

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

FEB 10 2022

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

TEDDY BRIAN SANCHEZ,

Petitioner-Appellant,

v.

RONALD DAVIS, Warden, San Quentin
State Prison,

Respondent-Appellee.

No. 16-99005

D.C. No.

1:97-cv-06134-AWI-SAB
Eastern District of California,
Fresno

ORDER

Before: GOULD, CALLAHAN, and BEA, Circuit Judges.

The Memorandum Disposition filed on April 22, 2021, is **WITHDRAWN** and **REPLACED** with an amended Memorandum Disposition filed concurrently with this order.

With that amendment, the panel unanimously votes to deny the petition for panel rehearing. Judges Gould and Callahan vote to deny the petition for rehearing *en banc* and Judge Bea so recommends.

The full court was advised of the petition for rehearing *en banc*. A judge requested a vote on whether to rehear the matter *en banc*, and the matter failed to receive a majority of the votes of the nonrecused active judges in favor of *en banc* consideration. Fed. R. App. P. 35.

The petition for panel rehearing and rehearing *en banc* is **DENIED**. Future

petitions for rehearing are **PERMITTED** under the deadlines set out in Federal Rules of Appellate Procedure 35(c) and 40(a)(1).

IT IS SO ORDERED.

NOT FOR PUBLICATION

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MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
Anthony W. Ishii, District Judge, Presiding

Argued and Submitted July 13, 2020
San Francisco, California

Before: GOULD, CALLAHAN, and BEA, Circuit Judges.

Teddy Sanchez appeals the district court’s denial of his petition for a writ of habeas corpus under 28 U.S.C. § 2254.¹ We grant Certificates of Appealability on the previously uncertified issues pertaining to ineffective assistance of counsel. 28

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

¹ In a separate opinion, filed concurrently with this memorandum disposition, we discuss the facts of this case and affirm against the three previously certified issues and one previously uncertified issue (“Claim 48”).

U.S.C. § 2253(c)(2); see *Browning v. Baker*, 875 F.3d 444, 471 (9th Cir. 2017).

We have jurisdiction under 28 U.S.C. § 1291 and 28 U.S.C. § 2253, and we affirm.

We address each of Sanchez’s ineffective assistance of counsel claims in turn.

First, Sanchez argues that his counsel was ineffective in failing to investigate the shoeprint evidence from the Bocanegra home (“Claim 10”). The evidence of three sets of shoeprints found in the house, rather than two, however, does not demonstrate that counsel’s failure to introduce it constituted ineffective assistance. See *Matylinsky v. Budge*, 577 F.3d 1083, 1097 (9th Cir. 2009) (a habeas petitioner “cannot show prejudice for [counsel’s] failure to present what is most likely cumulative evidence.”). The evidence suggests that three perpetrators participated in the murders, a fact already known to the trial court through the handprint evidence. *People v. Sanchez*, 12 Cal. 4th 1, 18 (1995). Under our doubly deferential review, *Harrington v. Richter*, 562 U.S. 86, 105 (2011), we cannot say that counsel’s performance was deficient.

Sanchez also argues that counsel provided ineffective assistance when he declined to cross-examine news reporter Michael Trihey after Trihey testified that Sanchez claimed to be a “triple murderer” (“Claim 15”). Sanchez reportedly told Trihey that he did not kill anyone but nevertheless believed that he was equally responsible because he assisted and made no effort to stop the murders. If counsel had cross-examined Trihey further, there is not a reasonable probability of a

different outcome because these statements supported his liability as an aider and abetter. *See Sanchez*, 12 Cal. 4th at 33–36; *see also Fields v. Woodford*, 309 F.3d 1095, 1107–08 (9th Cir. 2002) (requiring that a petitioner “demonstrate that the errors *actually* prejudiced him”) (internal citation omitted) (emphasis in original).

Sanchez argues that his attorney provided ineffective assistance during the guilt phase by failing to investigate and present a mental state defense, including information regarding a history of substance abuse (“Claim 6”). Counsel interviewed two mental experts, whose reports came to similar conclusions, neither of which was helpful to the defense. There is a reasonable argument that counsel satisfied *Strickland*’s deferential standard here. *Richter*, 562 U.S. at 105. Counsel cannot be faulted for not considering other possible mental state defenses when the experts he hired did not do so. *See Turner v. Calderon*, 281 F.3d 851, 876 (9th Cir. 2002).

Sanchez asserts that his counsel was ineffective for failing to challenge Hernandez’s credibility and memory by presenting his history of drug use (“Claim 7”). But Sanchez’s statements to the police and Trihey, his sale and possession of items from the Bocanegra residence, and his desire to plead guilty demonstrate that even if counsel had known of Hernandez’s drug use and cross-examined him about it, it is still likely that the trial court would have convicted Sanchez and would have found the multiple-murder special circumstance true. *Strickland v. Washington*,

466 U.S. 668, 688 (1984).

Next, Sanchez argues that counsel was ineffective for failing to submit evidence regarding lingering doubt or to counter the prosecution's evidence of Sanchez's culpability during the penalty phase ("Claim 44"). But fairminded jurists could conclude that Sanchez's defense counsel acted reasonably in declining to present the lingering-doubt defense that Sanchez now says should have been presented. The United States Supreme Court has stated that there are "countless ways to provide effective assistance in any given case." *Strickland*, 466 U.S. at 689. Jurists of reason could conclude that Sanchez's defense counsel acted reasonably in presenting a defense theory that accounted for Sanchez's consistent desire to plead guilty and accept the death penalty, which was inconsistent with a lingering-doubt defense. *See id.* at 673 (stating that counsel reasonably may "decide[] not to present and hence not to look further for evidence" on an issue).

Nor has Sanchez "demonstrate[d] that the [decision not to present a lingering-doubt defense] *actually* prejudiced him" in this case. *Fields*, 309 F.3d at 1107–08. To demonstrate prejudice, Sanchez must show a "reasonable probability" of a different result. *See Strickland*, 466 U.S. at 694. Put differently, in circumstances where a habeas petitioner challenges a death sentence, "the question is whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating

circumstances did not warrant death.” *Id.* at 695. There is no “reasonable probability” of a different result in this case where Sanchez had substantial involvement in the murder of three people, laughed with his co-conspirators about the murders, and told the press he was a triple murderer. The testimony Sanchez now argues should have been introduced would have given only a slightly different version of events: one in which Sanchez did not participate in “stabbing” the victim Mrs. Bocanegra, but instead just bashed her head with a metal bar in order to quiet her.

Despite Sanchez’s contentions to the contrary (“Claim 46”), counsel’s failure to object or introduce Sanchez’s proposed evidence of remorse was not objectively unreasonable and does not demonstrate deficient performance. *Strickland*, 466 U.S. at 686–88. Attorneys need not engage in activities that would be fruitless, much less harmful to the defense. *Richter*, 562 U.S. at 108. The news articles Sanchez pointed to contain aggravating information and demonstrate that there was little evidence of Sanchez’s remorse, other than his own statements. Although Detective Boggs erroneously attributed an incriminating statement by Reyes to Sanchez, Sanchez could not show prejudice. *See Fields*, 309 F.3d at 1107–08. Alleged juror statements suggested that Sanchez’s demeanor at trial had a significant impact on their belief that Sanchez showed no remorse.

AFFIRMED.

United States Court of Appeals for the Ninth Circuit

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

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

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

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

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

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)

Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

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

B. Purpose (Rehearing En Banc)

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

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

(2) Deadlines for Filing:

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

(3) Statement of Counsel

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

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

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

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

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

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

Attorneys Fees

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

Petition for a Writ of Certiorari

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

Counsel Listing in Published Opinions

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

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
Form 10. Bill of Costs**

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

9th Cir. Case Number(s)

Case Name

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

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

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Principal Brief(s) (<i>Opening Brief; Answering Brief; 1st, 2nd, and/or 3rd Brief on Cross-Appeal; Intervenor Brief</i>)	<input style="width: 60px; height: 25px;" type="text"/>	<input style="width: 60px; height: 25px;" type="text"/>	\$ <input style="width: 60px; height: 25px;" type="text"/>	\$ <input style="width: 60px; height: 25px;" type="text"/>
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