, who at the time of  
23 trial was in possession of Detective Nikkel's report concerning the alleged confrontation, had enough  
24 information to obtain this evidence on his own, had there actually been any evidence to obtain. See  
25 Raley, 470 F.3d at 804. Defense counsel could have interviewed these individuals. Counsel  
26 apparently did contact Ms. Ward and could have spoken to her about the incident. (SHCP Ex. 69B  
27 10/16/90 EMF Billing Statement at 3.)

28 Additionally, even if the prosecutor should have turned over evidence of these alleged  
interviews, Petitioner has failed to show prejudice. See Kyles, 514 U.S. at 433-34. Petitioner's  
habeas proffer of Ms. Hooten declaration referring to this incident does not suggest that Huffstuttler

1 acted violently toward or threatened violence upon Petitioner. Furthermore, the noted evidence  
2 against Petitioner was substantial. (See claims O, R and S, *post*.)

3 It follows that the state supreme court's rejection of the claim was not contrary to, or an  
4 unreasonable application of, clearly established federal law, nor based on an unreasonable  
5 determination of the facts in light of the evidence presented in the state court proceeding. See 28  
6 U.S.C. § 2254(d).

7 Claim K is denied.

8 **4. Review of Claim L**

9 Petitioner next claims his rights were violated by the jury's view of the crime scene. He  
10 asserts four subclaims which are addressed separately below. He claims cumulative error.

11 **a. Claim L1**

12 Petitioner alleges that he did not waive his right to be present at the jury view, or to the taking  
13 of testimony during the view, or to the viewing of the Sand Canyon Store by less than all jurors.  
14 (ECF No. 113 at 120-23.) He claims a denial of due process and the right to confront witnesses  
15 against him. (Id.)

16 Petitioner raised this same claim on direct appeal. The California Supreme Court held that  
17 Petitioner's state and federal constitutional rights had not been violated because he had expressly  
18 waived his right to be present at the jury view of the crime scene. Bolin, 18 Cal. 4th at 325. That  
19 court also found that the trial court had not committed prejudicial error under state law. Id.

20 Petitioner also raised this same claim in his petition for writ of habeas corpus in the California  
21 Supreme Court, which the California Supreme Court summarily denied on the merits without  
22 explanation (CSC Order Den. Pet. Habeas Corpus) as well as on procedural grounds (because the  
23 claim was repetitive of a claim that had been raised and rejected on direct appeal). (CSC Order Den.  
24 Pet. Habeas Corpus, citing In re Harris, 5 Cal. 4th at 824-29; In re Waltreus, 62 Cal. 2d at 225.)

25 **1) *Clearly Established Law***

26 A defendant has a federal due process right to be present at court proceedings if his presence  
27 has a reasonably substantial relation to his ability to defend himself. United States v. Gagnon, 470  
28 U.S. 522, 526 (1985). A waiver is ordinarily an intentional relinquishment or abandonment of a

1 known right or privilege. Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

2 **2) Analysis of Claim L1**

3 Petitioner alleges that he did not knowingly waive being present at the jury view because he  
4 did not anticipate that during the jury view, Kern County Sheriff's Department deputies Layman and  
5 Williamson, both of whom had previously been sworn in the case, would answer questions from the  
6 jury about issues such as the relative location of Huffstuttler's body and Wilson's truck and whether  
7 and the extent to which vegetation obscured views of portions of the crime scene, (RT at 1892-93;  
8 2120-22), matters only he (Petitioner) could challenge. He complains that the jurors may have  
9 understood the deputies to be continuing their prior testimony even though the deputies were not then  
10 under oath.

11 Petitioner also complains that, unbeknownst to him, Penal Code § 977 precluded waiver of  
12 presence at a proceeding where evidence is taken and requires a written waiver, not provided here.

13 Petitioner alleges that the information provided by the deputies during the crime scene view  
14 was relevant to his voluntary manslaughter defense and that at least to this extent his absence was not  
15 harmless beyond a reasonable doubt, Chapman v. California, 386 U.S. 18, 24 (1967), and had a  
16 substantial and injurious effect on the jury's verdict (see Brecht, 507 U.S. at 637).

17 The record reflects that, on December 10, 1990, prior to the conclusion of the guilt phase  
18 evidence, pursuant to the agreement of the prosecutor and defense counsel (11/1/90 RT 46-48), the  
19 jurors were taken to view the crime scene. (RT at 2119-22.) Defense counsel believed that it would  
20 be helpful to the jury and "agreed that the jury really needed to see the scene." (11/1/90 RT at 47-48.)

21 After Soria advised the trial court that Petitioner wished to waive attending the crime scene  
22 view (11/1/90 RT at 48), the following colloquy occurred:

23 MR. SORIA: Yes, your Honor, in order to facilitate the trip up on Monday, I believe my  
24 client will waive his presence to going up the mountain.

25 THE COURT: Yes, we had really kind of assumed he would. But, Mr. Bolin, would  
26 you waive your presence there, I take it?

27 DEFENDANT BOLIN: Yes, sir.

28 THE COURT: All right, and nobody has threatened you in order to get you to do this,  
have they?

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DEFENDANT BOLIN: No, sir.

THE COURT: All right, are you satisfied with the waiver, Mrs. Ryals?

MRS. RYALS: Yes, your Honor.

(RT at 1893; see also CT at 380.)

Petitioner did not attend the jury view on December 10, 1990. (RT at 2119.)

The California Supreme Court reviewed and rejected these same allegations, finding that:

We also find no violation of defendant’s constitutional rights by virtue of his absence during the view. Prior to the excursion, [Petitioner] expressly waived his presence and acknowledged he did so voluntarily. The record reflects that before making this decision he had discussed the matter with counsel. We have repeatedly rejected the argument that the Sixth Amendment confrontation clause of the United States Constitution or the due process clause of the California Constitution prevents a criminal defendant from waiving the right of presence at a critical stage of a capital trial. [Citation] We have no reason to reconsider that conclusion, particularly when no additional testimony was taken in conjunction with the view.

We also find no prejudicial error with respect to defendant’s statutory rights. In *People v. Jackson* (1996) 13 Cal. 4th 1164, 1211, this court held “that a capital defendant may not voluntarily waive his right to be present during the proceedings listed in section 977, including those portions of the trial in which evidence is taken [before the trier of fact] ....” [Citation] Although a jury view is not among the designated proceedings in section 977, we have long held that “in so viewing the premises the jury was receiving evidence” even if nontestimonial. [Citation] Thus, it comes within the purview of section 977. Nevertheless, in this case it is not reasonably probable that a more favorable result would have been reached had defendant, in addition to his counsel, been present. [Citation] On this record, we find “no sound basis to question the contemporaneous judgment of defense counsel, with which defendant then agreed, that defendant’s trial interests would be better served by *not* attending the jury view.” [Citation]

Bolin, 18 Cal. 4th at 325.

As noted, that court also concluded that no additional testimony was taken in conjunction with the jury view:

In this case, Layman and Williamson investigated the crime scene; the trial court therefore reasonably designated them as “showers” to explain how the actual physical conditions related to their trial testimony. The record establishes that their involvement was limited to that end, i.e., “showing” the jury what their words had described and the photographs had depicted. Given the court’s broad discretion in these matters, we find no abuse in having the deputies respond to specific questions rather than proceeding in

1 some other manner. Williamson’s statement that the foliage differed in height from the  
2 time of the crime was also proper “to account for any change in [the] condition between  
3 [its] state as shown by the evidence and [its] appearance at the time the jury inspected  
4 [it].”

4 Id. at 324-25.

5 The Court finds this claim to be unpersuasive. Petitioner has not demonstrated a clearly  
6 established federal right to be present at a jury view of a crime scene. See Snyder, 291 U.S. at 117-18  
7 (due process does not require the defendant’s presence at a jury view of the crime scene); see also  
8 Moore v. Campbell, 344 F.3d 1313, 1323 (11th Cir. 2003) (“the issue of whether a defendant must be  
9 present at all times in a capital trial has not yet been settled by the Supreme Court”). Mr. Soria stated  
10 that he had talked with Petitioner about the importance of viewing the scene. (11/1/90 RT at 48.)  
11 Having waived his presence, Petitioner did not attend the jury view of the scene. (RT at 1893, 2119; CT  
12 at 380.)

13 Nor has Petitioner demonstrated that his presence at the jury view would have contributed to  
14 the fairness of the proceeding, even where the “showers” then “point[ed] out particular features of the  
15 scene and [] request[ed] the jury to observe them.” Snyder, 291 U.S. at 110-11; see also Monroe v.  
16 Kuhlman, 433 F.3d 236, 245-47 (2d Cir. 2006) (attorney’s absence from jury view harmless error  
17 even though defendant could have learned something from observing what jury focused upon).

18 A defendant has a right to be present “whenever his presence has a relation, reasonably  
19 substantial, to the fullness of his opportunity to defend against the charge.” Stincer, 482 U.S. at 745  
20 (quoting Snyder, 291 U.S. at 105-06). However, he need not be present “when presence would be  
21 useless, or the benefit but a shadow.” Id. (quoting Snyder, 291 U.S. at 106-07); see Rice, 77 F.3d at  
22 1140 n.2 (listing cases finding right to presence not violated). The state supreme court could  
23 reasonably have found this to be such a case.

24 Once at the crime scene, the jurors were allowed to “look through the property” and to “walk  
25 down [to the marijuana area]”, which they had previously seen in crime scene photographs. (RT at  
26 1119.) The jurors were then allowed to ask questions, initially of the court and trial counsel and then  
27 of deputies Layman and Williamson as “showers.” The deputies variously spoke to the location of  
28 Wilson’s truck; the location and angle of Huffstuttler’s body; the location of the gun relative to

1 Huffstuttlar's body; the location of the main road; and the height of the surrounding vegetation and  
2 line of sight to the marijuana area at the time of the crime. (RT at 2120-22.) Detective Williamson  
3 stated that the crime scene was "intact" other than the wintertime foliage. (Id.)

4 The jurors, without juror Barnes, may have driven past the Sand Canyon store, where the  
5 victim met up with Petitioner prior to the shootings. (Id.) It appears the jurors were familiar with the  
6 crime scene through the photographs admitted into evidence and readily able to discern how the  
7 photographs might have differed from their view of the crime scene including the noted statements at  
8 the crime scene. Petitioner's suggestion that his presence was required to provide further clarity in  
9 these regards lacks factual support. Moreover, defense counsel was present at the jury view and  
10 apparently did not object to the noted statements or seek correction of the transcript of the jury's  
11 viewing.

12 Petitioner's state law claim is not a basis for federal habeas relief. See Estelle, 502 U.S. at 67-  
13 68. Under California law, a defendant shall be personally present at other proceedings involving the  
14 taking of all evidence, unless he signs a written waiver. Cal. Const., art. I, § 15; Pen. Code §§ 977(b),  
15 1043(a); People v. Johnson, 6 Cal. 4th 1, 17 (1993), abrogated on other grounds by People v. Rogers,  
16 39 Cal. 4th 826, 879 (2006). But a defendant's "absence from various court proceedings, even  
17 without waiver, may be declared non-prejudicial in situations where his presence does not bear a  
18 reasonably substantial relation to the fullness of his opportunity to defend against the charge."  
19 Johnson, 6 Cal. 4th at 18 (citing People v. Garrison, 47 Cal. 3d 746, 782 (1989)) (quoting People v.  
20 Bloyd, 43 Cal. 3d 333, 359-60 (1987)).

21 Even if the Court were to assume the state law gave rise to a protectable federal right,  
22 Petitioner has not demonstrated prejudice.

23 It was not unreasonable for the California Supreme Court to determine that "on this record,  
24 we find no sound basis to question the contemporaneous judgment of defense counsel, with which  
25 defendant then agreed, that defendant's trial interests would be better served by *not* attending the jury  
26 view." Bolin, 18 Cal. 4th at 325.

27 It follows that the state supreme court's rejection of the claim was not contrary to, or an  
28 unreasonable application of, clearly established federal law, nor based on an unreasonable



1 determination of the facts in light of the evidence presented in the state court proceeding. See 28  
2 U.S.C. § 2254(d).

3 Claim L1 is denied.

4 **b. Claim L2**

5 Petitioner claims that the manner in which the jury viewed the crime scene violated Penal  
6 Code § 1119 (“§ 1119”) (ECF No. 113 at 123-25), which in turn denied Petitioner state-created due  
7 process and fair trial rights under the Fifth and Fourteenth Amendments. (ECF No. 113 at 125:1-2.)

8 Petitioner raised this same claim on direct appeal, which the California Supreme Court  
9 rejected based on counsel’s failure “to object to any aspect of the jury view.” Bolin, 18 Cal. 4th at  
10 323. In the alternative, the California Supreme Court found that the trial court did not abuse its  
11 discretion by having “the deputies respond to specific questions[.]” Id. at 325.

12 Petitioner also raised this same claim on state habeas corpus, which the California Supreme  
13 Court summarily denied on the merits without explanation. (CSC Order Den. Pet. Habeas Corpus.)

14 **1) *Clearly Established Law***

15 The due process standard is set out in claim L1, *ante*.

16 **2) *Analysis of Claim L2***

17 Petitioner alleges the jury received communications not authorized under § 1119, violating  
18 state created federal due process and fair trial rights. Hicks v. Oklahoma, 447 U.S. 343, 346 (1979)  
19 (a criminal jury may deprive defendant of liberty only to the extent determined by the jury in the  
20 exercise of its statutory discretion).

21 Section 1119 provides in pertinent part:

22 When, in the opinion of the court, it is proper that the jury should view the place in  
23 which the offense is charged to have been committed, or in which any other material fact  
24 occurred, or any personal property which has been referred to in the evidence and cannot  
25 conveniently be brought into the courtroom, it may order the jury to be conducted in a  
26 body, in the custody of the sheriff or marshal . . . to the place, or to the property, which  
must be shown to them by a person appointed by the court for that purpose; and the  
officer must be sworn to suffer no person to speak or communicate with the jury, nor to  
do so himself or herself, on any subject connected with the trial. . . .”

27 Bolin, 18 Cal. 4th at 323 n.5.

28 The California Supreme Court reviewed and rejected this claim, by stating:

1 [T]he trial court conducted the jury view in full conformance with the provisions of  
2 section 1119, which expressly provides that when the court determines a jury view of  
3 the scene is proper, the place or property “must be shown to them by a person appointed  
4 by the court for that purpose ....” Originally, in People v. Green (1878) 53 Cal. 60, 61,  
5 this court construed the statute to preclude any person, even on direction of the trial  
6 court, from speaking to the jury on any subject connected with the trial. In People v.  
7 Bush (1887) 71 Cal. 602, 606, however, this rigid construction was rejected as illogical  
8 and inconsistent with the statutory language: “[W]e cannot conceive how [the shower]  
9 could have shown the jury the ... places which they were sent to view in any other way  
[than pointing out and naming such places], under the statute.” [Citation] For more than  
a century, courts have consistently applied this interpretation, implicitly recognizing that  
the admonition that “no person ... speak or communicate with the jury” (§ 1119) is  
plainly directed to insulating the jury from extraneous contact and potential tampering.  
[Citations]

10 At the same time, the broad discretion conferred by the statute authorizes the trial court  
11 to conduct the view as appropriate to the circumstances. For example, in People v.  
12 Pompa, supra, 192 Cal. 412, we rejected the defendant’s claim of error that the view was  
13 not, as originally directed by the court, strictly limited to an inspection of the premises.  
14 [Citation] Although considerable testimony was taken and evidence received by the jury,  
15 “the record expressly disclose[d] that during the entire proceedings ... the court in its  
16 completeness, including the judge, the clerk, the bailiff, the reporter, the interpreter, the  
17 jury, the defendant, and the respective counsel was at all times present, the only element  
absent being the walls and fittings of the courtroom wherein the court is usually  
convened.” [Citation] Since “the forms of law governing the trial of causes” was  
otherwise observed, we declined to hold this “absence of formality” had compromised  
the proceedings. [Citation]

18 In this case, Layman and Williamson investigated the crime scene; the trial court  
19 therefore reasonably designated them as “showers” to explain how the actual physical  
20 conditions related to their trial testimony. The record establishes that their involvement  
21 was limited to that end, i.e., “showing” the jury what their words had described and the  
22 photographs had depicted. [Citations] Given the court’s broad discretion in these  
23 matters, we find no abuse in having the deputies respond to specific questions rather  
than proceeding in some other manner. [Citation] Williamson’s statement that the  
foliage differed in height from the time of the crime was also proper “to account for any  
change in [the] condition between [its] state as shown by the evidence and [its]  
appearance at the time the jury inspected [it].” [Citation]

24 We also find no prejudicial error with respect to defendant’s statutory rights. [Citation]  
25 [I]n this case it is not reasonably probable that a more favorable result would have been  
26 reached had defendant, in addition to his counsel, been present. [Citation] On this  
27 record, we find “no sound basis to question the contemporaneous judgment of defense  
counsel, with which defendant then agreed, that defendant’s trial interests would be  
better served by *not* attending the jury view.” [Citation]

28 Bolin, 18 Cal. 4th at 324-325.

1 Petitioner has not convinced the Court that the comments of deputies Layman and Williamson,  
2 while showing the jury the crime scene, violated § 1119, denying him federal rights. As noted, the  
3 California Supreme Court, in rejecting this claim, broadly construed § 1119 to allow the appointed  
4 showers “to explain how the actual physical conditions related to their trial testimony.” Id. at 324-25.  
5 Because “their involvement was limited to that end,” id. at 325, and § 1119’s provision against  
6 communicating with the jury has been recognized by the California Supreme Court as directed to  
7 insulating the jury from “extraneous contact and potential tampering,” id. at 324, citing People v. Tarm  
8 Poi, 86 Cal. 225 (1890), the California Supreme Court could reasonably have determined that no abuse  
9 of discretion or violation of the statute occurred.

10 Petitioner has not cited any applicable clearly established Supreme Court laws. Accordingly,  
11 the state supreme court’s decision is not contrary to or an unreasonable application of United States  
12 Supreme Court precedent. Carey, 549 U.S. at 76.

13 Furthermore, to the extent Petitioner’s argument raises an issue of state law his claim is not a  
14 basis for habeas relief. (ECF No. 113 at 123-25.) “[F]ederal habeas corpus relief does not lie for  
15 errors of state law.” Lewis, 497 U.S. at 780. A federal habeas court may not examine questions of  
16 state law; it “is limited to deciding whether a conviction violated the Constitution, laws, or treaties of  
17 the United States.” Estelle, 502 U.S. at 67-68.

18 As with claim L1, *ante*, even if the Court were to assume the state law gave rise to a  
19 protectable federal right, Petitioner has not demonstrated prejudice. Petitioner concedes “the  
20 requirements of Penal Code § 1119 have not been strictly construed by the California courts . . . .”  
21 (ECF No. 178 at 158:1-2.) He complains of a lack of courtroom decorum and that the court clerk was  
22 not present. Yet he does not explain with reference to the record how this, or the comments of the  
23 “showers,” prejudicially impacted him.

24 In sum, the California Supreme Court could reasonably find that Petitioner did not make a  
25 showing of why and how the manner in which the jury view was conducted denied him a fair trial.  
26 This Court agrees with the state supreme court that, “[o]n this record, we find no sound basis to  
27 question the contemporaneous judgment of defense counsel, with which defendant then agreed, that  
28 defendant’s trial interests would be better served by not attending the jury view.” Bolin, 18 Cal. 4th

1 at 325.

2 It follows that the state supreme court’s rejection of the claim was not contrary to, or an  
3 unreasonable application of, clearly established federal law, nor based on an unreasonable  
4 determination of the facts in light of the evidence presented in the state court proceeding. See 28  
5 U.S.C. § 2254(d).

6 Claim L2 is denied.

7 **c. Claim L3**

8 In this next claim, Petitioner alleges that the viewing of the Sand Canyon Store by only 11 of  
9 the 12 jurors violated Penal Code § 1119, that he did not waive this violation, and that the violation  
10 denied him a fair jury trial and due process under state and federal law. (ECF No. 113 at 125-28.)

11 Petitioner raised this same claim on habeas corpus in the California Supreme Court. The  
12 California Supreme Court ruled that Petitioner’s claim was procedurally barred because this claim  
13 could have been, but was not raised on direct appeal. (CSC Order Den. Pet. Habeas Corpus [citing In  
14 re Harris, 5 Cal. 4th at 825 n.3 and In re Dixon, 41 Cal. 2d at 759].) The California Supreme Court  
15 also summarily rejected Petitioner’s claim on the merits without explanation. (CSC Order Den. Pet.  
16 Habeas Corpus.)

17 **1) *Clearly Established Law***

18 The due process standard is set out in claim L1, *ante*.

19 **2) *Analysis of Claim L3***

20 Petitioner alleges that the jury, as a body, did not view the Sand Canyon Store, the location  
21 where Petitioner and Ramirez met the victims on the day of the shootings. (RT at 2121.) Petitioner  
22 states that he did not anticipate this alleged structural error and did not knowingly waive his rights  
23 regarding it. (RT at 1892-93.)

24 As noted, juror Barnes, with the agreement of the parties and the trial court, was allowed to  
25 drive home from the crime scene view separately from the other jurors. (RT at 2121.) After juror  
26 Barnes departed, the remaining jurors were told they would drive past the Sand Canyon Store. (Id.)

27 Petitioner argues that once Barnes left, the jury was no longer constituted as a jury, such that  
28 any action taken by the partial jury denied him fair trial and due process under Article I § 16 of the

1 California Constitution and the Fifth, Sixth and Fourteenth Amendments. Hicks, 447 U.S. at 346. He  
2 argues the eleven jurors received additional information relevant to testimony of witnesses Ramirez  
3 and Wilson outside his presence, i.e., effectively conducting the jury trial without the full jury. He  
4 alleges this created structural error, exempt from harmless error review, and highly prejudicial under  
5 Brecht.

6 This claim fails. Preliminarily, the record is unclear whether juror Barnes and/or the  
7 remaining 11 jurors actually drove past and saw the Sand Canyon Store. Equally uncertain is whether  
8 deputies Layman and Williamson commented on the Store during the jury view. In short, Petitioner  
9 makes no showing that during the jury view, any juror received information about the Store that was  
10 relevant to the testimony of Ramirez and Wilson. The California Supreme Court would not have  
11 been unreasonable in determining that speculation alone is not a basis for error.

12 Similarly, any violation of § 1119 could be seen as speculative. Even if juror Barnes was absent  
13 from a jury viewing of the San Canyon Store, the state supreme court could reasonably find such a state  
14 law violation did not result in a fundamentally unfair trial violating Petitioner's constitutional rights.  
15 Petitioner argues that because Ramirez and Wilson described the Sand Canyon Store in their testimony,  
16 their credibility would have been impacted by any inconsistencies between their description of the Sand  
17 Canyon Store and what the jury saw when viewing the Store. But Petitioner does not point to any facts  
18 in his proffer suggesting such inconsistencies existed, much less reflected upon witness credibility.  
19 This argument could be seen as speculative.

20 Petitioner's citation to Hicks in support of the argument that § 1119 supports a state created due  
21 process right is unavailing. Hick's does not so hold. Petitioner does not demonstrate that the state  
22 legislature intended this result, or that courts have interpreted § 1119 in this fashion.

23 Petitioner's waiving attendance at the scene view did not run afoul of due process protections  
24 for reasons discussed in claim L1, *ante*. Moreover, it appears that defense counsel was present during  
25 the jury view and did not object in relation to any viewing of the Sand Canyon Store. (RT at 2121.)

26 Finally, Petitioner has not established any prejudice related to this allegation. Petitioner has  
27 not demonstrated that the trial testimony of eyewitnesses Ramirez and Wilson was dependent upon or  
28 related to the location and structure of the Sand Canyon Store or that the Sand Canyon Store had

1 some material relationship to other locations and events described in the trial testimony. Moreover,  
2 all the jurors had seen photographs of the Sand Canyon Store. (RT at 1724-25; CT at 390). Even if  
3 juror Barnes was absent from a viewing of the Store, the California Supreme Court could reasonably  
4 have found this had only a minor, if any, impact on the jury's determinations, for the reasons stated.  
5 See e.g., Olano, 62 F.3d at 1188 (finding no error where juror missed an afternoon of testimony but  
6 reviewed a written transcript of what he missed).

7 In sum, Petitioner makes no showing that during the jury view, any juror received information  
8 about the Store that was relevant to the testimony of Ramirez and Wilson, or that any absence of juror  
9 Barnes from a jury viewing of the San Canyon Store resulted in a fundamentally unfair trial violating  
10 Petitioner's constitutional rights.

11 It follows that the state supreme court's rejection of the claim was not contrary to, or an  
12 unreasonable application of, clearly established federal law, nor based on an unreasonable  
13 determination of the facts in light of the evidence presented in the state court proceeding. See 28  
14 U.S.C. § 2254(d).

15 Claim L3 is denied.

16 **d. Claim L4**

17 In this final claim, Petitioner complains that the trial court did not take steps to reduce the  
18 intrusive effect of press coverage during the jury view, denying Petitioner due process and a fair jury  
19 trial under the Fifth, Sixth, and Fourteenth Amendments. (ECF No. 113 at 128-30.)

20 Petitioner raised this same claim on habeas corpus in the California Supreme Court. (CSC  
21 Pet. Habeas Corpus at 197-200.) The California Supreme Court ruled that Petitioner's claim was  
22 procedurally barred because this claim could have been, but was not, raised on direct appeal. (CSC  
23 Order Den. Pet. Habeas Corpus [citing In re Harris, 5 Cal. 4th at 825 n.3 and In re Dixon, 41 Cal. 2d  
24 at 759].) The California Supreme Court also summarily rejected the claim on the merits without  
25 explanation. (CSC Order Den. Pet. Habeas Corpus.)

26 **1) *Clearly Established Law***

27 The standard for due process is set out in claim L1, *ante*.

28 **2) *Analysis of Claim L4***

1 Petitioner argues that the jury view was tainted by excessive media involvement, denying  
2 fairness and integrity of the proceedings.

3 The trial court, prior to the jury view, warned jurors that the press would be “tailing” them up  
4 the mountain to the crime scene. (RT at 1892-93.) Petitioner claims that the media presence at the  
5 jury view denied “judicial serenity and calm,” Estes, 381 U.S. at 536, and changed the jury’s  
6 perception of the crime scene and how it relates to the testimony at trial. (ECF No. 113 at 129.) This,  
7 he claims, had a substantial and injurious effect or influence in determining the jury’s verdict.  
8 Brecht, 507 U.S. at 637.

9 But the state court could reasonably have found these allegations, relating to media at the jury  
10 view and how the media might have influence matters there, to be speculative and without merit.  
11 Petitioner seizes upon two comments the trial court made prior to the trip to the crime scene. (ECF  
12 No. 113 at 128-29.) The court first stated: “[w]e will be tailed by a television crew who will be  
13 filming again.” (RT at 1892.) Later, the court commented:

14 [T]his trip Monday has gotten a little more complicated and publicized than I might  
15 wish, and I cannot close down these highways, at least I don’t think that’s within my  
16 power, and there are going to be television stations following us up and down and  
17 around, so I just have to warn you about that. Avoid contact with them, and I am sure  
18 that we will make some security arrangements for you but there’s going to be more than  
19 one television crew, I think, tailing us, so to speak, up the mountain. [Citation] The trial  
20 court also told jurors that the media “are ordered not to talk [to you], and you are  
21 ordered not to talk to them.

22 (RT at 1976-77.)

23 Notwithstanding these comments, nothing in the record reasonably suggests that media was in  
24 fact present at the jury view. It follows that Petitioner’s suggestion the presence of the media “would  
25 have dramatically altered the jury’s perceptions” of the crime scene, and his ruminations regarding  
26 how media might have impacted the jury view, e.g., detracting from the sense of remoteness and  
27 creating background noise, are all unavailing absent any showing the media was present for the  
28 viewing. (ECF No. 113 at 129.) Petitioner was given the opportunity to obtain discovery regarding  
this claim. (ECF No. 174 at 11.) Nonetheless, the claim remains unsupported in the record.

Even if the media was present for the jury’s view of the crime scene, the state supreme court



1 could reasonably have concluded there was no prejudice. Nothing in the record suggests media  
2 activity that impacted or altered the jury's view of the crime scene. The court referenced security  
3 arrangements for the trip which could have ameliorated distraction the media might otherwise  
4 present. (RT at 1893, 1976-77.) Moreover, the trial court admonished the jury numerous times to  
5 avoid any and all contact with the media. (RT at 25, 228, 235, 249, 326, 1642-43, 1892-93, 1976-77,  
6 2090.) Jurors are presumed to follow the court's instructions. Olano, 507 U.S. at 740.

7 It follows that the California Supreme Court's rejection of the claim was not contrary to, or an  
8 unreasonable application of, clearly established federal law, nor based on an unreasonable  
9 determination of the facts in light of the evidence presented in the state court proceeding. See 28  
10 U.S.C. § 2254(d).

11 Claim L4 is denied.

#### 12 **5. Review of Claim M**

13 Petitioner, in his next claim, alleges trial court error by admitting cumulative, irrelevant, and  
14 gruesome crime scene and autopsy photographs, discussed in claim I12, *ante*, which he alleged were  
15 unduly prejudicial and violated Petitioner's state law rights and rights under the Fifth, Eighth and  
16 Fourteenth Amendments. (ECF No. 113 at 130-32.)

17 Petitioner presented these same allegations to the California Supreme Court on direct appeal.  
18 The California Supreme Court held that Petitioner's failure to object on federal constitutional grounds  
19 in the trial court waived the claim. Bolin, 18 Cal. 4th at 319. The California Supreme Court also  
20 held that Petitioner's failure to object to the admission of photographs other than People's Exhibits  
21 42, 43, and 44 waived any state law objection to the remaining photographs. Id. at 319 n.4.

22 Petitioner raised this same claim on habeas corpus in the California Supreme Court. (CSC  
23 Pet. Habeas Corpus at 148-150.) That court summarily rejected the claim on the merits without  
24 explanation. (CSC Order Den. Pet. Habeas Corpus.)

#### 25 **a. Clearly Established Law**

26 As noted, a due process claim can be stated where graphic photos of victims make the trial  
27 fundamentally unfair. Jammal, 926 F.2d at 919. However, photos that are relevant to the crime  
28 charged and elements thereof are admissible. See Villafuerte, 75 F.3d at 1343.

1 Under California law, “photographs which disclose the manner in which the victim was  
2 wounded are relevant on the issues of malice and aggravation of the crime and the penalty.”  
3 Thompson, 50 Cal. 3d at 182. But otherwise relevant evidence will be precluded if “its probative  
4 value is substantially outweighed by the probability that its admission will . . . create substantial  
5 danger of undue prejudice, of confusing the issues, or of misleading the jury.” Evid. Code §§ 350,  
6 352; People v. Cardenas, 31 Cal. 3d 897, 903-04 (1982).

7 **b. Analysis of Claim M**

8 Petitioner revisits the photographs which were the subject of ineffective assistance of counsel  
9 claim I12, *ante*, but this time alleging trial court error in allowing the prosecution to introduce the  
10 color photographs of Mincy and Huffstuttler at the crime scene and during autopsy. (People’s Ex.’s.  
11 3, 4, 10, 17, 35, 40, 42, 43, 44, 72, and 73; see RT at 2079-80, 2083-85, 2088; ECF No 113 at 130:20-  
12 24; CT at 391.) These photographs were used by prosecution criminalist Laskowski to support his  
13 allegedly improper blood splatter testimony. (See e.g., RT at 2084.) Petitioner claims the  
14 photographs had a substantial and injurious effect or influence in determining the jury’s verdict.  
15 Brecht, 507 U.S. at 637.

16 This claim fails for the same reasons discussed in claim I12, summarized below.

17 The state supreme court could reasonably have found the photographs corroborative of the  
18 trial testimony and forensic evidence; relevant to expert testimony; probative for sentence selection;  
19 and not unnecessarily inflammatory or gruesome. These photographs clearly relate to the  
20 circumstances of the murders and the identities of the victims. These photographs could reasonably  
21 inform as to state(s) of mind of the perpetrator(s) and thus have probative value regarding charges and  
22 elements including intent to kill, aggravation and penalty. Photographs that are relevant to the crime  
23 charged are admissible. See Villafuerte 75 F.3d at 1343; Thompson, 50 Cal. 3d at 182  
24 (“[P]hotographs which disclose the manner in which the victim was wounded are relevant on the  
25 issues of malice and aggravation of the crime and the penalty.”).

26 Significantly, criminologist Laskowski relied upon People’s Exhibits 42 through 44, 72, and 73  
27 to support his testimony and conclusions that Huffstuttler was shot and died where he was found and  
28 that he was shot after he was no longer moving. (RT at 2055-65.) The other photographs were not

1 close-ups and not particularly bloody or gruesome and were reasonably probative of the manner of  
2 death and the crime scene and the victims in relation thereto. (RT at 1661-62, 1671, 1683, 1732, 1790-  
3 92, 1817, 1946-47.)

4 Petitioner argues that the photographs were cumulative of and offered little beyond the  
5 testimony of those who saw what was depicted. However, he does not point to facts in his proffer  
6 showing the photographs lacked all probative value and permissible inference and were unduly  
7 prejudicial and that their admission prevented Petitioner from having a fair trial. It appears that the  
8 photographs informed the expert testimony of criminologist Laskowski (see People's Ex.'s 42-44, 72-  
9 73), and might have been of value to the jury in understanding and evaluating the credibility of this  
10 and other testimony. See Batchelor v. Cupp, 693 F.2d 859, 865 (9th Cir. 1982) (“[A]dmission of  
11 photographs lies largely within the discretion of the trial court, whose ruling will not be disturbed . . .  
12 unless the admission of the photographs rendered the trial fundamentally unfair”). Some of the  
13 photos were wide area shots of the crime scene, not focusing on the bodies, which reasonably could  
14 have provided useful context to the testimony of the eyewitnesses. (See People's Ex.'s 17, 35, 40.)

15 Even without the photographs, it is not reasonably probable the jury would have returned a  
16 more favorable verdict. Petitioner argues the jurors were likely to accord more weight to the  
17 photographs than deserved because the jurors were unused to seeing such photos. But the noted  
18 evidence against Petitioner including the circumstances surrounding the murders and their aftermath  
19 was substantial. (See claims O, R and S, *post.*) As the California Supreme Court observed: “[w]ith  
20 two eyewitnesses to the killing, the defendant’s state of mind and intent were the only issues open to  
21 question. The forensic evidence bearing on those elements was straightforward, to the point, and not  
22 susceptible to much controversy.” Bolin, 18 Cal. 4th at 313.

23 Petitioner’s argument that admission of the photos was unduly prejudicial and violated state  
24 law, citing Pen. Code §§ 350, 352, cannot alone be a basis for federal habeas relief. Lewis, 497 U.S.  
25 at 780; see also Pulley, 465 U.S. at 41.

26 For the reasons stated, admission of the photographs of the victims did not cause Petitioner’s  
27 trial to be fundamentally unfair. Jammal, 926 F.2d at 919. This Court does not find that the state  
28 supreme court’s rejection of the claim was contrary to, or an unreasonable application of, clearly

1 established federal law, as determined by the Supreme Court, or that the state court's ruling was  
2 based on an unreasonable determination of the facts in light of the evidence presented in the state  
3 court proceeding. See 28 U.S.C. § 2254(d).

4 Claim M is denied.

5 **6. Review of Claim N**

6 In this next claim, Petitioner alleges trial court error by allowing criminologist Laskowski to  
7 testify as an "expert" regarding blood splatter evidence and by admitting his irrelevant, cumulative  
8 and prejudicial testimony relating to blood splatter causing Petitioner's trial to be unfair. (ECF No.  
9 113 at 132:14-134:-1.)

10 Petitioner presented this claim to the California Supreme Court on direct appeal. The  
11 California Supreme Court held that Petitioner's claim was waived because he failed to object  
12 contemporaneously to Laskowski's testimony on the grounds urged on appeal. Bolin, 18 Cal. 4th at  
13 319.

14 Petitioner raised this same claim on habeas corpus in the California Supreme Court. (CSC Pet.  
15 Habeas Corpus at 126-133.) The California Supreme Court summarily rejected the claim on the  
16 merits without explanation. (CSC Order Den. Pet. Habeas Corpus.)

17 **a. Clearly Established Law**

18 The standard for trial court error is set out at claim A.

19 **b. Analysis of Claim N**

20 This claim is related to claims I8 and I9, denied *ante*, wherein Petitioner raised failure to  
21 challenge Laskowski's qualifications to opine on blood splatter evidence in the context of claimed  
22 ineffective assistance of counsel.

23 Laskowski testified regarding analysis of bullets removed from the victims and the patterns of  
24 blood spatters and drips on and near the victims. (RT at 2053-63.) Laskowski did so having never  
25 visited the crime scene, relying instead on crime scene photographs. (RT at 2053-63.)

26 Petitioner alleges that Laskowski was not qualified to give expert testimony as to blood  
27 splatter evidence. He alleges the testimony was not probative, but inflammatory, and so prejudicial  
28 as to violate Petitioner's federal due process rights. He faults the trial court for allowing the

1 testimony and defense counsel for failing to challenge Laskowski's qualifications as a blood splatter  
2 expert. (ECF No. 113 at 132-34.)

3 Petitioner also alleges that California Supreme Court did not adjudicate the federal claims,  
4 instead disposing of these allegations on state law procedural grounds given trial counsel's failure to  
5 contemporaneously object to Laskowski's testimony. (ECF No. 113 at 133:22-26); see also Bolin, 18  
6 Cal. 4th at 319.

7 However, the record reflects that the California Supreme Court on direct appeal did review  
8 these same allegations, as a federal constitutional violation (ineffective assistance of counsel), and  
9 denied them. See Bolin, 19 Cal. 4th at 321-22; see also claims I8-I9, *ante*. Thus the summary denial  
10 does not alone rest on an unadjudicated procedural denial of these allegations. See e.g., Kernan v.  
11 Hinojosa, No. 15-833, 2016 WL 2842454, at \*2 (U.S. May 16, 2016) (strong evidence can refute  
12 presumption that a later decision rejecting claim did so on the basis of an earlier reasoned opinion  
13 imposing a procedural default).

14 In rejecting Petitioner's related ineffective assistance of counsel claim based on failure to  
15 challenge Laskowski's qualifications, the state supreme court observed that:

16 Utilizing photographs of the crime scene, Criminalist Laskowski testified regarding the  
17 various positions of Mincy's and Huffstuttler's bodies when they were shot. Based on  
18 blood spatters and drips depicted in the photos, he indicated one shot was to Mincy's  
19 body while in a "fetal-like" position on its left side; as to the others, his body was in a  
20 vertical position. Laskowski also concluded Mincy "was moving at a relatively rapid  
21 pace" after being initially wounded. With respect to Huffstuttler, he determined that for  
22 several shots the body was prone and not moving. Defendant now contends this  
evidence was inadmissible because the witness was not qualified to render an expert  
opinion (Evid. Code, § 720) and because he did not personally investigate the crime  
scene. He further asserts it should have been excluded pursuant to Evidence Code  
section 352. Since he failed to make these objections at trial, the issue is waived.  
[Citation]

23 ...

24 Evidence Code section 720 provides that a person may testify as an expert "if he has  
25 special knowledge, skill, experience, training, or education sufficient to qualify him,"  
[Citation] which "may be shown by any otherwise admissible evidence, including his  
26 own testimony." [Citation] The trial court's determination of whether a witness qualifies  
27 as an expert is a matter of discretion and will not be disturbed absent a showing of  
manifest abuse. [Citation] "Where a witness has disclosed sufficient knowledge of the  
subject to entitle his opinion to go to the jury, the question of the degree of his  
28 knowledge goes more to the weight of the evidence than its admissibility." [Citation]

The record establishes Laskowski was fully qualified to testify based on his educational

1 background in biochemistry and serology and his training as a criminalist for 13 years,  
2 including attending and giving seminars in blood-spatter analysis and crime scene  
3 investigation. He had also testified as an expert witness on numerous prior occasions.  
4 Given his expertise, Laskowski's testimony was not cumulative. Utilizing his knowledge  
5 of blood spatters and drips, he was better able to describe the particulars of what  
6 occurred during the shooting of Huffstutler and Mincy than any photographic depiction  
7 of their bodies. For example, he concluded from the spatter evidence that Mincy was  
8 moving around after he was first shot and before he fell into a fetal position, where he  
9 was shot one more time. He also explained that the large pool of blood around  
10 Huffstutler's body indicated he was prone and not moving when he received the final  
11 shots. As discussed in other contexts, this evidence was relevant to the issues of intent  
12 and premeditation and deliberation. The photographs Laskowski referred to adequately  
13 illustrated his testimony; therefore, the fact he did not personally examine the crime  
14 scene was a matter of evidentiary weight. Since his testimony was admissible on all  
15 grounds, counsel had no basis for objecting.

9 Bolin, 18 Cal. 4th at 321-22.

10 This Court, for purposes of this claim, finds that the California Supreme Court's conclusion  
11 that Laskowski was "fully qualified" as an expert in blood spatter analysis, Bolin, 18 Cal. 4th at 321-  
12 22, was not unreasonable given the facts on record and inference therefrom, as more fully discussed  
13 in claims I8 and I9, *ante*. Laskowski's testimony regarding the forensic evidence and photographs  
14 was probative of the charged offenses and neither cumulative nor more prejudicial than probative.  
15 See claims I8, I9 and M, *ante*, and O, *post*. The state court could reasonably have found his  
16 testimony instructive on matters of intent, premeditation, deliberation, and self-defense, as explained  
17 in claims I8, I9, M and O. Federal courts may not interfere with a state evidentiary ruling unless the  
18 evidence was so prejudicial that its admission violated fundamental due process and the right to a fair  
19 trial. Jeffries, 5 F.3d at 1192; Butcher, 758 F.2d at 378. Only if no permissible inferences can be  
20 drawn from admitted evidence will due process be violated. Jammal, 926 F.2d at 920. This is not  
21 such a case, for the reasons stated.

22 Even without Laskowski's testimony, the California Supreme Court could have found no  
23 reasonable probability and likelihood that the result of the proceeding would have changed. The  
24 noted evidence of Petitioner's guilt was substantial. (See claims O, R and S, *post*.) Laskowski's  
25 testimony was not the only evidentiary support for Petitioner's intent, premeditation, and planning.  
26 See Bolin, 18 Cal. 4th at 331-33. As the California Supreme Court observed: "[w]ith two  
27 eyewitnesses to the killing, the defendant's state of mind and intent were the only issues open to  
28 question. The forensic evidence bearing on those elements was straightforward, to the point, and not

1 susceptible to much controversy.” Id. at 313.

2 For the reasons stated, the California Supreme Court’s rejection of the claim was not contrary  
3 to, or an unreasonable application of, clearly established federal law, as determined by the Supreme  
4 Court, or based on an unreasonable determination of the facts in light of the evidence presented in the  
5 state court proceeding. See 28 U.S.C. § 2254(d).

6 Claim N is denied.

7 **7. Review of Claim O**

8 Petitioner claims the evidence presented at trial was insufficient to prove beyond a reasonable  
9 doubt all the elements of first-degree murder, denying him due process and a fair jury trial. (ECF No.  
10 113 at 134-36.)

11 Petitioner raised this same claim on direct appeal. The California Supreme Court denied the  
12 claim on the merits. Bolin, 18 Cal. 4th at 331-33.

13 **a. Clearly Established Law**

14 Then applicable California law provided, “[m]urder is the unlawful killing of a human being .  
15 . . . with malice aforethought.” Pen. Code § 187, subd. (a). “[A]ll murder which is perpetrated . . . by  
16 any kind of willful, deliberate, and premeditated killing . . . is murder of the first degree.” Pen. Code  
17 § 189; see People v. Berryman, 6 Cal. 4th 1048, 1085 (1993), overruled on other grounds, People v.  
18 Hill, 17 Cal. 4th 800, 822-23 (1998). Premeditation and deliberation are generally established by  
19 proof of (1) planning activity; (2) motive (established by a prior relationship and/or conduct with the  
20 victim); and (3) manner of killing. People v. Anderson, 70 Cal. 2d 15, 26-27 (1968). The California  
21 Supreme Court “sustains verdicts of first degree murder typically when there is evidence of all three  
22 types and otherwise requires at least extremely strong evidence of (1) or evidence of (2) in  
23 conjunction with either (1) or (3).” Id. at 27.

24 A federal habeas court reviews challenges to the sufficiency of the evidence by determining  
25 whether in “viewing the evidence in a light most favorable to the prosecution, any rational trier of fact  
26 could have found the essential elements of the crime beyond a reasonable doubt.” Lewis, 497 U.S. at  
27 781. “A reviewing court must consider all of the evidence admitted by the trial court, regardless  
28 whether that evidence was admitted erroneously.” McDaniel v. Brown, 558 U.S. 120, 131 (2010).



1 Sufficiency of the evidence claims raised in § 2254 proceedings must be measured with  
2 reference to substantive requirements as defined by state law. Jackson v. Virginia, 443 U.S. 307, 324  
3 n.16 (1979). In cases where the evidence is unclear or would support conflicting inferences, the  
4 federal court “must presume -- even if it does not affirmatively appear in the record -- that the trier of  
5 fact resolved any such conflict in favor of the prosecution, and must defer to that resolution.” Id. at  
6 326. To prevail here, Petitioner must show “that the prosecution’s case against him “was so lacking  
7 that the trial court should have entered a judgment of acquittal.” McDaniel, 558 U.S. at 131.

8 AEDPA adds another layer of deference over the already deferential Jackson standard. Under  
9 AEDPA, the federal court may not grant a habeas petition unless it finds that the state court  
10 unreasonably applied the principles underlying the Jackson standard when reviewing the petitioner’s  
11 claim. See, e.g., Juan H. v. Allen, 408 F.3d 1262, 1275 n.12 (9th Cir. 2005); Jones v. Wood, 114  
12 F.3d 1002, 1013 (9th Cir. 1997) (recognizing that “unreasonable application” standard applies to  
13 insufficient evidence claim). “Expressed more fully, this means a reviewing court faced with a record  
14 of historical facts that supports conflicting inferences must presume -- even if it does not  
15 affirmatively appear in the record -- that the trier of fact resolved any such conflicts in favor of the  
16 prosecution, and must defer to that resolution.” McDaniel, 558 U.S. at 133.

17 **b. Analysis of Claim O**

18 Petitioner alleges the evidence presented was insufficient to prove that he acted with  
19 deliberation and premeditation. (ECF No. 113 at 134); Anderson, 70 Cal. 2d at 26-27. He re-argues  
20 his voluntary manslaughter theory, namely, that the Huffstuttler shooting resulted from a sudden  
21 argument with Petitioner (ECF No. 113 at 135:1-4) caused by Huffstuttler bringing Mincy and  
22 Wilson to the cabin and showing them the marijuana field (RT at 1729-42, 1755, 1764-65).  
23 Petitioner goes on to assert that he then immediately shot Mincy and Wilson (RT at 1741), not  
24 because he planned to, but by reacting on impulse to a perceived threat from Huffstuttler and because  
25 they were uninvited intruders. (ECF No. 113 at 135:13-17.)

26 Petitioner points out that Wilson initially told authorities he heard a scuffle before shots were  
27 fired (RT at 1809-10), though by the time of trial he was unable to remember a scuffle. (RT at 1770.)  
28 Petitioner also points out that the prosecution expert identified dust on Huffstuttler’s clothing which

1 Petitioner contends is consistent with a struggle having occurred prior to the gunshots. (RT at 2071.)

2 Petitioner contends that this claim was not adjudicated by the state court because that court  
3 did not address the constitutional issues presented. (ECF No. 135 at 135:24-25.) This Court  
4 disagrees for the reasons that follow.

5 The California Supreme Court considered and rejected these allegations on direct appeal,  
6 noting that:

7 Defendant contends the evidence of first degree murder was insufficient to establish a  
8 preconceived design or careful thought or reflection. [Citation] In particular, he argues  
9 that he could not have formed the requisite state of mind because the unexpected arrival  
of Mincy and Wilson immediately precipitated both the argument with Huffstuttler  
about the strangers' observations of the marijuana plants and the shootings.

10 In assessing the sufficiency of the evidence, we review the entire record in the light most  
11 favorable to the judgment to determine whether it discloses evidence that is reasonable,  
12 credible, and of solid value such that a reasonable trier of fact could find the defendant  
13 guilty beyond a reasonable doubt. [Citations] Reversal on this ground is unwarranted  
14 unless it appears "that upon no hypothesis whatever is there sufficient substantial  
15 evidence to support [the conviction]." [Citation] In People v. Anderson, *supra*, 70 Cal.  
16 2d at pages 26-27, we identified three categories of evidence relevant to resolving the  
17 issue of premeditation and deliberation: planning activity, motive, and manner of killing.  
18 However, as later explained in People v. Pride (1992) 3 Cal. 4th 195, 247: "Anderson  
19 does not require that these factors be present in some special combination or that they be  
accorded a particular weight, nor is the list exhaustive. Anderson was simply intended to  
guide an appellate court's assessment whether the evidence supports an inference that  
the killing occurred as the result of preexisting reflection rather than unconsidered or  
rash impulse. [Citation]" Thus, while premeditation and deliberation must result from "  
'careful thought and weighing of considerations' " (70 Cal. 2d at p. 27), we continue to  
apply the principle that "[t]he process of premeditation and deliberation does not require  
any extended period of time. 'The true test is not the duration of time as much as it is the  
extent of the reflection. Thoughts may follow each other with great rapidity and cold,  
calculated judgment may be arrived at quickly ....' [Citations]"

20 Defendant correctly notes the killings took place within a few minutes of the victims'  
21 arrival at his cabin. What occurred within those few minutes, however, is particularly  
22 telling with respect to his state of mind. According to both Wilson and Eloy Ramirez,  
23 defendant began arguing with Huffstuttler when Mincy and Wilson were shown the  
marijuana plants. Defendant continued berating Huffstuttler as the two walked back  
24 toward the cabin. Defendant went inside, retrieved a revolver, and shot Huffstuttler at  
close range. He proceeded back across the creek and confronted Wilson and Mincy.  
25 After apologizing that he had "nothing against" them, he opened fire. As a wounded  
Wilson fled the scene, he heard Mincy plead for his life. More shots were fired.  
26 Defendant returned to Huffstuttler and fired several rifle rounds into his motionless  
body. The autopsy report indicated at least three shots were inflicted before he died,  
27 although according to Ramirez he did not move after the first shot. After the shootings,  
defendant told Ramirez he was going to make the scene look like a bad dope deal had  
occurred and scattered marijuana, broke bottles, and poured chili sauce around  
Huffstuttler's body. None of the victims were armed; nor did they engage in any  
provocative conduct.

28 From this evidence, a reasonable trier of fact could infer defendant had a motive for the

1 killings, both to punish Huffstuttler for revealing the marijuana operation to strangers  
2 and to protect his crop from theft or exposure to law enforcement. He also may have  
3 wanted to eliminate Mincy and Wilson as witnesses to the Huffstuttler shooting. In  
4 conjunction with these possible motives, the manner of killing supports a finding of  
5 premeditation and deliberation. Both victims died of multiple gunshot wounds, several  
6 of which would have been fatal individually. While defendant fired some shots at Mincy  
7 as he was attempting to flee, at least one shot entered his body as he lay in a fetal  
8 position. This forensic evidence indicates defendant did not want merely to wound either  
9 victim; he wanted to make certain they died. The trial testimony also suggests rapid but  
10 purposeful planning activity once defendant realized the potential consequences of his  
11 partner's carelessness. While chastising Huffstuttler, he walked back to the cabin where  
12 he got a gun. Rather than seek a reconciliation, he shot Huffstuttler without warning. He  
13 then shot Mincy and Wilson and made good his escape after attempting to conceal his  
14 own involvement in the crimes. Viewing the record in its entirety, we find sufficient  
15 evidence to support the jury's finding of first degree murder. [Citation] Defendant's  
16 argument simply asks this court to reweigh the facts.

17 Bolin, 18 Cal. 4th at 331-33. Petitioner argues the facts demonstrate that he had insufficient time to  
18 plan the killings, and that he had no prior relationship with any of the victims that would suggest a  
19 motive for the killings. (ECF No. 178 at 177:14-178:5, citing the Anderson factors.) The Court  
20 disagrees for the reasons stated by the California Supreme Court. The trial record suggests Petitioner  
21 was motivated to kill Huffstuttler for bringing strangers to the marijuana field, followed by some  
22 amount of time to retrieve a gun, return and take Huffstuttler down to the ground with a single shot.  
23 Petitioner then pursued Mincy, apologized for what he was about to do, and shot him dead while  
24 Mincy begged to live. Petitioner's conduct after the shootings could reasonably inform the manner in  
25 which he killed his victims. See People v. Perez, 2 Cal.4th 1117, 1128 (1992). Petitioner searched  
26 for Wilson after he escaped wounded into to the forest; when he could not find him, Petitioner  
27 commented to Ramirez that Wilson would bleed to death before he got off the hill. (RT at 1928-29.)  
28 Apparently to ensure this, Petitioner disabled Wilson's truck, removing wires and discarding them  
during his flight to Los Angeles. (RT at 1738, 1863-64, 1929, 1957, 1959, 1961, 1975.) Petitioner  
altered the crime scene and then fled. All these facts reasonably suggest Petitioner was motivated to,  
planned to and purposefully obtained a gun and shot Huffstuttler and Mincy in order to kill them.  
These facts do not suggest the victims threatened to physically harm Petitioner.

A rational trier of fact could have found the essential elements of the crime beyond a  
reasonable doubt based on the noted evidence in the record. The state supreme court's denial of these  
claims was not contrary to, or an unreasonable application of, clearly established federal law, or based

1 on an unreasonable determination of the facts in light of the evidence presented in the state court  
2 proceeding. See 28 U.S.C. § 2254(d).

3 For the stated reasons, the California Supreme Court reasonably rejected Petitioner's  
4 constitutional challenge to the sufficiency of the evidence. See 28 U.S.C. § 2254(d).

5 Claim O is denied.

6 **8. Review of Claim P**

7 Petitioner next claims instructional error, in 10 subclaims, which he alleges individually,  
8 cumulatively, and in combination with defense counsel's deficient guilt phase closing argument (see  
9 claim I17, *ante*), confused the elements of first degree murder, second degree murder, and voluntary  
10 manslaughter, and denied him due process and a fair jury trial. (ECF No. 113 at 136-52.) Each  
11 subclaim is discussed separately below.

12 **a. Clearly Established Law**

13 Initially, the Court notes that any error in the state court's determination of whether state law  
14 supported an instruction in this case cannot form the basis for federal habeas relief. Estelle, 502 U.S.  
15 at 71 (1991) (citing Marshall v. Lonberger, 459 U.S. 422, 438 n.6 (1983)) (“[T]he Due Process  
16 Clause does not permit the federal courts to engage in a finely tuned review of the wisdom of state  
17 evidentiary rules”). “Failure to give [a jury] instruction which might be proper as a matter of state  
18 law, by itself, does not merit federal habeas relief.” Menendez v. Terhune, 422 F.3d 1012, 1029 (9th  
19 Cir. 2005) (quoting Miller v. Stagner, 757 F.2d 988, 993 (9th Cir. 1985)).

20 The Supreme Court has stated instead that a claim that a court violated a petitioner's due  
21 process rights by omitting an instruction requires a showing that the error “so infected the entire trial  
22 that the resulting conviction violate[d] due process.” Henderson v. Kibbe, 431 U.S. 145, 154 (1977)  
23 (quoting Cupp, 414 U.S. at 147). The burden on Petitioner is especially heavy “where . . . the alleged  
24 error involves the failure to give an instruction.” Clark v. Brown, 450 F.3d 898, 904 (9th Cir. 2006).

25 Even if constitutional instructional error has occurred, the federal court must still determine  
26 whether Petitioner suffered actual prejudice, that is, whether the error “had substantial and injurious  
27 effect or influence in determining the jury's verdict.” Brecht, 507 U.S. at 637. A “substantial and  
28 injurious effect” means a “reasonable probability” that the jury would have arrived at a different

1 verdict had the instruction been given. Clark, 450 F.3d at 916.

2 **b. Review of Claim P1**

3 Petitioner alleges that the trial court’s failure to instruct with CALJIC No. 3.31 allowed the  
4 jury to convict him of two counts of premeditated first-degree murder without finding a joint  
5 concurrence of an act and specific intent. (ECF No. 113 at 136-39; ECF No. 178 at 215.)

6 Petitioner raised this claim in his petition for writ of habeas corpus filed in the California  
7 Supreme Court. The California Supreme Court found that Petitioner’s claim was procedurally barred  
8 because it could have been, but was not, raised on direct appeal. (CSC Order Den. Pet. Habeas  
9 Corpus [citing In re Harris, 5 Cal. 4th at 825 n.3 and In re Dixon, 41 Cal. 2d at 759].) The California  
10 Supreme Court also summarily denied the claim on the merits without explanation. (CSC Order Den.  
11 Pet. Habeas Corpus.)

12 Petitioner argues the trial court had a *sua sponte* duty to instruct on concurrent act and intent  
13 where specific intent crimes, such as murder, were charged. (ECF No. 113 at 137:8-10); see People  
14 v. Alvarez, 14 Cal. 4th 155, 220 (1996). He claims the trial court should have given CALJIC 3.31,  
15 which requires that for murder there be a concurrence of act and intent, and states in pertinent part:

16 In the crime(s) and allegation(s) charged in Counts [ ] of the information, and [or] which  
17 [is a] [are] lesser crime[s] thereto), [namely \_\_\_\_], there must exist a union or joint  
18 operation of act or conduct and a certain specific intent in the mind of the perpetrator.  
19 Unless such specific intent exists the [crime(s)] [or] [allegation(s)] to which it relates [is  
20 not committed] [or] [is not true]. [The specific intent required is included in the  
21 definition[s] of the [crime[s]] [or] [allegation[s]] set forth elsewhere in these  
22 instructions.]

23 Petitioner claims that, instead, the trial court gave CALJIC 3.31.5, which is to be read for  
24 crimes in which a specific mental state is an element of the crime, as follows:

25 In each of the crimes charged in Counts one and two and in the lesser included crimes of  
26 2nd degree murder and voluntary manslaughter there must exist a certain mental state in  
27 the mind of the perpetrator and unless that mental state exists the crime to which it  
28 relates is not committed . . . .

(RT at 2195-96.) He claims instruction 3.31.5 does not require concurrent act and intent and because of  
that is intended to be read in addition to instruction 3.31 where the charged crime involves act and  
intent. (ECF No. 113 at 137:19-24.) Petitioner claims that, because of this error, the jury was never  
instructed that intent to kill had to be concurrent with the act of shooting the victims. As a result, he

1 claims, the jury may have believed it could find the requisite mental states from actions that occurred  
2 after the crimes. (ECF No. 113 at 139:1-4.)

3 Petitioner also argues that the government failed to carry its burden of showing this instructional  
4 error was harmless beyond a reasonable doubt, Chapman, 386 U.S. at 23, and denied him due process,  
5 a fair trial, and a reliable adjudication of the charges under Brecht, violating the Fifth, Sixth, Eighth and  
6 Fourteenth Amendments. In re Winship, 397 U.S. 358, 364 (1970) (“[T]he Due Process Clause  
7 protects the accused against conviction except upon proof beyond a reasonable doubt of every fact  
8 necessary to constitute the crime with which he is charged.”).

9 Respondent concedes the trial court did not instruct with CALJIC No. 3.31 (which explains  
10 the requirement of a joint concurrence of intent and act) in relation to counts I and II, but argues that  
11 other instructions substantially covered the same principle. (ECF No. 194 at 209:1-3.)

12 The California Supreme Court, on direct appeal, considered claimed instructional error for  
13 CALJIC 3.31.5, 8.30, 8.40 and 8.43, regarding mental state for lesser included offenses, and found  
14 the instructions correctly stated the law and were not likely to confuse the jury when considered in  
15 context and in relation to each other. Bolin, 18 Cal. 4th at 328-29.

16 The Court finds this claim to be unpersuasive. The record reflects that the trial court  
17 instructed the jury on the essential elements of murder (RT at 2197; CT at 458-59; CALJIC No.  
18 8.10), on the intent required for first degree murder under the theory of willful, deliberate, and  
19 premeditated killing (RT at 2198; CT at 463; CALJIC No. 8.20), and on the sufficiency of  
20 circumstantial evidence to prove specific intent or mental state (RT at 2196-97; CT at 472; CALJIC  
21 No. 2.02).

22 Furthermore, the trial court instructed that jury with CALJIC No. 3.31.5 as follows:

23 In each of the crimes charged in Counts 1 and 2 and in the lesser included crimes of  
24 second-degree murder and voluntary manslaughter as to counts 1 and 2, there must exist  
25 a certain mental state in the mind of the perpetrator, and unless that mental state exists,  
the crime to which it relates is not committed.

26 The mental state required or the mental states required are included in the definition of  
27 the crimes charged, which I will read to you later. *The specific intent or mental state*  
28 *with which an act is done may be shown by the circumstances surrounding the*  
*commission of that particular act, but you may not find the defendant guilty of the*  
*offenses charged in Counts 1, 2, and 3 [ . . . ] unless the proved circumstances which are*  
*not only, first of all, consistent with the theory that the defendant had the required*  
*specific intent or mental state but, secondly, cannot be reconciled with any other*



1           *rational conclusion.*

2 (RT at 2195-96, emphasis added.)

3           The trial court also instructed the jury with CALJIC No. 8.20 (ECF No. 113 at 139:12-19),  
4 stating that:

5           All murder which is perpetrated by any kind of willful, deliberate and premeditated  
6 killing with express malice aforethought is murder of the first degree. [¶] The word  
7 “willful,” as used in this instruction, means intentional. [¶]

8           The word “deliberate” means formed or arrived at or determined upon as a result of  
9 careful thought and weighing of considerations for and against the proposed course of  
10 action. The word “premeditated” means considered beforehand. [¶]

11           The significance of an omitted instruction is evaluated by a comparison of the omitted  
12 instruction with the instructions that were given. Murtishaw, 255 F.3d at 971 (citing Henderson, 431  
13 U.S. at 156).

14           Here, the instructions given, in particular CALJIC Nos. 3.31.5 and 8.20 (see also claim P2, *post*)  
15 expressed to the jury that the killing must be committed with the requisite mental state, i.e.,  
16 intentionally, willfully and with premeditation, in order to be first degree murder. The noted  
17 instructions given specifically referenced the “specific intent or mental state with which an act is done.”  
18 (RT at 2196.) The jury would have understood that there must be joint union of such intent and the act  
19 of murder in order to find Petitioner guilty of first degree murder. The jury would not reasonably have  
20 understood this instruction to consider only Petitioner’s mental state formed after the killings. See e.g.,  
21 Alvarez, 14 Cal. 4th at 219-20 (holding that the omission of CALJIC No. 3.31 with regard to the  
22 charge of murder did not require reversal because the murder instructions “substantially covered” the  
23 concept of concurrence of act and specific intent); People v. Rodrigues, 8 Cal. 4th 1060, 1142-43  
24 (1994) (holding that the court’s instructions as a whole properly guided the jury’s consideration of the  
25 evidence because CALJIC No. 8.20 “adequately expressed the need for joint operation of act and intent  
26 on that theory”) (citing People v. Kozel, 133 Cal. App. 3d 507, 522 (1982)); see also People v.  
Benjamin, 52 Cal. App. 3d 63, 84-85 (1975).

27           The state supreme court could reasonably have found that the noted instructions given  
28 adequately express the requirement for a joint concurrence of requisite intent and act with regard to first



1 degree murder.

2 Petitioner may believe that CALJIC No. 3.31 would have communicated the relevant  
3 principle to the jury better. However, “[t]he availability of a better instruction is not a ground for  
4 reversal” under federal law. United States v. Ward, 914 F.2d 1340, 1344 (9th Cir. 1990).

5 Additionally, to the extent that Petitioner complains of a state law violation, this Court must  
6 defer to the ruling by the California Supreme Court. Therefore, the issue before this Court is whether  
7 any violation of state law occurred that rose to the level of a deprivation of a right guaranteed by the  
8 federal Constitution. For the reasons stated, it did not.

9 It follows that the California Supreme Court’s rejection of the claim was not contrary to, or an  
10 unreasonable application of, clearly established federal law, nor based on an unreasonable  
11 determination of the facts in light of the evidence presented in the state court proceeding. See 28  
12 U.S.C. § 2254(d).

13 Claim P1 is denied.

14 **c. Review of Claim P2**

15 In this next claim, Petitioner alleges that the trial court prejudicially misspoke when  
16 instructing the jury on the definition of first degree murder. (ECF No. 113 at 139-40.)

17 Petitioner raised this same claim in his petition for writ of habeas corpus in the California  
18 Supreme Court. (CSC Pet. Habeas Corpus at 206-08.) The California Supreme Court ruled that  
19 Petitioner’s claim was procedurally barred because this claim could have been, but was not, raised on  
20 direct appeal. (CSC Order Den. Pet. Habeas Corpus [citing In re Harris, 5 Cal. 4th at 825 n.3 and In  
21 re Dixon, 41 Cal. 2d at 759].) That court also summarily denied the claim on the merits without  
22 explanation. (CSC Order Den. Pet. Habeas Corpus.)

23 Petitioner contends that the trial court read the word “reflex” instead of the word “reflection,”  
24 when instructing with CALJIC No. 8.20 (ECF No. 113 at 139:12-19), specifically as follows:

25 All murder which is perpetrated by any kind of willful, deliberate and premeditated  
26 killing with express malice aforethought is murder of the first degree. [¶] The word  
“willful,” as used in this instruction, means intentional. [¶]

27 The word “deliberate” means formed or arrived at or determined upon as a result of  
28 careful thought and weighing of considerations for and against the proposed course of  
action. The word “premeditated” means considered beforehand. [¶]

1 If you find that the killing was preceded and accompanied by a clear, deliberate intent on  
2 the part of the defendant to kill, which was the result of deliberation and premeditation,  
3 so that it must have been formed upon pre-existing reflex and not under a sudden heat of  
4 passion or other condition precluding the idea of deliberation, it is murder of the first  
5 degree. [¶]

6 The law does not undertake to measure in units of time the length of the period during  
7 which the thought must be pondered before it can ripen into an intent to kill which is  
8 truly deliberate and premeditated. The time will vary with different individuals and  
9 under varying circumstances.

10 The true test is not the duration of time, but rather the extent of the reflection. A cold,  
11 calculated judgment and decision may be arrived at in a short period of time, but a mere  
12 unconsidered and rash impulse, even though it includes an intent to kill, is not  
13 deliberation and premeditation as will fix an unlawful killing as murder of the first  
14 degree. [¶] To constitute a deliberate and premeditated killing, the slayer must weigh  
15 and consider the question of killing and the reasons for and against such a choice and,  
16 having in mind the consequences, he decides to and does kill.

17 (RT at 2198-2200.) Petitioner argues this error prejudiced his defense. He claims the jury could have  
18 convicted him of first degree murder even though he may have acted without malice aforethought.  
19 He contends this instructional error was prejudicially erroneous not merely ambiguous, Boyde, 494  
20 U.S. at 378-80, and had a substantial and injurious effect or influence in determining the jury's  
21 verdict. Brecht, 507 U.S. at 637.

22 Respondent concedes that the Reporter's Transcript indicates the trial court misspoke by  
23 stating the word "reflex," instead of "reflection," when reading CALJIC No. 8.20 to the jury. (ECF  
24 No. 194 at 213:19-21; RT at 2198-2200.)

25 The Court finds this claim unavailing. The record reflects that the trial court also provided the  
26 jury the instructions in written form, which correctly used the word "reflection" rather than "reflex."  
27 (CT at 412, 463.) Furthermore, the jury was instructed that "deliberate" means "formed or arrived at  
28 or determined upon as a result of careful thought and weighing of considerations for and against the  
proposed course of action," and that premeditated means "considered beforehand." (RT at 2198.)

Properly considering the jury instructions as a whole, the trial court's misstatement was  
unlikely to mislead the jury into believing, as Petitioner suggests, that they could convict him of  
premeditated murder based on a "reflexive" urge to kill (ECF No. 178 at 187). See United States v.  
Marin-Cuevas, 147 F.3d 889, 893 (9th Cir. 1998) (considering whether the jury instructions "*taken as*  
*a whole* were misleading or represented a statement inadequate to guide the jury's deliberations"

1 (quoting Stoker v. United States, 587 F.2d 438, 440 (9th Cir. 1978)) (emphasis in original).

2 In light of the definitions provided to the jury and the instruction as a whole, the California  
3 Supreme Court reasonably could have found that no reasonable juror would give the instructions the  
4 meaning that Petitioner proposes, rather than the obvious meaning stated in the written form. People  
5 v. Crittenden, 9 Cal. 4th 83, 138 (1994) (inadvertent misreading of instruction not error where no  
6 reasonable juror would have given the instruction the meaning asserted by defendant). It is not  
7 reasonably likely that the jury would have misunderstood the instruction in this context. See Boyde,  
8 494 U.S. at 380; United States v. Ancheta, 38 F.3d 1114, 1117 (9th Cir. 1994) (misreading of a single  
9 phrase in the conspiracy instruction not plain error where corrected in the written instructions  
10 provided to the jury).

11 Petitioner's argument that the Ninth Circuit requires precedence be given to the oral  
12 instructions, citing People of Territory of Guam v. Marquez, 963 F.2d 1311, 1314-15 (9th Cir. 1992),  
13 is likewise misplaced. Marquez stands for the proposition that "all jury instructions must be read  
14 aloud to the jury in the presence of counsel and the defendant." 963 F.2d at 1314-15. The trial court  
15 in Marquez failed entirely to instruct the jury orally on any elements of the crimes charged and the  
16 definitions of the terms used in a description of the charges, providing only written instructions, such  
17 that the reviewing court could not tell from the record whether each juror was aware of the elements.  
18 Id. at 1315-16. The Marquez court found the refusal of the trial court to read the elements of the  
19 alleged offense to be structural error that precluded harmless error analysis. Id.

20 Here, the trial court did not refuse to read the elements of the charged offense, but rather non-  
21 prejudicially misspoke in doing so. Nor is Marquez clearly established law of the Supreme Court.  
22 Casey, 386 F.3d at 907. Petitioner's cited California v. Roy, 519 U.S. 2, 7 (1996), wherein that court  
23 applied harmless error analysis in reviewing instructional error omitting the intent element from the  
24 definition of the crime, is not authority that the error in this case was structural, or more than  
25 harmless.

26 The California Supreme Court's rejection of this claim was not contrary to, or an  
27 unreasonable application of United States Supreme Court law, or based upon an unreasonable  
28 determination of the facts.

1 For the reasons stated, claim P2 is denied.

2 **d. Review of Claim P3**

3 In this claim, Petitioner alleges that the trial court prejudicially misspoke when instructing the  
4 jury on the premeditation element of attempted murder (ECF No. 113 at 140-42), denying him due  
5 process and a fair jury trial, in violation of his rights under the Fifth, Sixth, and Fourteenth  
6 Amendments.

7 Petitioner raised this claim in his petition for writ of habeas corpus in the California Supreme  
8 Court. The California Supreme Court ruled that Petitioner's claim was procedurally barred because  
9 this claim could have been, but was not, raised on direct appeal. (CSC Order Den. Pet. Habeas  
10 Corpus [citing In re Harris, 5 Cal. 4th at 825 n.3 and In re Dixon, 41 Cal. 2d at 759].) The California  
11 Supreme Court also summarily rejected Petitioner's claim on the merits without explanation. (CSC  
12 Order Den. Pet. Habeas Corpus.)

13 Petitioner alleges that the trial court read the word "events" in place of the word "reflection,"  
14 when instructing with CALJIC No. 8.67. (ECF No. 141:1-4.) Specifically, the trial court instructed  
15 the jury as follows:

16 It is also alleged in Count 3 that the crime attempted was willful, deliberate, and  
17 premeditated murder. If you find the defendant guilty of attempted murder, you must  
18 determine whether this allegation is true or not true. [¶] "Willful" means intentional."  
19 "Deliberate" means formed or arrived at or determined upon as a result of careful thought  
20 and weighing of considerations for and against the proposed course of action.  
21 "Premeditated" means considered beforehand. [¶] If you find that the attempted murder  
22 was preceded and accompanied by a clear, deliberate intent to kill, which was the result  
23 of deliberation and premeditation, so that it must have been formed upon pre-existing  
24 reflection and not under a sudden heat of passion or other condition precluding the idea  
25 of deliberation, it is attempt to commit willful, deliberate, and premeditated murder. [¶]

26 The law does not undertake to measure in units of time the length of the period during  
27 which the thought must be pondered before it can ripen into an intent to kill which is  
28 truly deliberate and premeditated. The time will vary with different individuals and  
under varying circumstances. [¶] The true test is not the duration of time, but rather the  
extent of the **events**. A cold, calculated judgment and decision may be arrived at in a  
short period of time, but a mere unconsidered and rash impulse, even though it includes  
an intent to kill, is not deliberation and premeditation. [¶] To constitute willful,  
deliberate, and premeditated attempted murder, the would-be slayer must weigh and  
consider the question of killing and the reasons for and against such a choice and, having  
in mind the consequences, decides to kill and makes a direct but ineffectual act to kill  
another human being. [¶] The People have the burden of proving the truth of this

1 allegation. If you have a reasonable doubt that it is true, you must find it to be not true.

2 (RT at 2208-10) (emphasis added.)

3 Petitioner alleges that this error “instructed the jury to rely on the extent of Petitioner’s actions  
4 or other events prior to the shootings, rather than the extent of any thought taken before [the  
5 shootings],” precluding the jury from considering the requirement for deliberation. (ECF No. 113 at  
6 141:5-8); see Roy, 519 U.S. at 7 ([prejudicial instructional error mis-describing element violates  
7 constitution).

8 Petitioner alleges this instruction was not provided to the jury in writing, (ECF No. 178 at  
9 181:6-17; CT 412-30), and that in any event the incorrect oral instruction must be given precedence.  
10 Marquez, 963 F.2d at 1314-15.

11 Petitioner alleges this instruction was prejudicially erroneous, Boyde, 494 U.S. at 378-80, was  
12 not harmless beyond a reasonable doubt, id., and had a substantial and injurious effect or influence in  
13 determining the jury’s verdict. Brecht, 507 U.S. at 637.

14 Respondent does not dispute that the trial court read the word “events” in place of the word  
15 “reflection,” when reading CALJIC No. 8.67. (RT at 2209.) However, Respondent contends, and the  
16 record demonstrates that the trial court also provided the jury the instructions in written form, which  
17 correctly used the word “reflection,” rather than “events.” (CT at 412, 486.) Moreover, it appears that  
18 the jury was properly instructed that the crime of attempted murder must be committed with the  
19 requisite mental state, i.e., willfully, deliberately and with premeditation. (CALJIC No. 8.67; RT at  
20 2208-10.) Specifically, the instruction given provided that, in order to find Petitioner guilty of the  
21 crime, the jury must find “that the attempted murder was preceded and accompanied by a clear,  
22 deliberate intent to kill, which was the result of deliberation and premeditation, so that it must have  
23 been formed upon pre-existing reflection and not under a sudden heat of passion or other condition  
24 precluding the idea of deliberation[.]” (RT at 2209.)

25 The state supreme court, viewing the jury instructions as a whole, could have found no  
26 reasonable likelihood that the jury’s finding of willful, deliberate and premeditated attempted murder  
27 was based on “the events” surrounding the shooting of Mr. Wilson, rather than the extent of  
28 Petitioner’s reflection. This is because the instructions given, viewed in toto, appear to clearly

1 require that the jury find Petitioner committed the act with this state of mind in order to find the  
2 special allegation true. See Marin-Cuevas, 147 F.3d at 893 (stating the test for error is whether the  
3 jury instructions “taken as a whole were misleading or represented a statement inadequate to guide  
4 the jury’s deliberations”). It is not reasonably likely that the jury would have misunderstood the  
5 instruction given the plain language of the instructional charge in its entirety. See Boyde, 494 U.S.  
6 at 380; see Ancheta, 38 F.3d at 1117 (misreading of a single phrase in the conspiracy instruction not  
7 plain error where corrected in the written instructions provided to the jury). Petitioner’s citation to  
8 Roy is not authority otherwise, for the reasons stated, *ante*.

9 As was the case above, Petitioner’s reliance upon Marquez in support of this claim is  
10 misplaced. The trial court in this action did not refuse to read the elements of the charged offense.

11 For the reasons stated, the California Supreme Court could reasonably conclude the jury was  
12 not misled by the attempted murder instructional error.

13 The California Supreme Court’s rejection of this claim was not contrary to, or an  
14 unreasonable application of, United States Supreme Court law, or based upon an unreasonable  
15 determination of the facts.

16 Claim P3 is denied.

17 e. **Review of Claim P4**

18 Petitioner alleges the trial court erred in giving duplicative, unnecessary and prejudicial  
19 instructions, partially over defense objection, regarding both consciousness of guilt by suppression of  
20 evidence (CALJIC 2.06) and flight from the crime scene (CALJIC 2.52). (ECF No. 113 at 142-44.)

21 Petitioner first raised this claim on direct appeal. The California Supreme Court found that  
22 Petitioner had forfeited his right to object to any claim relating to CALJIC No. 2.06 by failing to  
23 object below, and in fact agreeing that the evidence supported giving the instruction. Bolin, 18 Cal.  
24 4th at 326-27 (citing People v. Jackson, 13 Cal. 4th 1164, 1223 (1996)). The California Supreme  
25 Court also rejected the entire claim on the merits. Id.

26 Petitioner revisits allegations in claim I16 (ineffective assistance), alleging that the trial court  
27 erred by giving CALJIC 2.06 (regarding consideration of suppression of evidence against defendant  
28 as showing consciousness of guilt) and CALJIC 2.52 (regarding consideration of flight after

1 commission of a crime as showing consciousness of guilt). (RT at 2172-92; CT at 440, 450.)

2 Petitioner claims giving these instructions “effectively circumvented” the requirement that  
3 jurors find deliberation and premeditation, Penal Code § 189, by “providing duplicitous jury  
4 instructions which unduly emphasized noncriminal actions allegedly taken by [Petitioner] after the  
5 shootings as the basis for using consciousness of guilt in place of a finding of deliberation and  
6 premeditation.” (ECF No. 113 at 143:12-15.)

7 Petitioner claims these instructions may have drawn the jury’s attention from the  
8 premeditation and deliberation elements, denying him due process and a fair trial under the Brecht  
9 standard.

10 Petitioner also states that this claim was not adjudicated by the state court because that court  
11 did not address the constitutional issues. (ECF No. 135 at 144:8-9.) The Court disagrees, for the  
12 reasons stated below.

13 On direct appeal, the California Supreme Court considered whether the consciousness of guilt  
14 instructions prejudicially emphasized “noncriminal conduct occurring after the shootings” and  
15 concluded they did not, as follows:

16  
17 CALJIC Nos. 2.06 and 2.52 do not impermissibly emphasize noncriminal activity as  
18 “consciousness of guilt.” On the contrary, these instructions “made clear to the jury that  
19 certain types of deceptive or evasive behavior on a defendant’s part could indicate  
20 consciousness of guilt, while also clarifying that such activity was not of itself sufficient  
21 to prove a defendant’s guilt, and allowing the jury to determine the weight and  
22 significance assigned to such behavior. The cautionary nature of the instructions benefits  
23 the defense, admonishing the jury to circumspection regarding evidence that might  
24 otherwise be considered decisively inculpatory. [Citations] Moreover, section 1127(c)  
25 requires a flight instruction when the prosecution relies on such conduct as tending to  
26 show guilt.

27 As in past decisions, we find no merit in the contention the instructions improperly  
28 allow the jury to draw inferences about defendant’s state of mind and equate evidence of  
suppression or concealment with a confession. “A reasonable juror would understand  
‘consciousness of guilt’ to mean ‘consciousness of some wrongdoing’ rather than  
‘consciousness of having committed the specific offense charged.’ The instructions  
advise the jury to determine what significance, if any, should be given to evidence of  
consciousness of guilt, and caution that such evidence is not sufficient to establish guilt,  
thereby clearly implying that the evidence is not the equivalent of a confession and is to  
be evaluated with reason and common sense. The instructions do not address the  
defendant’s mental state at the time of the offense and do not direct or compel the  
drawing of impermissible inferences in regard thereto.” [Citation] For cognate reasons  
they do not violate the proscription of Griffin v. California (1965) 380 U.S. 609, 615,  
against referring to the defendant’s exercise of his Fifth Amendment right not to testify



1 as evidence of guilt. The instructions in no respect implicated defendant's failure to  
2 testify or directed the jury to draw negative inferences from it.

3 Bolin, 18 Cal. 4th at 326-27.

4 The Court finds this claim unpersuasive for the reasons stated above and those discussed in  
5 claim I16, *ante*. These instructions appear to unequivocally state that the conduct described therein is  
6 not sufficient to prove guilt, but instead that it "may be considered." The California Supreme Court  
7 could reasonably have found that these instructions did not improperly reduce the prosecution's burden  
8 of proof. See Allen, 442 U.S. at 167 (prosecution may rely on all the evidence in the record to meet the  
9 reasonable doubt standard where the state presumption is permissive rather than mandatory).

10 Furthermore, the California Supreme Court found these instructions appropriately supported by  
11 the trial record:

12 [S]ufficient evidence supported the instruction in light of Ramirez's testimony defendant  
13 attempted to make the murder scene "look like a bad dope deal" by breaking bottles,  
14 scattering loose marijuana, and shooting the body several more times with a rifle after  
15 the initial revolver shot. Defendant wiped his fingerprints off the handgun, put the  
16 weapon in Huffstuttler's hand, placed a knife near the body, and poured chili sauce  
17 around it. He then fled south before leaving the state for Chicago. Along the way he  
18 threw away some wires he had taken to disable Wilson's truck.

19 Bolin, 18 Cal. 4th at 327. This Court finds no basis to depart from these factual determinations, which  
20 are to be "presumed correct absent clear and convincing evidence to the contrary." Miller-El, 537 U.S.  
21 at 340; 28 U.S.C. § 2254 (e)(1). The crime was remote and secluded. (RT at 1731, 1760-61.)  
22 Petitioner told Huffstuttler, just prior to shooting him, that it was a "no-no" to bring people to see the  
23 marijuana plantation. (RT at 1739, 1922, 1950.) Petitioner also told Vance that he did not know Mincy  
24 and Wilson and could not understand Huffstuttler's reasons for bringing them to see the marijuana  
25 plants. (RT at 1739-40.) Immediately after shooting Huffstuttler, Petitioner approached Mincy and  
26 Wilson with a gun, told them that he had nothing against them, and then shot them. (RT at 1741.)

27 Accordingly, this Court finds that the California Supreme Court could reasonably conclude that  
28 sufficient evidence was presented to justify giving instructions regarding consciousness of guilt and  
flight.

The California Supreme Court's rejection of this claim was not contrary to or an unreasonable  
application of, United States Supreme Court law, or based upon an unreasonable determination of the

1 facts.

2 Claim P4 is denied.

3 **f. Review of Claim P5**

4 Petitioner's next claim alleges that the trial court erred by instructing the jury with CALJIC  
5 1.00 (Respective Duties of Judge and Jury), CALJIC 2.51 (Motive), and CALJIC 2.52 (Flight After  
6 Crime), which directed the jury to decide between "guilt and innocence," rather than between "guilty  
7 and not guilty." (ECF No. 113 at 144-45.) He claims this error lowered the prosecution's burden to  
8 prove guilt beyond a reasonable doubt, depriving Petitioner of his Fifth, Sixth, and Fourteenth  
9 Amendment rights to a jury trial, due process, and a reliable penalty determination. (Id.; ECF No.  
10 178 at 195-98.)

11 Petitioner raised this same claim in his petition for writ of habeas corpus in the California  
12 Supreme Court. The California Supreme Court ruled that Petitioner's claim was procedurally barred  
13 because this claim could have been, but was not raised on direct appeal. (CSC Order Den. Pet.  
14 Habeas Corpus [citing In re Harris, 5 Cal. 4th at 825 n.3 and In re Dixon, 41 Cal. 2d at 759].) The  
15 California Supreme Court also summarily rejected Petitioner's claim on the merits without  
16 explanation. (CSC Order Den. Pet. Habeas Corpus.)

17 Petitioner alleges that the jury's obligation is to find whether there is sufficient evidence to  
18 support a guilty verdict, and that use of an "innocence" standard impermissibly relieves the  
19 prosecution of the burden to prove guilt and places the burden on Petitioner to prove innocence.  
20 (ECF No. 113 at 144:24-25); Mullaney v. Wilbur, 421 U.S. 684, 704 (1975) (due process requires  
21 that prosecution prove beyond a reasonable doubt the absence of heat of passion when the issue is  
22 presented in a homicide case). Petitioner points to the trial court's reading of CALJIC Nos. 1.00,  
23 2.51, and 2.52 referring to "innocent" or "innocence", as follows:

24 CALJIC No. 1.00, discussing the respective duties of the judge and the jury, included, as  
25 given, in its final paragraph:

26 You must not be influenced by pity for a defendant or by prejudice against him. You  
27 must not be biased against the defendant because he was arrested for this offense,  
28 because he was charged with certain crimes, or because he was brought here to stand  
trial. None of these circumstances is evidence of his guilty [sic], and you must not infer  
or speculate from any or all of them that he is more likely to be guilty than innocent.

1 (RT at 2183.)

2 CALJIC No. 2.51, instructing on motive, as given, provided:

3 Motive is not an element of the crimes charged and it does not have to be shown.

4 However, you may consider motive or lack of motive as a circumstance in this case.  
5 Presence of motive may tend to establish guilt and absence of motive may tend to  
6 establish innocence. You will, therefore, give its presence or absence, as the case may  
7 be, the weight to which you find it to be entitled.

7 (RT at 2191.)

8 CALJIC No. 2.52, instructing on flight, as given, provided:

9 The flight of a person immediately after the commission of a crime or after being  
10 accused of a crime is not sufficient in itself to establish guilt, but it is a fact which, if  
11 proved, may be considered by you in light of all the other proved facts in deciding the  
12 question of his guilt or his innocence.

12 (RT at 2191-92.)

13 Petitioner contends it was not enough that subsequent instructions may have correctly stated  
14 the law because the jurors’ deliberative process had been “inescapably tainted” by the “notion that  
15 they had to find [Petitioner] innocent of the offenses to return a verdict of not guilty.” (ECF No. 113  
16 at 145:2-6.)

17 Petitioner contends that requiring the jury to decide between “guilty” and “innocence” had a  
18 substantial and injurious effect or influence on the jury’s determination of a verdict, Brecht, 507 U.S.  
19 at 637, denying him due process and a fair jury trial.

20 The Court is not persuaded by this claim. The record shows that the trial court instructed the  
21 jury with CALJIC No. 1.01, requiring that the jury consider the instructions as a whole. (RT at 2183-  
22 84.) A reasonable juror would have understood that any reference to guilt or innocence in these  
23 instructions was to be considered in light of CALJIC No. 2.90, instructing the jury that it must use the  
24 proof-beyond-a-reasonable-doubt standard in its determination of guilt. (RT at 2195.)

25 Also, as Respondent points out, the trial court also made several references to reasonable  
26 doubt. It did so when instructing on: (1) sufficiency of circumstantial evidence (CALJIC No. 2.01;  
27 RT at 2186-87), (2) reliance on the state of the evidence (CALJIC No. 2.61; RT at 2192), (3) murder  
28 and manslaughter distinguished (CALJIC No. 8.50; RT at 2204), (4) reasonable doubt as to whether a

1 murder was of the first or second degree (CALJIC No. 8.71; RT at 2205), (5) reasonable doubt as to  
2 whether killing was murder or manslaughter (CALJIC No. 8.72; RT at 2205), (6) special  
3 circumstances (CALJIC No. 8.80; RT at 2206), (7) willful, deliberate, and premeditated attempted  
4 murder (CALJIC No. 8.67; RT at 2210), (8) use of a firearm (CALJIC No. 17.19; RT at 2213), and  
5 (9) implied acquittal before conviction of a lesser included or lesser related offense (CALJIC No.  
6 17.10; RT at 2214). (See ECF No. 194 at 224.)

7 The Court finds that the California Supreme Court could reasonably have determined that  
8 CALJIC Nos. 1.00, 2.51, and 2.52, considered in conjunction with the entire set of instructions,  
9 including CALJIC No. 2.90, sufficiently made the jury was aware that it must apply the beyond-a-  
10 reasonable-doubt standard of proof. (See RT at 2183, 2191-92; CT at 432-33, 449-50.)

11 “Although the Constitution does not require jury instructions to contain any specific language,  
12 the instructions must convey both that a defendant is presumed innocent until proven guilty and that  
13 he may only be convicted upon a showing of proof beyond a reasonable doubt.” Gibson v. Ortiz, 387  
14 F.3d 812, 820 (9th Cir. 2004), overruled on other grounds by Byrd v. Lewis, 566 F.3d 855, 866 (9th  
15 Cir. 2009). “Any jury instruction that reduces the level of proof necessary for the Government to  
16 carry its burden is plainly inconsistent with the constitutionally rooted presumption of innocence.”  
17 Id. “Any challenged instruction must be considered in light of the full set of jury instructions and the  
18 trial record as a whole.” Id. at 821.

19 Here, for the reasons stated, the use of the noted instructions could not reasonably have  
20 resulted in the violation of any constitutional right.

21 The California Supreme Court’s rejection of this claim was not contrary to, or an  
22 unreasonable application of, United States Supreme Court law, or based upon an unreasonable  
23 determination of the facts.

24 Claim P5 is denied.

25 **g. Review of Claim P6**

26 In this claim Petitioner alleges that the trial court misread CALJIC 2.22, the instruction on  
27 weighing conflicting testimony. (ECF No. 113 at 145-47.)

28 Petitioner first raised this claim in his petition for writ of habeas corpus in the California

1 Supreme Court. The California Supreme Court ruled that Petitioner's claim was procedurally barred  
2 because this claim could have been, but was not, raised on direct appeal. (CSC Order Den. Pet.  
3 Habeas Corpus [citing In re Harris, 5 Cal. 4th at 825 n.3 and In re Dixon, 41 Cal. 2d at 759].) The  
4 California Supreme Court also summarily rejected Petitioner's claim on the merits without  
5 explanation. (CSC Order Den. Pet. Habeas Corpus.)

6 Petitioner alleges that the trial court prejudicially misspoke when instructing with CALJIC  
7 No. 2.22, regarding the weight to be given to conflicting testimony. The Reporter's Transcript  
8 indicates that the court instructed the jury with CALJIC No. 2.22, as follows:

9 Now, you are not bound to decide an issue of fact in accordance with the testimony of [~~a~~  
10 ~~number of~~] witnesses which does not convince you as against the testimony of a lesser  
11 number or some other evidence which appeals to your mind with more convincing force.  
12 [¶] You may not disregard the testimony of the greater number of witnesses merely from  
13 caprice or whim or prejudice or from a desire to favor one side as against the other. [¶]  
14 You must not decide an issue by the simple process of counting the number of witnesses  
15 who have testified on the opposing sides [**because**] [t]he final test is not in the relative  
16 [~~number of witnesses but in the~~] convincing force of the evidence.

17 (RT at 2190-91 [material omitted by the court is struck-through, bolded and bracketed; material  
18 added by the trial court is bolded and bracketed].)

19 Petitioner argues this instruction, as read, suggested jurors should not resolve conflicting  
20 testimony by focusing on the convincing force of evidence but rather on matters outside the  
21 evidentiary record, and allowed the jurors to disregard one witness's credible testimony in favor of  
22 testimony from two witnesses lacking in credibility, the opposite of what the instruction was intended  
23 to convey. He contends this was especially prejudicial given the pretrial publicity from the *America's*  
24 *Most Wanted* program and what he believes was the substantially conflicting testimony from the two  
25 eyewitnesses, Ramirez (who testified the shooting occurred outside the cabin and that Wilson and  
26 Mincy were on their way to the cabin) (RT at 1923, 1952), and Wilson (who testified he originally  
27 thought that the shooting occurred inside the cabin and that he was in the creek bed at the time). (RT  
28 at 1768-69.) He suggests a properly instructed jury would have found Wilson more credible. (ECF  
No. 113 at 147:8-11.) He claims the instructional error was prejudicial because Wilson's testimony  
supported Petitioner's "heat of passion" defense. (ECF No. 113 at 147:14-17.)

Petitioner also claims this instruction was not provided to the jury in writing. However, the

1 record reflects that the trial court provided the jury the instruction in written form. The copy of  
2 CALJIC No. 2.22 provided to the jury during deliberations was worded correctly and properly set  
3 forth the jury's duty in weighing conflicting testimony. (CT at 412, 447.)

4 The trial court also clearly instructed the jury that it must:

5 [D]ecide all of the questions of fact in this case from the evidence received in this trial  
6 and not from any other source. That means that you must not make any independent  
7 investigation of the fact or the law or consider or discuss facts as to which there is no  
8 evidence.

8 (RT at 2184-85.) The California Supreme Court, upon consideration of this instruction, could have  
9 determined there is no reasonable likelihood that the jury based its decision on sources outside of  
10 evidence presented at trial simply because the trial court omitted the phrase "number of" when  
11 instructing with CALJIC No. 2.22.

12 CALJIC No. 2.22, as read to the jury, plainly told the jury that it "is not bound to decide an  
13 issue of fact in accordance with the testimony of witnesses which does not convince you as against  
14 the testimony of a lesser number or some other evidence which appeals to your mind with more  
15 convincing force." (RT at 2190.) In light of this instruction, there is no reasonable likelihood that the  
16 jury would have disregarded the credible testimony of one witness in favor of the less-credible  
17 testimony of two other witnesses.

18 The Court also finds that, viewing the jury instructions as a whole, there is no reasonable  
19 likelihood that the jury would have been confused or misled into believing, as Petitioner suggests,  
20 that they could find him guilty of the premeditated attempted murder based on information presented  
21 outside of the trial, or by incorrectly weighing witness testimony. Given the instructions as a whole,  
22 a reasonable juror would give the instructions the obvious meaning stated in the written form.  
23 Crittenden, 9 Cal. 4th at 13; see also Marin-Cuevas, 147 F.3d at 893 (stating the test for error is  
24 whether the jury instructions "*taken as a whole* were misleading or represented a statement  
25 inadequate to guide the jury's deliberations" (emphasis in original)). It is not reasonably likely that  
26 the jury would have misunderstood the instruction in this context. As was the case above, the Court  
27 finds that Petitioner's cited case of Roy, 519 U.S. at 7, is not authority otherwise.

28 Additionally, any possible misunderstanding that could have resulted from the court's

1 misstatement was harmless because the written instructions given to the jury provided the correctly  
2 worded instruction. See Ancheta, 38 F.3d at 1117.

3 The California Supreme Court's rejection of this claim was not contrary to, or an  
4 unreasonable application of, United States Supreme Court law, or based upon an unreasonable  
5 determination of the facts.

6 Claim P6 is denied.

7 **h. Review of Claim P7**

8 Petitioner next alleges that the trial court misread the instruction on the special circumstance  
9 of multiple murder, CALJIC 8.80, denying Petitioner due process and reliable sentencing, violating  
10 the Sixth, Eighth and Fourteenth Amendments. (ECF No. 113 at 148-49.)

11 On direct appeal, Petitioner claimed that CALJIC No. 8.80 did not define "reasonable doubt."  
12 The California Supreme Court held that the trial court's instruction with CALJIC No. 8.80 correctly  
13 stated the law and that Petitioner waived the issue on appeal based on his defense counsel's failure to  
14 request clarification or amplification of the instruction. Bolin, 18 Cal. 4th at 327-28 (citing People v.  
15 Arias, 13 Cal. 4th 92, 171 (1996)); People v. Byrnes, 30 Cal. 206, 208 (1866)). The California  
16 Supreme Court also rejected Petitioner's claim on the merits. Id. at 328.

17 Petitioner raised that claim a second time in his petition for writ of habeas corpus in the  
18 California Supreme Court and added the allegations in this claim. The California Supreme Court  
19 ruled the habeas claim was procedurally barred because it could have been, but was not raised on  
20 direct appeal. (CSC Order Den. Pet. Habeas Corpus [citing In re Harris, 5 Cal. 4th at 825 n.3 and In  
21 re Dixon, 41 Cal. 2d at 759].) The California Supreme Court also summarily rejected the habeas  
22 claim on the merits without explanation. (CSC Order Den. Pet. Habeas Corpus.)

23 Petitioner argues that the trial court's reading of CALJIC No. 8.80 was incomprehensible, did  
24 not define "reasonable doubt," and did not inform the jurors that they must find the special  
25 circumstance to be true beyond a reasonable doubt by unanimous finding. (ECF No. 113 at 148:14-  
26 18.)

27 At the time of trial, CALJIC 8.80 read as follows:

28 If you have a reasonable doubt as to whether a special circumstance is true, you must



1 find it to be not true . . . In order to find a special circumstance alleged in the case to be  
2 true or untrue, you must agree unanimously.

3 CALJIC 8.80 (1989 Revision)

4 Petitioner claims the trial court read CALJIC 8.80 as follows:

5 If you have a reasonable doubt as to whether a special circumstance is true, you must  
6 find it to be **unreasonable**. In order to find the special circumstance alleged in the case  
7 to be true or untrue, **it has unanimously**.

8 (RT at 2206, emphasis added.)

9 Petitioner claims that the jury was not instructed that the special circumstance finding had to be  
10 beyond a reasonable doubt, Santosky v. Kramer, 455 U.S. 745, 755 (1982); In re Winship, 397 U.S.  
11 358, 361 (1970), and had to be unanimous, People v. Collins, 17 Cal. 3d 687, 693 (1976). He claims  
12 this resulted in structural error, Boyde, 490 U.S. at 380, and an unreliable death finding and death  
13 sentence. Ford v. Wainwright, 477 U.S. 399, 414 (1986). Petitioner also claims this instruction as not  
14 provided to the jury in writing. (CT at 412-30.)

15 Here, the record reflects that the trial court read the word “unreasonable,” instead of the phrase  
16 “not true,” when reading CALJIC No. 8.80, as follows:

17 Now, if you find the defendant in this case guilty of murder of the first degree, you must  
18 then determine if the following circumstance is true or not true. That special  
19 circumstance is multiple murder. The People have the burden of proving the truth of that  
special circumstance.

20 If you have a reasonable doubt as to whether or not a special circumstance is true, then  
21 you must find it to be **unreasonable**. In order to find the special circumstance alleged in  
22 this case to be true or untrue, it has to be unanimous. You will state your special finding  
as to whether the special circumstance is or is not true on the form that will be handed to  
you at the end of these instructions.

23 (RT at 2206-2207) (emphasis added); see also CSC Order dated 9/24/97.

24 The California Supreme Court rejected on direct appeal the allegation that the jury was not  
25 sufficiently instructed that it must find the special circumstance to be true beyond a reasonable doubt,  
26 and on the definition of reasonable doubt, stating that:

27 Shortly before giving the special circumstance instruction, the court had already charged  
28 the jury that the defendant is presumed innocent and that the prosecution has the burden  
of proving guilt beyond a reasonable doubt. It then delineated the applicable standard:

1 “Reasonable doubt is defined as follows: It is not a mere possible doubt because  
2 everything relating to human affairs and depending on moral evidence is open to some  
3 possible or imaginary doubt. It is that state of the case which after the entire comparison  
4 and consideration of all the evidence leaves the minds of the jurors in that condition that  
5 they cannot say they feel an abiding conviction to a moral certainty of the truth of the  
6 charge.”

7 It is well established in California that the correctness of jury instructions is to be  
8 determined from the entire charge of the court, not from a consideration of parts of an  
9 instruction or from a particular instruction. [T]he fact that the necessary elements of a  
10 jury charge are to be found in two instructions rather than in one instruction does not, in  
11 itself, make the charge prejudicial. The absence of an essential element in one  
12 instruction may be supplied by another or cured in light of the instructions as a whole.  
13 In [People v. Burgener, 41 Cal. 3d 505 (1986)], the court had not defined reasonable  
14 doubt in conjunction with the instruction on express malice but had given the definition  
15 elsewhere. Hence, the instruction was not defective. Given the entirety of the charge to  
16 the jury, it is clear that there is no reasonable possibility that the jury could have been  
17 misled as to the appropriate standard for their special finding on express malice. The  
18 instructions taken as a whole indicate that the prosecution’s burden of proof throughout  
19 was proof beyond a reasonable doubt. We reach a similar conclusion on this record.

20 Bolin, 18 Cal. 4th at 328.

21 On this basis, the California Supreme Court could reasonably have found any error was no more  
22 than harmless. See Neder v. United States, 527 U.S. 1, 8 (1999) (“most constitutional errors can be  
23 harmless”) (quoting Arizona v. Fulminante, 499 U.S. 279, 306 (1991)). Any error by failing to instruct  
24 the jury specifically that it must find the special circumstance unanimously true beyond a reasonable  
25 doubt appears similar to a jury instruction that omits an element of an offense, which is subject to  
26 harmless error analysis. See Neder, 527 U.S. at 10.

27 The jury was correctly instructed on reasonable doubt before the special circumstance  
28 instruction was given. Bolin, 18 Cal. 4th at 328. A reasonable juror would have understood from the  
trial judge’s instruction that the multiple murder special circumstance could not be found unless, based  
on the evidence presented at trial, all jurors unanimously believed the special circumstance was true  
beyond a reasonable doubt. (RT at 2206-2207.) The jurors were given the CALJIC No. 8.80 special  
circumstance form referred to by the judge in his instructions (id.) upon which to render its true or not  
true finding on the special circumstance. (See CT at 537.) Furthermore, the jury was polled following  
the penalty verdict and revealed that its decision was unanimous. (RT at 2620.) Given this record, it  
does not reasonably appear that the jury could have been misled as to the appropriate standards for  
finding the special circumstance to be true.

1           Additionally, the trial court did provide the jury with the correctly worded instruction in  
2 written form. (CT at 412, 481-82.) The trial court also read to the jury similar instructions regarding  
3 true or not true findings as to willful, deliberate, and premeditated attempted murder (CALJIC No.  
4 8.67; RT at 2210), and personal use of a firearm (CALJIC No. 17.19; RT at 2213).

5           Petitioner does not make an evidentiary showing of any trial court misstatement related to the  
6 unanimity requirement. (CT at 481; RT at 2206; CSC Order dated 9/24/97.) It appears that the  
7 California Supreme Court corrected the language “it has unanimously” by replacing it with “it has to  
8 be unanimous.” (See CSC Order dated September 24, 1997.)

9           The entire charge to the jury was clear that it had to make a true or not true finding, not an  
10 “unreasonable” finding, on the special circumstance. Cupp, 414 U.S. at 146-47. Furthermore, a true  
11 finding on the special circumstance of multiple murder followed from the jury’s verdicts of guilt on  
12 both of Petitioner’s first degree murder counts. (CT at 533, 535, 537.)

13           The California Supreme Court’s rejection of this claim was not contrary to, or an  
14 unreasonable application of, United States Supreme Court law, or based upon an unreasonable  
15 determination of the facts.

16           Claim P7 is denied.

17           **i. Review of Claim P8**

18           Petitioner next alleges that the trial court misread CALJIC 17.40, errantly instructing the jury  
19 to discuss the evidence with individuals other than their fellow jurors. (ECF No. 113 at 149-50.)

20           Petitioner first raised this claim in his petition for writ of habeas corpus in the California  
21 Supreme Court. The California Supreme Court ruled that Petitioner’s claim was procedurally barred  
22 because this claim could have been, but was not, raised on direct appeal. (CSC Order Den. Pet.  
23 Habeas Corpus [citing In re Harris, 5 Cal. 4th at 825 n.3 and In re Dixon, 41 Cal. 2d at 759].) The  
24 California Supreme Court also summarily rejected Petitioner’s claim on the merits without  
25 explanation. (CSC Order Den. Pet. Habeas Corpus.)

26           Petitioner alleges that the trial court’s misreading invited each juror to discuss the evidence,  
27 not with “the other jurors” but rather with “your colleagues.” (RT at 2216; CT at 506.)

28           At the time of trial, CALJIC 17.40, entitled “Individual Opinion Required – Duty to

1 Deliberate,” read as follows:

2 Each of you must decide the case for yourself, but should do so only after discussing the  
3 evidence and instructions with **the other jurors**.

4 CALJIC 17.40 (1989 Revision, emphasis added)

5 Petitioner claims the trial court read CALJIC 17.40 as follows:

6 Each of you must decide the case for yourself, but should do so only after discussing the  
7 evidence and instructions **with your colleagues**.

8 (RT at 2216, emphasis added.)

9 Petitioner argues that, because of this error, the jurors may not have based their verdict “solely  
10 on the evidence before them in a fair and unbiased manner” (ECF No. 113 at 150:3-4), denying him  
11 due process, violating the Fifth, Sixth and Fourteenth Amendments. He claims the error had a  
12 substantial and injurious effect or influence in determining the jury’s verdict. Brecht, 507 U.S. at 637.

13 This claim fails. When considered in context, it is clear that the jurors’ “colleagues” were  
14 limited to the other jurors. The instruction itself provided that each of them had to decide the case for  
15 themselves after discussing the evidence and instructions. (RT at 2216.) Because individuals other  
16 than jurors were not present for all of the evidence and instructions, the jurors would not have  
17 understood the court to be instructing them to discuss the case outside of the jury room.

18 Additionally, as Respondent notes, other instructions clarified that the jury alone was able to  
19 render a verdict. The jury was instructed:

20 You must decide all questions of fact in this case from the evidence received in this trial  
21 and not from any other source. [¶] You must not make any independent investigation of  
22 the facts or the law or consider or discuss facts as to which there is no evidence. This  
23 means, for example, that you must not on your own visit the scene, conduct experiments,  
24 or consult reference works or persons for additional information. [¶] You must not  
discuss this case with any other person except a fellow juror, and you must not discuss  
the case with a fellow juror until the case is submitted to you for your decision and only  
when all jurors are present in the jury room.

25 (ECF No. 194 at 234:2-6; see CT at 436; RT at 2184-85, 2215-17; CALJIC No. 1.03.) Furthermore, at  
26 the end of the jury instructions, the court swore the bailiff using these words:

27 You do solemnly swear that you will take charge of this jury and take them to some  
28 private and convenient place where they may deliberate upon a verdict, and suffer no  
person or persons to communicate with them, nor do so yourself except to ask them if

1 they have agreed upon a verdict, or by order of the Court, and you will return them to  
2 this courtroom when they have agreed upon a verdict or by order of the Court, so help  
you God?

3 (RT at 2218-19.)

4 To the extent Petitioner also claims that the correction version of CALJIC 17.40 was not  
5 provided to the jury in writing, the record suggests otherwise. (CT at 412, 506.) But in any event, the  
6 claim fails because, for the reasons stated above, it was clear from the entire charge to the jury that it  
7 was not to speak with anyone other than fellow jurors during the deliberations. Cupp, 414 U.S. at 146-  
8 47.

9 The California Supreme Court’s rejection of this claim was not contrary to, or an unreasonable  
10 application of, United States Supreme Court law, or based upon an unreasonable determination of the  
11 facts.

12 Claim P8 is denied.

13 **j. Review of Claim P9**

14 Petitioner next alleges that the trial court misread CALJIC 17.41 (How Jurors Should Approach  
15 Their Task) so as to omit the instruction that they be “impartial” jurors. (ECF No. 113 at 150-51.)

16 Petitioner first raised this claim in his petition for writ of habeas corpus in the California  
17 Supreme Court. The California Supreme Court ruled that Petitioner’s claim was procedurally barred  
18 because the claim could have been, but was not raised on direct appeal. (CSC Order Den. Pet.  
19 Habeas Corpus [citing In re Harris, 5 Cal. 4th at 825 n.3 and In re Dixon, 41 Cal. 2d at 759].) The  
20 California Supreme Court also summarily rejected Petitioner’s claim on the merits without  
21 explanation. (CSC Order Den. Pet. Habeas Corpus.)

22 At the time of trial, CALJIC 17.41, entitled “How Jurors Should Approach Their Task” read  
23 as follows:

24 The attitude and conduct of jurors at all times are very important. It is rarely helpful for  
25 a juror at the beginning of deliberation to express an emphatic opinion on the case or to  
26 announce a determination to stand for a certain verdict. When one does that at the  
27 outset, a sense of pride may be aroused, and one may hesitate to change a position even  
if shown it is wrong. Remember that you are not partisans or advocate in this matter.  
You are **impartial** judges of the facts.

28 CALJIC 17.40 (1989 Revision, emphasis added.)