No. _____

IN THE SUPREME COURT OF THE UNITED STATES

TEDDY BRIAN SANCHEZ,
Petitioner,
v.
RON BROOMFIELD, Warden,
Respondent.

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

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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Dated: July 11, 2022

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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 OPINION

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

Filed April 22, 2021

Before: Ronald M. Gould, Consuelo M. Callahan, and Carlos T. Bea, Circuit Judges.

Opinion by Judge Gould

SUMMARY*

Habeas Corpus / Death Penalty

The panel affirmed the district court's denial of Teddy Brian Sanchez's habeas corpus petition challenging his California state conviction and death sentence for two first-degree murders.

The panel applied the deferential standards imposed by the Antiterrorism and Effective Death Penalty Act in a case in which the district court granted Certificates of Appealability (COA) on three issues, and the panel granted a COA on uncertified claims pertaining to ineffective assistance of counsel.

Because there was no reasoned state court decision addressing any of Sanchez's claims, the panel considered what arguments could have supported the state court's decision, and then asked whether those arguments or theories are inconsistent with a prior Supreme Court holding.

Sanchez claimed that Eugene Toton, lead counsel at the guilt phase, was ineffective for failing to investigate and present evidence from a jailhouse informant. The panel wrote that although there are reasonable arguments for and against the contention that Toton's conduct constituted deficient performance, it did not need to decide that question because Sanchez did not establish prejudice, as the informant's testimony would not have created a reasonable

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

probability that Sanchez would not have been convicted as an aider and abettor in the murders.

As to Sanchez's claim that Toton and Gary Frank—who shared responsibilities at the penalty phase—provided ineffective assistance when they did not raise Sanchez's mental impairments as mitigating evidence at the penalty phase, the panel held that Toton and Frank did not render deficient performance.

The panel denied relief on Sanchez's claim that the trial court, in denying his automatic motion for a modification of the death sentence, failed to consider his mitigation evidence presented during the penalty phase as required by Cal. Pen. Code § 190.4(e). Sanchez asserted that the California Supreme Court's denial of this claim on the merits amounted to an unreasonable determination of the facts under 28 U.S.C. § 2254(d)(2), and that the trial court violated the Eighth and Fourteenth Amendments when it failed to consider the mitigating evidence. Without clearly established federal law to support the claim that the Constitution requires an independent judicial review of a jury's death verdict, the panel wrote that it could not issue a writ of habeas corpus based on perceived error of state law.

Sanchez contended that his death sentence is disproportionate to the sentences received by his co-defendants, that these disparate impositions of penalties violated the Eighth and Fourteenth Amendments, and that he is entitled to intra-case proportionality review. Affirming the district court's denial of habeas relief on Sanchez's proportionality claim, the panel explained that there is no clearly established federal law requiring intra-case proportionality review, and noted that the California

Supreme Court provided meaningful appellate review when it rejected Sanchez's proportionality claim.

In a simultaneously filed memorandum disposition, the panel affirmed the district court on all other previously uncertified claims relating to ineffective assistance of counsel.

COUNSEL

Nina Rivkind (argued), Berkeley, California; Heather E. Williams, Federal Defender; David Harshaw, Assistant Federal Defender; Office of the Federal Public Defender, Sacramento, California; for Petitioner-Appellant.

Jamie A. Scheidegger (argued), Sean M. McCoy, and Rachelle A. Newcomb, Deputy Attorneys General; Michael P. Farrell, Senior Assistant Attorney General; Lance Winters, Chief Assistant Attorney General; Xavier Becerra, Attorney General; Office of the Attorney General, Sacramento, California; for Respondent-Appellee.

OPINION

GOULD, Circuit Judge:

Teddy Sanchez appeals the district court's denial of his petition for a writ of habeas corpus under 28 U.S.C. § 2254. Following a bench trial in 1988, a California court convicted Sanchez of the first-degree murders of Juan and Juanita Bocanegra and Woodrow Tatman. A jury sentenced Sanchez to death.

After exhausting his state court remedies, Sanchez filed a federal habeas petition seeking relief from his conviction and sentence. The district court denied relief, and granted Certificates of Appealability ("COA") on the following issues: (1) whether defense counsel provided ineffective assistance by failing to investigate and present testimony of jailhouse informant Charles Seeley; (2) whether the trial court failed to consider Sanchez's mitigation evidence when it imposed the death penalty; and (3) whether imposition of the death penalty is constitutionally disproportionate as to Sanchez. Sanchez timely appealed. We have jurisdiction under 28 U.S.C. § 1291 and 28 U.S.C. § 2253, and we affirm.

In his briefing, Sanchez also raises several uncertified issues. We grant a COA on the claims pertaining to ineffective assistance of counsel ("IAC"). *See Browning v. Baker*, 875 F.3d 444, 471 (9th Cir. 2017) (holding that the district court erred in limiting a COA to particular ineffective assistance of counsel claims rather than to the broader issue of whether the petitioner demonstrated a denial of the constitutional right to effective assistance of counsel). In this opinion, we address the certified claims as well as the previously uncertified claim ("Claim 48"), namely whether

trial counsel failed to present evidence of Sanchez's mental impairments at the penalty phase.[1]

I. BACKGROUND

A. The Crimes[2]

1. The Tatman Murder

Woodrow Wilson Tatman was "a frail, undernourished, 72-year-old man who . . . was confined to a wheelchair." *People v. Sanchez*, 12 Cal. 4th 1, 19 (1995). Tatman rented a room at the Bakersfield Inn and spent his days drinking alcohol and watching television. *Id.* Motel employees helped care for Tatman and gave money to him from his Social Security checks. *Id.* Tatman was last seen alive on February 2, 1987. *Id.*

On the afternoon of February 4, 1987, an employee noticed that Tatman's curtains were drawn and that he had not yet picked up his check. *Id.* The employee discovered Tatman's body on the floor near his bed, covered with a bedspread. *Id.* Tatman's television, radio, and electric skillet were missing from the room. *Id.* An autopsy report indicated that Tatman was killed by a massive blunt force injury to the left chest, collapsing his left lung and causing

[1] In a separate memorandum disposition filed simultaneously with this opinion, we affirm the district court on all other previously uncertified claims relating to ineffective assistance of counsel raised by Teddy Sanchez.

[2] Our recitation of the facts is based on the California Supreme Court opinion upholding Sanchez's conviction and sentence on direct appeal, *see People v. Sanchez*, 12 Cal. 4th 1 (1995), and on our own review of the record.

substantial hemorrhaging, consistent with a heel stomp or an instrument approximately two inches by three inches in size. *Id.* Tatman also had several superficial stab wounds to the chest and lower abdomen which did not contribute to his death. *Id.*

According to evidence presented at trial, Sanchez, Robert Reyes, and an unknown third person planned to rob Tatman for his check, his refrigerator, and other items in his room. *Id.* at 21. Detective Randy Boggs testified that Sanchez told him that Tatman was asleep when they entered his room. *Id.* Sanchez was taking items from the room when Tatman woke up. *Id.* Reyes pulled Tatman from the bed and stabbed him with a screwdriver. *Id.* Despite blaming Reyes for the murder, Sanchez's statement explained only the superficial stab wounds, not the delivery of the fatal blow. *Id.*

2. The Bocanegra Murders

On February 3, 1987, the day after Tatman's murder, Juan and Juanita Bocanegra were murdered in their home. *Id.* at 17. Juanita[3] was found in her sewing room with lengths of fabric tied around her neck and right wrist, and Juan was found in the kitchen. *Id.* Both had extensive stab wounds and head injuries. *Id.* at 17. Blood spatter evidence showed that the attack began in a hallway near the bathroom before moving to the kitchen where large amounts of blood showed that a struggle took place throughout the room. *Id.* at 18. There were small amounts of diluted blood in the

[3] For clarity, we refer to the members of the Bocanegra family by their first names.

bathroom, suggesting that someone had cleaned up after the attack. *Id.*

Police found evidence of two types of shoe tracks on the floor of the Bocanegra kitchen and one consistent shoe track in the bathroom. *Id.* Police also found a bloody palm print belonging to Reyes on the doorknob inside the Bocanegra front door. *Id.* Autopsies performed on both Juan and Juanita revealed that they died from massive hemorrhaging caused by multiple stab wounds. *Id.* The day after the murder, police found the Bocanegras' car abandoned. *Id.* Based on bloodstains and fingerprints in the car, police arrested the Bocanegras' son, Joey Bocanegra. *Id.*

Detective Bob Stratton interviewed Sanchez multiple times. *Sanchez*, 12 Cal. 4th at 20. Initially, Sanchez told Stratton that he saw Joey leaving the Bocanegras' house on the day of their murders. *Id.* Later, after Stratton challenged Sanchez's initial story, Sanchez asked several hypothetical questions, including, "What if I was present in the house; what if Joey hit his dad after his dad had refused to give some money; and what if Joey's dad hit him back and what if Joey got real mad and grabbed a knife and started stabbing his dad; what if Joey's mother didn't know what was happening because she was in another room?" *Id.*

Two pieces of physical evidence further linked Sanchez to the crime. *Id.* at 18. The Bocanegras' television set was found in the same room at the Bakersfield Inn where Sanchez stayed at the time of the murder, and Sanchez sold the Bocanegras' vacuum cleaner to one of the motel employees. *Id.* The remaining evidence against Sanchez was primarily circumstantial, along with Sanchez's incriminating statements to Detectives Boggs and Stratton, a jailhouse informant named Rufus Hernandez, and a local reporter named Michael Trihey. *Id.* at 18–21.

Sanchez, Reyes, and Joey were charged with robbery and first-degree murder of the Bocanegras, with allegations of robbery-murder and multiple-murder special circumstances. Sanchez and Reyes were also charged with robbery and first-degree murder of Tatman with an allegation of the robbery-murder special circumstance. On the prosecution's motion, the trial court dismissed the charges against Joey. Reyes ultimately pleaded guilty to three counts of first-degree murder in exchange for three consecutive sentences of life with the possibility of parole.

B. Trial: Guilt Phase

Sanchez was represented by attorneys Eugene Toton and Gary Frank. Toton was lead counsel at the guilt phase, and Toton and Frank shared responsibilities at the penalty phase. Before trial, the court appointed psychiatrist Francis Matychowiak to determine whether Sanchez was mentally competent. Dr. Matychowiak diagnosed Sanchez with borderline personality disorder and no other significant mental impairments, concluding that Sanchez was competent to stand trial. Toton also retained psychologist Theodore Donaldson, Ph.D. to assess Sanchez's competence, a possible insanity defense, and whether Sanchez was developmentally disabled. Dr. Donaldson found no reality deficits, thought disorders, significant anxiety, or depression, and he concluded that Sanchez was "a highly sociopathic individual." Neither Dr. Matychowiak nor Dr. Donaldson recommended any additional testing. Toton did not pursue any further testing or psychological evaluation, and he did not present a mental state defense at trial.

Sanchez waived his right to a jury trial at the guilt and special circumstance phases and submitted the guilt phase for a bench trial based on the preliminary hearing transcripts,

with some additional witness testimony and other evidentiary submissions. Detectives Stratton and Boggs testified about Sanchez's incriminating statements made in their interviews with him during their investigation of the murders. *See supra* Part I.A.

The court also heard testimony from jailhouse informant Hernandez. Hernandez was incarcerated with Sanchez for two months in early 1987, and he reportedly spoke to Sanchez about the Bocanegra murders. *Sanchez*, 12 Cal. 4th at 19–20. Hernandez had been charged with receiving stolen property and second-degree burglary. *Id.* In exchange for his testimony against Sanchez, Hernandez received six months in county jail and three years of probation. *Id.*

Hernandez testified that Sanchez told him that he went to the Bocanegras' house with Joey. *Id.* Hernandez's testimony was inconsistent as to whether Sanchez and Joey planned to rob the Bocanegras or planned to borrow money. *Id.* According to Hernandez, Sanchez said that he waited outside and entered the house when he heard Joey and Juan arguing in the hallway. *Id.* Sanchez tried to stop the fight by hitting Juan with a curved metal bar, and Sanchez did not say whether Joey stabbed Juan before or after Sanchez hit Juan. *Id.*

Juanita heard the confrontation and came out of a back room yelling. *Id.* Sanchez slipped in a puddle of blood as he jumped over Juan to grab Juanita, and Sanchez told Joey to "shut her up." *Id.* Joey then stabbed his mother repeatedly and pushed her into the sewing room. *Id.* Sanchez did not tell Hernandez that he participated beyond restraining Juanita, but Sanchez claimed that he saw Joey stab both victims with a kitchen knife. *Id.* Sanchez threw the metal bar into the front yard, one of the assailants threw the knife into a canal, and Joey took the television, a toolbox, and his

parents' car. *Id.* Hernandez then reported Sanchez's statements to Detective Stratton. *Id.*

A second jailhouse informant named Charles Seeley claimed to have had several conversations with Sanchez about the murders. Seeley spoke to an investigator from the district attorney's office, and his statements were available to Sanchez's counsel before trial. Toton did not investigate Seeley's statements, and neither party offered Seeley's testimony in the guilt or penalty phase.

Against his attorneys' advice, Sanchez repeatedly spoke to Michael Trihey, a reporter for the *Bakersfield Californian* newspaper. Trihey reported that Sanchez described himself as a triple murderer, said death was an appropriate punishment, and said that he wanted to die for what he had done. *Id.* at 21, 36.

The trial court found Sanchez guilty of the first-degree murders of Tatman and the Bocanegras. The court found true the multiple-murder special circumstance allegation as to the Bocanegra murders but found not true the robbery-murder special circumstance allegations that had been charged in the Tatman and Bocanegra murders. The court also found that Sanchez used a deadly and dangerous weapon in both Bocanegra murders, and that Sanchez was guilty of the robbery of Tatman but not guilty of the robbery of the Bocanegras.

C. Trial: Penalty Phase

The court empaneled a penalty phase jury and heard more evidence and arguments. The prosecution introduced aggravating evidence, including evidence of Sanchez's past crimes, as well as further testimony from Detective Boggs, Detective Stratton, and Hernandez.

The jury heard evidence of Sanchez's criminal history, including that in May 1982, Sanchez had assaulted a store owner who was hospitalized for two weeks as a result. In June 1982, Sanchez attacked an acquaintance who refused to comply with Sanchez's demand for money.

Boggs testified that Sanchez told him that after stealing Tatman's possessions, he and Reyes "kicked back, drank some whiskey, smoked some dope, ate some food and just relaxed for the rest of the evening." Stratton and Hernandez testified that Sanchez told Hernandez that he had taken an active role in the murders, including beating the Bocanegras and beating and assisting Reyes in stabbing Tatman. With respect to the Bocanegra murders, Hernandez testified that Sanchez entered the Bocanegra home with a metal bar, ran up to Juan, held Juan in place until Joey got a knife, and then both Sanchez and Joey beat and stabbed Juan. When Juanita walked out of the sewing room, Sanchez "rushed [her]," and both Sanchez and Joey stabbed her and beat her with the metal bar.

As mitigating evidence, Sanchez presented testimony from relatives, friends, and social anthropologist Isabel Wright, Ph.D., to the effect that his "dysfunctional[,] poverty-stricken, migratory family life severely hampered his ability to live a productive life." Sanchez was rejected by his mother after his birth and sent to live with his grandparents. At the age of three, Sanchez's parents moved him from his grandparents' home to Arkansas. Soon thereafter, Sanchez's mother left his stepfather and moved Sanchez and his half-brother to California. Further disrupting Sanchez's home life, his mother remarried a man with three children, and the couple subsequently had five additional children.

Sanchez's mother and stepfather were alcoholics and drug abusers who were violent with each other and their children. Sanchez's grandparents also drank heavily and abused drugs. Sanchez's mother and stepfather died in their mid-thirties of acute alcoholism. Sanchez tried to take care of his siblings but turned to drugs to escape his difficult life. He began committing crimes because he had "no marketable job skills to prepare him for life as an adult." Toton and Frank did not introduce evidence of any mental impairments.

After hearing and weighing the aggravating and mitigating evidence, the jury sentenced Sanchez to death.

D. Post-Conviction Proceedings

The California Supreme Court affirmed Sanchez's convictions and sentences on direct appeal. *Sanchez*, 12 Cal. 4th 1, *cert. denied*, 519 U.S. 835 (1996). The California Supreme Court then denied Sanchez's initial habeas petition in a summary denial order.[4]

On September 17, 1998, Sanchez timely filed a federal habeas petition in the United States District Court for the Eastern District of California. The district court denied that petition on the merits on July 22, 2015. The district court

[4] In 2017, Sanchez filed a second state habeas petition in the California Supreme Court alleging claims under *People v. Chiu*, 59 Cal. 4th 155, 166 (2014) (an aider and abettor may not be convicted of first-degree premeditated murder in California under the natural and probable consequences doctrine). On May 22, 2019, the California Supreme Court transferred Sanchez's petition to Kern County Superior Court. The state proceeding remains pending as of the publication of this opinion.

denied a motion for reconsideration, and Sanchez timely appealed.

II. STANDARD OF REVIEW

We review a district court's denial of a petition for a writ of habeas corpus and its findings of fact *de novo*. *See Stanley v. Schriro*, 598 F.3d 612, 617 (9th Cir. 2010). Because Sanchez's petition was filed after the Antiterrorism and Effective Death Penalty Act ("AEDPA") became effective, we may grant relief only if the state court's decision was: (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States;" or (2) "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

Under § 2254(d)(1), "clearly established" "refers to the holdings, as opposed to the dicta, of [the Supreme Court's] decisions as of the time of the relevant state-court decision." *Lockyer v. Andrade*, 538 U.S. 63, 71 (2003). A state court's decision is contrary to clearly established federal law "if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 413 (2000). A state court's decision is an unreasonable application of clearly established federal law "if the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the [petitioner]'s case." *Id*.

Even a strong case for relief does not mean the state court's denial was unreasonable. *Harrington v. Richter*,

562 U.S. 86, 102 (2011). The standard is highly deferential and demands that state court decisions be given the benefit of the doubt. *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002). To obtain relief on a claim in federal court, a petitioner bears the burden to demonstrate that the state court's ruling on the claim was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fair-minded disagreement. *Richter*, 562 U.S. at 102–03.

We apply the deferential review under AEDPA to the last reasoned state court decision. *See Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018). In this case, because there is no reasoned state court decision addressing any of the claims, we consider what arguments could have supported the state court's decision, and then ask whether it is possible fair-minded jurists could disagree about whether those arguments or theories are inconsistent with a prior Supreme Court holding. *Richter*, 562 U.S. at 102.

III. DISCUSSION

A. Ineffective Assistance of Counsel

Sanchez raises two ineffective assistance of counsel claims.[5] In the first claim, initially certified by the district court, Sanchez contends that Toton rendered ineffective assistance at the guilt phase by failing to investigate and present evidence from jailhouse informant Charles Seeley. In the second claim, on which we grant a COA, Sanchez contends that Toton and Frank rendered ineffective

[5] We address Sanchez's additional IAC challenges in the separate memorandum disposition filed simultaneously with this opinion.

assistance at the penalty phase for failing to raise Sanchez's mental impairments as mitigating evidence.[6]

To establish that counsel's legal representation fell below the standard required by the Sixth Amendment, Sanchez must show that counsel's performance was both deficient and prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *see also Smith v. Robbins*, 528 U.S. 259, 285–89 (2000). The "benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686.

To establish deficient performance, Sanchez must show that counsel's performance fell below an objective standard of reasonableness. *Id*. at 688. Under *Strickland*, we apply a strong presumption that counsel's performance was within the wide range of reasonable professional assistance. *Id*. at

[6] Toton was disbarred four months after Sanchez was sentenced to death. Sanchez asserts that Toton was subject to disbarment proceedings during the time of the trial due to allegations of failing to perform services and misappropriation of client funds and deceptive dealings in unrelated cases. Although Sanchez acknowledges that Toton was still a licensed attorney while representing Sanchez, he asserts that Toton had already agreed to surrender his law license and did not disclose this fact to his co-counsel or the trial court. Sanchez also acknowledges, however, that Toton's later disbarment does not prove his ineffectiveness in this case, although it may raise doubts about his competence. *See Sanders v. Ratelle*, 21 F.3d 1446, 1460 (9th Cir. 1994) (holding that a subsequent disbarment could help to explain a failure to investigate). We limit discussion of Toton's subsequent disbarment to this footnote. *See Bonin v. Calderon*, 59 F.3d 815, 828–29 (9th Cir. 1995) ("[A] habeas petitioner should not be allowed to transform what should be an inquiry into the reasonableness of counsel's performance . . . into a[] general inquisition of defense counsel's record and reputation.").

689. Moreover, "[e]stablishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is all the more difficult." *Richter*, 562 U.S. at 105. Both the *Strickland* standard and the standard under § 2254(d) are highly deferential and when the two apply together, our review is doubly deferential. *Id*. Under AEDPA, we ask not whether counsel's actions were reasonable; rather, we ask whether there is any reasonable argument that counsel satisfied *Strickland's* deferential standard. *Id*. "The *Strickland* standard is a general one, so the range of reasonable applications is substantial." *Id*. (internal citation omitted). Thus, we are required not merely to give trial counsel the benefit of the doubt, "but to affirmatively entertain the range of possible reasons" for counsel having proceeded as they did. *Cullen v. Pinholster*, 563 U.S. 170, 196 (2011) (internal quotation omitted).

The prejudice prong of the *Strickland* analysis is equally burdensome. Sanchez must show that it is "reasonably likely" that the result would have been different. *Richter*, 562 U.S. at 111 (citing *Strickland*, 466 U.S. at 696). The likelihood of a different result must be substantial, not just conceivable. *Id*. at 112. Assessing whether such a reasonable probability of a different trial outcome would have existed but for counsel's deficient performance requires assessing the hypothetical impact of evidence not presented at trial on that which was presented. *Strickland*, 466 U.S. at 696 ("Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors."). Our analysis "must consider the totality of the evidence before the judge or jury," keeping

in mind that the weaker the evidence at trial, the more likely it was that an attorney's error was prejudicial. *Id.* at 695–96.

1. Claim 8: Evidence from Charles Seeley

Sanchez contends that Toton was ineffective for failing to investigate and present evidence from jailhouse informant Seeley. On July 27, 1987, an investigator from the Kern County District Attorney's Office interviewed Seeley at the California Institution for Men at Chino. Seeley said that he had been housed two cells away from Sanchez in the Kern County Jail for months before Sanchez's trial and claimed to have had several conversations with Sanchez, including discussions of Sanchez's criminal activity.

Seeley said that Sanchez told him about the Bocanegra murders. Seeley's account differs from Hernandez's testimony. According to Seeley, Sanchez said that he and Reyes met with Joey on the day of the murder and went to the Bocanegra home so that Joey could ask his father for money to buy drugs. Sanchez and Reyes sat in the living room watching television while Joey spoke with his father. Sanchez heard a scuffle in the kitchen, and he and Reyes went to investigate. Sanchez saw Joey stabbing Juan repeatedly and hitting Juan over the head with a curved, metal bar.

Under Seeley's account, Juanita came down the hall, screaming for the men to stop. Sanchez and Reyes grabbed Juanita and pushed her back down the hall into a bedroom. Sanchez tried to tie Juanita's hands and feet with some nearby fabric. When she would not stop screaming, Sanchez tied a length of cloth around her face or neck. According to Seeley, Sanchez did not clarify whether he was trying to gag or strangle her. While Sanchez tried to restrain Juanita, Reyes unsuccessfully attempted to hit her with the metal bar.

Seeing Reyes struggling, Sanchez took the bar and used it to strike her on the head several times. Joey then came into the room, told his mother to shut up, and repeatedly stabbed her when she continued to scream.

After Sanchez, Reyes, and Joey completed their attack on Joey's parents, the three men cleaned up in the bathroom and changed clothes. Sanchez then went outside to check for potential witnesses and helped carry several items from the house, including money from Joey's parents. Sanchez recalled that the three men were laughing about the murders as they left the house, dumped the bloody clothes in a canal, and took the stolen items to a drug connection's house.

Regarding the Tatman murder, Seeley said that Sanchez told him the following information: On the day before the Bocanegra murders, Sanchez accompanied Reyes and an unidentified third man to Tatman's room at the Bakersfield Inn while Tatman slept, planning to steal his television and Social Security check. Tatman woke up while Sanchez was carrying items out of the room, Reyes hit Tatman with a metal bar, and one of the men stabbed Tatman. Sanchez covered up Tatman's body, helped clean up the room, and carried out the stolen property.

Seeley also claimed in the interview that he spoke with Reyes while they were incarcerated together. Reyes reportedly laughed about the murders, recounting that he and Sanchez had gone to the Bocanegra house to get money from Joey's father because they knew that Juan had just received a disability check. Reyes allegedly said that he was in the living room when he heard Joey arguing with his father. When Reyes went to investigate, he saw Joey stabbing Juan. Reyes reportedly said that he removed a metal bar from his waistband and began to hit Juan in the head as Joey continued stabbing, even after Juan slumped to the floor.

According to Seeley, Reyes recounted that while he and Joey assaulted Juan, Sanchez struggled to restrain Juanita in the hallway and called for help pushing her to the back bedroom. Reyes allegedly said that he hit Juanita with the metal bar while Sanchez tried to gag or strangle her with a length of fabric. Joey then came to the bedroom, told his mother to shut up, and began to stab her. After the three men cleaned up, Reyes reportedly said that they removed items from the house, loaded them into Juanita's car, and Reyes and Joey changed into some of Juan's clothes. According to this account, there was so much stolen property in the car that Reyes could barely fit in the back seat. Reyes also allegedly said that all three men had been smoking PCP all day and left the scene to buy more drugs and get high.

Although Seeley's statements were made to an investigator from the district attorney's office and available to Sanchez's counsel before trial, neither party offered Seeley's testimony in the guilt or penalty phase.

In his state habeas petition, Sanchez claimed that Toton was ineffective for not interviewing Seeley and not calling him as a defense witness. The California Supreme Court rejected this claim in a summary denial. In support of his state and federal habeas petitions, Sanchez submitted a transcript of Seeley's statement; declarations from Sanchez's trial attorneys Toton and Frank, defense investigator Susan Penninger, medical expert David Foster, M.D., and habeas attorney Steven Shatz; and declarations from Reyes's counsel Stanley Simrin and Daniel Ybarra.

The district court denied the claim on the merits, concluding that Toton could have had tactical reasons for not interviewing Seeley and that the state court could have reasonably concluded that there was not a reasonable

probability of a different outcome had the proposed testimony been presented.

On appeal, Sanchez emphasizes that Reyes's admissions to Seeley identified Reyes—not Sanchez—as the second assailant responsible for Juan's murder. This discrepancy, according to Sanchez, directly contradicted the prosecution's theory that Sanchez aided and abetted Juan's murder. Sanchez further contends that Seeley's testimony would have pointed to Joey—not Sanchez—as the one who told Juanita to shut up, undermining the prosecution's theory that Sanchez had aided and abetted the first-degree murder of Juanita.

A strong argument can be made that, by failing to investigate and present Reyes's admissions to Seeley—which refuted the only trial testimony that directly implicated Sanchez in Juan's murder—Toton's performance was deficient. Although Toton had no obligation to pursue an investigation that would have been harmful to Sanchez, Hernandez's testimony already provided evidence for concluding that Sanchez beat Juanita with the metal bar. Thus, if Seeley were cross-examined on what Sanchez told him, which was that Sanchez hit Juanita on the head with the bar several times, that portion of Seeley's testimony might be merely duplicative and would not add to the totality of evidence against Sanchez. *See Browning v. Baker*, 875 F.3d 444, 473 (9th Cir. 2017) (recognizing that "the obligation to investigate, recognized by *Strickland*, exists when there is no reason to believe doing so would be fruitless or harmful"). Moreover, Toton's inactions can be said to show that Toton, despite possessing Seeley's recorded interview that detailed Reyes's confession, did not understand Seeley's potential value as a defense witness. *See Staten v. Davis*, 962 F.3d 487, 495 (9th Cir. 2020) (finding objectively unreasonable

performance where "[t]he record thus suggests not that [defense counsel] thoroughly probed the issue and determined that the witnesses' stories were not credible, but rather that he did not recognize the possible significance of the incident and failed to investigate it fully").

Similarly, a strong argument can be made that, under the doubly deferential standard of AEDPA and *Strickland*, a reasonable jurist could determine that the failure to introduce evidence of questionable benefit and possible harm to the defense did not amount to deficient performance. *See Richter*, 562 U.S. at 105, 108.[7] Seeley's account may have been more damaging to Sanchez than Hernandez's account because Seeley's account may have described Sanchez actively participating in Juan's murder by preventing Juanita from intervening or calling for help as the attack took place, and Seeley's version may have suggested a higher level of culpability for Sanchez in murdering Juanita than was apparent from Hernandez's account. *See Gerlaugh v. Stewart*, 129 F.3d 1027, 1033 (9th Cir. 1997) (failure to call three witnesses who could have relayed mitigating sentencing evidence was a reasonable tactical decision because counsel reasonably believed the testimony could backfire). Toton's prior experience with Seeley, coupled with his correct assessment that the State would not call Seeley as a witness, indicates that Toton may have

[7] Sanchez presents a different claim than the one he asserted before the California Supreme Court and the district court. On appeal, Sanchez contends that Toton should have attempted to present only those portions of Seeley's statements that allegedly came from Reyes. Before the state and district courts, however, Sanchez contended that Toton and Frank rendered ineffective assistance for failing to introduce both his and Reyes's alleged statements to Seeley. Because we review the claims as presented to the state court, we consider the claim in its totality. *See Pinholster*, 563 U.S. at 181–82.

reasonably determined that Seeley's statements were not credible.

Though there are reasonable arguments for and against deficient performance, we do not decide whether Toton's conduct constituted deficient performance because we conclude that Sanchez did not establish prejudice under *Strickland*'s second prong.

The physical evidence presented at Sanchez's trial was not overwhelming; it established that at least two assailants were responsible for the Bocanegra murders but did not provide many clues as to who the assailants were. Juan and Juanita were discovered murdered in their home having sustained stab wounds and head injuries. Blood spatter "indicated a fierce struggle occurred throughout the house," and two sets of shoeprints were identified in the blood.[8] *Sanchez*, 12 Cal. 4th at 18. From this, the State's theory—at least at Sanchez's trial—was that two assailants, Sanchez and Joey Bocanegra, attacked and killed Juan and Juanita Bocanegra. The physical evidence that tied Sanchez to the murders was that he was later discovered in possession of a television that he had taken from the Bocanegras' residence; Sanchez also sold the Bocanegras' vacuum cleaner to another individual. Other physical evidence connected Reyes and Joey Bocanegra to the murders. This included Reyes's bloody palm print, which was found on the front doorknob inside the Bocanegra residence, and Joey's fingerprints, which were found in the Bocanegras' blood-soaked car the day after the murders.

[8] The State's expert later revised his report during the state's case against Reyes for the same murders and concluded there were three sets of shoeprints in the kitchen.

Beyond the physical evidence, Sanchez made incriminating statements to three parties about the Bocanegra murders which were admitted in evidence against him. The most important of these witnesses was Sanchez's cellmate at the county jail, Rufus Hernandez. Hernandez provided the only evidence that Sanchez attacked Juan Bocanegra. Other evidence—physical and testimonial—tended to show that Sanchez was at the Bocanegra home when Juan and Juanita were murdered. Hernandez testified that Sanchez told him that he had gone to the Bocanegra residence with Joey the morning of the murders, and at some point, heard Joey arguing with Juan in the house while he waited outside. Sanchez entered the house and attempted to break up the fight between the father and son, and then Sanchez began hitting Juan with a curved metal bar, and Joey stabbed and killed Juan. Juanita came into the room screaming, and Sanchez yelled at Joey to "shut her up." Sanchez then grabbed Juanita while Joey stabbed her, and the two of them pushed her into the back bedroom where she was killed. Joey and Sanchez then took a few items from the home and left. Thus, regardless of whether Reyes told Seeley that Reyes wielded the metal bar hitting Juan, and Hernandez was incorrect as to that, the fact remains that Hernandez put Sanchez in the middle of the Joey-Juan fight; he was not "down the hall" in the living room watching TV. Hernandez's testimony also provides evidence that Sanchez aided and abetted Juan's murder when he restrained Juanita and told Joey to "shut her up," because the only reasonable inference is that he was trying to prevent her from interfering in Juan's murder. This is because the object was to ensure Joey got the money for drugs from Juan one way or another.

A second witness who testified about Sanchez's incriminating statements was police investigator Bob Stratton. Stratton testified that he spoke to Sanchez on two

occasions. In their first conversation, Sanchez told Stratton that he had seen Joey on the morning Juan and Juanita were killed, but Sanchez denied having gone to the Bocanegra residence with Joey. One week later, however, Sanchez again talked to Stratton. This time Sanchez "asked Stratton a series of hypothetical questions, including: 'What if I was present in the house; what if Joey hit his dad after his dad had refused to give him some money; and what if Joey's dad hit him back and what if Joey got real mad and grabbed a knife and started stabbing his dad; what if Joey's mother didn't know what was happening because she was in another room?'" *Sanchez*, 12 Cal. 4th at 20. While Sanchez's questions to Stratton stopped short of confessing to the murders, they still placed Sanchez as a witness to the murder of Juan. Moreover, they were false as to Juanita not knowing what was happening, because Sanchez had to restrain her when she came to the aid of Juan.

Finally, Michael Trihey, a reporter with the *Bakersfield Californian*, testified briefly regarding interviews he conducted with Sanchez after he was arrested. Citing reporter's privilege, Trihey provided very limited testimony. In the short, substantive portion of his testimony, Trihey stated that Sanchez had said in an interview that he was "a triple murderer" and that his victims "were killed for their social security checks."[9] Thus, even if Sanchez might have incorrectly confessed to having been the actual "murderer" of Juan, Juanita, and Tatman, this statement shows that he

[9] A fourth witness, Detective Randy Boggs, testified about the Tatman murder only. Boggs testified that Sanchez admitted he had gone with Reyes to rob Tatman the day before the Bocanegra murders. Sanchez told Boggs that while he was removing a refrigerator from Tatman's room, he witnessed Reyes kill the disabled Tatman by hitting him in the chest, throwing him to the floor, and stabbing him with a screwdriver. *Sanchez*, 12 Cal. 4th at 21.

thought himself responsible for their murders, which is evidence of aiding and abetting.

From the trial evidence and testimony, the judge found Sanchez guilty of the first-degree murders of Juan and Juanita Bocanegra on the theory that he aided and abetted Joey's premeditated killings of his parents. The State argued at trial, and the California Supreme Court affirmed on direct appeal, that Hernandez's testimony allowed the court to conclude that Sanchez had beaten both Bocanegras with a metal bar while they were stabbed to death and that the act of beating both victims with the metal bar supported a finding that Sanchez knowingly aided in the murders and that he intended for both victims to be killed. *Sanchez*, 12 Cal. 4th at 34–35. Sanchez was also found guilty of the separate first-degree murder of Woodrow Wilson Tatman on a felony murder theory whereby Sanchez aided and abetted Reyes in the robbery of Tatman, and during the robbery Reyes killed Tatman. *Sanchez*, 12 Cal. 4th at 68.

Regarding special circumstances that potentially made Sanchez eligible for capital punishment, the court found the robbery murder special circumstance allegation not true for both the Tatman and Bocanegra murders. For the Bocanegra murders, the court found that any intent to rob the victims was not formed until after victims were killed, making the robbery murder special circumstance inapplicable. The trial court found the robbery murder special circumstance not true for the Tatman murder because Sanchez was "not the actual killer" and did not have an "intent to kill" Tatman. *Id.* at 67–68. The court found the multiple murder special circumstance allegation true for the Bocanegra murders only. *Id.* at 17. The upshot of all of this is that Sanchez's eligibility for a capital sentence was based on a finding that he aided in the murders of both Juan and Juanita Bocanegra

and that he harbored an intent to kill both victims. *See id.* at 17, 31–32 & n.1.[10]

As discussed, had Seeley testified, the court would have heard an account of the Bocanegra murders that, while in some respects irreconcilable with the account given by Hernandez, still provided evidence that Sanchez aided and abetted the deaths of the Bocanegras and intended to kill both of them. The State's theory at trial, and also when arguing the sufficiency of the evidence on direct appeal, was that Sanchez was liable as an aider and abettor of Juan's murder because Sanchez assaulted Juan with the metal bar while he was being stabbed by Joey, per Hernandez's testimony.[11] Under Seeley's accounts from Reyes and Sanchez, Sanchez still aided and abetted Juan's murder by restraining Juanita from interfering.[12] Accordingly, regardless of whose testimony the court would have found more credible—Hernandez's or Seeley's—there is no reasonable probability of a different trial outcome. This is reinforced by Stratton's testimony, which placed Sanchez as a witness to the murder of Juan and showed that Sanchez was

[10] Sanchez's intent may be inferred from his actions where direct evidence is lacking, and "an act which has the effect of giving aid and encouragement, and which is done with knowledge of the criminal purpose of the person aided, may indicate that the actor intended to assist in fulfillment of the known criminal purpose." *People v. Beeman*, 35 Cal. 3d 547, 559 (1984).

[11] In the State's closing argument, the assistant district attorney mentioned at least seven times that Sanchez struck Juan Bocanegra in the head with the metal bar as he was being stabbed, and from that act the court should infer that Sanchez intended to kill Juan or aid Joey in killing Juan.

[12] This is the alternative argument that the State put forth at oral argument.

not telling the true story about Juanita coming to Juan's aid, which Sanchez prevented by grabbing her. Sanchez's admission to Trihey that he was a "triple murderer" is further evidence of aiding and abetting.

We hold that presenting Seeley's testimony would not have created a reasonable probability that Sanchez would not have been convicted as an aider and abettor in Juan and Juanita's murders.

2. Claim 48: Mental Impairment Evidence

Sanchez contends that Toton and Frank provided ineffective assistance when they did not raise Sanchez's mental impairments as mitigating evidence at the penalty phase. We conclude that Toton and Frank's performance was not deficient on this claim.

The California Supreme Court summarily denied this claim in Sanchez's state habeas petition. The district court denied this claim on the merits, holding that it was not reasonably probable that Sanchez would have received a more favorable sentence had further mitigating evidence been presented. The district court also specifically held that the state court could have reasonably found that Sanchez's alleged neurological and psychiatric conditions were not sufficiently supported by the record.

i. The Mental Impairment Evidence

In support of this claim, Sanchez submitted a report from psychiatrist Francis Matychowiak, and declarations from psychologist Theodore Donaldson, Ph.D.,

neuropsychologist Karen Froming, Ph.D., and psychiatrist David Foster, M.D.[13]

[13] Sanchez also submitted an unsigned declaration of Dr. Wright concerning her recollections of the penalty phase. Post-conviction counsel Nina Rivkind submitted these draft versions with her own signed declaration attesting that she was in the process of revising and finalizing a declaration for Wright's signature when Wright fell ill and passed away. The first version of Wright's declaration is a draft on which, according to Rivkind's declaration, Wright wrote handwritten changes and edits. Rivkind attested that she made these edits and others after speaking with Wright on the phone, that she submitted a revised draft for Wright's consideration, and that she learned of Wright's death soon thereafter.

The revised draft declaration purported to reflect Wright's recollections that Frank began work on the penalty phase late, that he was uncommunicative with Sanchez engendering mistrust, and that the penalty efforts were unfocused and mismanaged. The unsigned declaration also described Wright's purported efforts to convince Frank to engage experts in the effects of PCP use and a conversation wherein Wright recommended the use of a neuropsychologist to determine whether Sanchez had evidence of organic brain damage as a result of drug abuse. According to the unsigned declaration, a lack of time was the greatest impediment to performing additional work on Sanchez's history and mental health. Although the declaration purports to describe Wright's efforts to convince Frank to pursue evidence of a possible mental disorder, it also contains admissions that Wright was not a psychologist and not qualified to make a mental assessment.

Because the California Supreme Court summarily denied Sanchez's habeas petition, we do not know whether it considered Wright's unsigned declaration. As discussed *infra*, it was reasonable for the state court to deny Claim 48 concerning evidence of Sanchez's mental impairments. If the court declined to consider the Wright declaration, its denial was reasonable because the record contained no other expert suggestion that additional testing was needed. Moreover, Rivkind's signed declaration indicates that both versions of the unsigned declaration were drafts and works in progress, and Rivkind did not aver

The trial court appointed Dr. Matychowiak to determine if Sanchez was competent to stand trial. Dr. Matychowiak reported that Sanchez did not feel that he had killed anyone but was depressed and wanted to plead guilty to "get it over with." Dr. Matychowiak recorded Sanchez's difficult childhood, which included being raised initially by his grandmother and then taken back by his mother, who was addicted to drugs and would lock him in the closet. Sanchez also said that he began sniffing paint around the fifth grade, suffered a head injury in a fight when he was about 16 to 18 years old, and that his substance abuse since that time included alcohol and PCP. Sanchez reported no significant history of psychiatric hospitalizations or outpatient treatment, and denied any suicidal thoughts, delusions, or hallucinations at the time of the interview.

Dr. Matychowiak opined that Sanchez understood the court process and system, demonstrated no signs of bizarre mental processes, and had no discernable memory gaps. Sanchez also appeared to have borderline intelligence with no insight and poor general judgment. Dr. Matychowiak diagnosed Sanchez with a Borderline Personality Disorder and no other significant mental impairment, although he noted a recent history of depression evidenced by an apparent suicide attempt. Dr. Matychowiak concluded that Sanchez's diagnostic presentation did not significantly interfere with his ability to make and explain his decisions (including the decision to plead guilty and to accept the death

that Wright agreed with or agreed to sign the declaration after the first round of edits. If the court considered the Wright declaration, its denial was also reasonable because Wright's declaration is contradicted by other, signed declarations and because of her admission that she was not qualified to make a mental assessment. We limit our consideration of the Wright declaration to this footnote.

penalty), to understand court procedures and his need to present a defense, or to cooperate with his attorneys.

Before the preliminary hearing, Toton retained Dr. Donaldson to assess Sanchez's competence to stand trial, a possible insanity defense, and whether Sanchez was developmentally disabled. Dr. Donaldson detailed his findings in a declaration dated seven years after Sanchez's trial. Dr. Donaldson reported that Sanchez was of below average IQ (except for signs of average intelligence in abstract reasoning), that Sanchez had possible organic difficulties in perceptual motor integration (likely related to a history of paint sniffing and substance abuse), and that Sanchez had serious memory deficits. Nonetheless, Dr. Donaldson believed Sanchez to be of average intelligence, and he opined that testing showed no reality deficits, thought disorders, significant anxiety, or depression. Dr. Donaldson further observed that Sanchez displayed a "rather grandiose view of himself," and opined that Sanchez was "a highly sociopathic individual."

Almost two months after submitting his first declaration, Dr. Donaldson submitted a second declaration, which was also included with Sanchez's state habeas petition. Dr. Donaldson said that he evaluated Sanchez only for an insanity defense and did not consider the possibility of other mental state defenses. He said that at the time he interviewed and tested Sanchez, he discovered indications of a possible organic brain disfunction, which might have helped in Sanchez's defense.

Dr. Donaldson opined that his original findings warranted further investigation through a neuropsychological evaluation—which he was not qualified to conduct—to determine if Sanchez suffered from organic or developmental deficits. He stated that he would likely

have recommended that Toton retain a neuropsychologist if he had been asked, but he could not recall if such a conversation ever took place. Also, he stated that if he had been aware of information regarding Sanchez's *in utero* exposure to drugs, his childhood, and a head injury sustained when Sanchez was 18 years old, such information would have supported a recommendation for further testing. Dr. Donaldson did not repudiate his original determination that Sanchez was a highly sociopathic individual.

In support of his state habeas claim, Sanchez also submitted Dr. Froming's declaration, dated seven years after Sanchez's sentencing. Dr. Froming opined that Sanchez may have needed neuropsychological testing based on possible *in utero* exposure to drugs, his childhood marred by malnutrition and abuse, his learning difficulties in school, his history of drug abuse, a head injury, and his mental health history.

According to Dr. Froming, Sanchez displayed severe, diffuse brain damage across multiple tests from several possible sources, including *in utero* exposure to drugs, inherited deficits, head injury, and severe poly-substance abuse. However, Dr. Froming admitted that the possibilities of *in utero* drug exposure, inherited deficits, and head injuries were not confirmed but were based on anecdotal evidence regarding Sanchez's social history. These problems would have been exacerbated by drug and alcohol intoxication. Dr. Froming further opined that the likely circumstances of the Bocanegra murders indicated that Sanchez was acting with a reduced capacity to respond

appropriately to Joey's sudden attacks and would have likely prevented Sanchez from forming premeditation.[14]

Although Dr. Froming added that all the tests she performed were available and in use at the time of Sanchez's arrest and trial, she did not declare that she would have been available or willing to testify at that time. Dr. Froming opined that Sanchez's need for neuropsychological testing should have been apparent at the time of trial based on Dr. Donaldson's observations of perceptual motor disturbance and deficits in auditory and visual memory, although she did not opine whether that need would have been obvious to someone who was not a trained neuropsychologist.

Finally, Sanchez also submitted Dr. Foster's declaration in support of this claim on habeas review. Dr. Foster presented a psychiatric opinion to the California Supreme Court, dated October 19, 1995.

Dr. Foster opined that Sanchez was incapable of knowingly waiving his right to a jury trial based on the combined effects of depression, PTSD, and PCP withdrawal and flashbacks. Reviewing the reports of Dr. Matychowiak and Dr. Donaldson, Dr. Foster asserted that these evaluations

[14] Dr. Froming also opined that Sanchez's deficits would have prevented him from being able to knowingly and intelligently waive his right to a jury trial or to proceed with his counsel. These conclusions, however, were made by reference to California jury instructions and presented opinions regarding legal conclusions, outside the scope of Dr. Froming's expertise. *See* Cal. Evid. Code § 801 (limiting expert testimony to opinions related to a subject that is sufficiently beyond common experience that the opinion would assist the trier of fact, and based on matter including special knowledge that is of a type that reasonably may be relied upon by an expert in forming an opinion).

were inadequate and missed crucial signs in Sanchez's presentation, which should have alerted them to deeper organic and affective disorders.

ii. Ineffective Assistance of Counsel

The California Supreme Court could have reasonably concluded that Toton's and Frank's performance did not fall below an objective standard of reasonableness when they did not seek neuropsychological testing at the penalty phase. Because we hold that Toton's and Frank's performance was not deficient, we do not reach the prejudice prong of *Strickland*.

Although Dr. Froming's and Dr. Foster's declarations may provide relevant details about Sanchez's possible mental impairments, such details were not available to Toton and Frank. At the penalty phase, Toton and Frank were in possession of Dr. Donaldson's and Dr. Matychowiak's reports. Dr. Donaldson concluded that Sanchez was well-adapted to the world in which he lived, was "highly sociopathic," and showed no indications of other significant mental illness. That opinion was consistent with Dr. Matychowiak's opinion, which also diagnosed Sanchez with a personality disorder and no other significant mental impairment. Neither Dr. Matychowiak nor Dr. Donaldson apparently communicated a need for further testing to counsel at the time of the penalty phase.

Sanchez asserts that Toton should have hired additional experts. The choice of what type of expert to use, however, is one of trial strategy and deserves "a heavy measure of deference." *Turner v. Calderon*, 281 F.3d 851, 876 (9th Cir. 2002) (quoting *Strickland*, 466 U.S. at 691) (trial counsel was not ineffective for using a general psychological expert rather than one specialized in the effects of PCP). Counsel

is not constitutionally ineffective because, with the benefit of hindsight, other strategies or experts may have been a better choice. *Id*.

Also, having consulted two doctors who did not provide support for the conclusion that Sanchez was mentally impaired in a way that could provide a defense, counsel was under no duty to continue to search in an unending quest to find a supportive expert, especially when if that were done, the views of the first experts would still be discoverable and usable by the prosecution to contradict. *See Burger v. Kemp*, 483 U.S. 776, 794 (1987) ("[C]ounsel's decision not to mount an all-out investigation . . . in search of mitigating circumstances was supported by reasonable professional judgment."); *Preston v. Delo*, 100 F.3d 596, 605 (8th Cir. 1996) ("Counsel can reasonably decide not to present potentially helpful mitigating evidence—including the testimony of mental experts—if such evidence would result in the introduction of damaging evidence."). Even if Dr. Foster and Dr. Froming had been available to testify, and had testified consistent with their declarations, the prosecution could have cross-examined them by introducing Dr. Donaldson's report, which found no severe mental illness or cognitive impairment and concluded that Sanchez was a "highly sociopathic individual." Toton and Frank could have reasonably opted to avoid further exploration of that diagnostic "basket of cobras," potentially uncovering more evidence harmful to the defense. *Gerlaugh*, 129 F.3d at 1035 (noting the "obvious countervailing tactical dangers" of evidence regarding antisocial personality disorder and holding that trial counsel was not ineffective for failing to develop possibly dual-edged psychological evidence).

Dr. Donaldson states that he was not in possession of all the reports, records, and other information that was

available. But an attorney is not responsible for gathering background material that might be helpful to an expert evaluating his client in the absence of a specific request for that information. *Turner*, 281 F.3d at 876 (citing *Hendricks v. Calderon*, 70 F.3d 1032, 1038 (9th Cir. 1995)). To impose such a duty would "defeat the whole aim of having experts participate in the investigation." *Turner*, 281 F.3d at 876–77 (quoting *Hendricks*, 70 F.3d at 1038).

Toton and Frank possessed two expert reports that came to similar conclusions, neither of which was helpful to the defense. Both opined that Sanchez suffered from a personality disorder and did not display evidence of serious brain dysfunction. There is no indication that Dr. Donaldson advised Toton or Frank that they would need to hire additional experts or run further tests.

We hold that Toton and Frank did not render deficient performance when they did not raise Sanchez's mental impairments as mitigating evidence.

B. Claim 59: Mitigation Evidence

Sanchez next contends that the trial court failed to consider his mitigation evidence presented during the penalty phase as required by Cal. Pen. Code § 190.4(e). Because we cannot issue a writ of habeas corpus based on perceived error of state law, *Pulley v. Harris*, 465 U.S. 37, 41 (1984), Sanchez's claim fails.

At the penalty phase, the trial court empaneled a jury, which heard evidence of aggravating and mitigating factors before returning a verdict of death. Under Cal. Pen. Code § 190.4(e), at the time Sanchez's conviction became final, imposing a death sentence triggered an automatic motion for a modification of the death sentence, on which the trial judge

ruled. On this review of the jury's verdict, the judge must "consider . . . the aggravating and mitigating circumstances . . . [and] state on the record the reasons for his findings." Cal. Pen. Code § 190.4(e).

On direct appeal to the California Supreme Court, Sanchez asserted that the trial court committed prejudicial error in denying his automatic motion for a modification of the death sentence. *Sanchez*, 12 Cal. 4th at 83. The California Supreme Court denied this claim on the merits, determining that the trial court's decision complied with California law. *Id.*

In affirming the trial court's ruling, the California Supreme Court noted that the trial judge reviewed the statutory mitigating factors under California Penal Code § 190.3(a)-(i) and found that several did not apply. *Id*. The trial court discussed that Sanchez may have been under the influence of PCP as one of those mitigating factors. *Id*. The court then reflected, "[a]re there other circumstances that mitigate against the aggravation of the [defendant], I think not." *Id*. The California Supreme Court noted:

> [B]efore denying the modification motion, the court stated that it had considered defendant's motion to reduce penalty and the People's response, both of which referred to defendant's mitigating evidence. Thus, although the court did not specifically mention defendant's mitigating evidence of his family life, the court's statement regarding section 190.3, factor (k) evidence shows it considered all pertinent penalty phase evidence, including testimony about defendant's family life and his behavior toward his siblings, but merely found it

> unpersuasive. The record is clear that. . . the trial court independently assessed the weight of the evidence under each factor, and stated its reasons for denying defendant's motion.

Id. The California Supreme Court concluded that all constitutional and statutory considerations were observed in the trial court's ruling. *Id.*

The district court ruled that this claim raised solely an issue of state law under *Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991) (holding that a federal habeas court may not reexamine state court determinations of state law questions). Accordingly, the court found that the state court's rejection of this claim on the merits did not amount to either an unreasonable application of clearly established federal law or an unreasonable determination of the facts.

Sanchez asserts that the California Supreme Court's denial of this claim on the merits amounted to an unreasonable determination of the facts under 28 U.S.C. § 2254(d)(2) and that the trial court violated the Eighth and Fourteenth Amendments when it failed to consider his mitigating evidence.

Despite Sanchez's contention to the contrary, whether the state court adequately considered mitigation evidence when independently reviewing the jury's death verdict is a matter of state law. The Supreme Court has held that the Eighth and Fourteenth Amendments require that a sentencing judge or jury not be precluded from considering in mitigation any aspect of a defendant's character or record, or any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982). But Sanchez does not challenge the fact finder's underlying sentencing decision in

this claim. He does not argue that the California statute "preclude[s] the sentencer from considering any mitigating factor[,]" nor does he argue that the judge "instructed [the] jury to disregard the mitigating evidence." *See id.* at 112–15 (trial judge's statement that "'in following the law,' he could not 'consider' . . . the mitigating evidence of Eddings' family history" violated the Constitution). Rather, he challenges the sufficiency of the judge's consideration of mitigating factors in applying a state statute reviewing the jury's decision.

Sanchez has not cited any clearly established federal law to support the claim that the Constitution requires an independent judicial review of a jury's death verdict. That right exists in state law, and the California Supreme Court affirmed the trial court's review on direct appeal. *See* Cal. Pen. Code § 190.4(e); *Sanchez*, 12 Cal. 4th at 83. Sanchez contends that judicial review of a death penalty sentence pursuant to Penal Code § 190.4(e) falls squarely within clearly established Eighth Amendment law because "the jury verdict [merely] authorizes the death penalty, [but] the judge becomes the sentencer and must determine whether, in his or her own judgment, a death sentence is warranted." But Sanchez cites no law indicating that this procedural safeguard renders the judge the ultimate sentencer, nor does he show that the judge's independent review of the jury's verdict is subject to the same clearly established Eighth Amendment law as the jury's initial verdict. As the State argues, although the Supreme Court has discussed this procedure favorably, *see Pulley*, 465 U.S. at 52–53, it has never held that this type of trial court review is constitutionally required. We have also previously determined that a court's review of the sentencing jury's verdict is a matter of California state law. *Turner*, 281 F.3d at 871 ("[B]ecause the trial court made an individualized

determination of whether death was the proper punishment, we agree with the district court that 'at most the [trial court's] error would be one of state law.'") (second alteration in original). Without clearly established law to this effect, we cannot fairly infer that a state's decision to provide a favorable procedural safeguard ought to subject the state's procedures to double scrutiny.

Federal habeas review is not available to retry state law issues. *Milton v. Wainwright*, 407 U.S. 371, 377 (1972). Because this claim rests on an issue of state law, we do not review Sanchez's argument that the state court made an unreasonable determination of the facts under 28 U.S.C. § 2254(d)(2). *See Pulley*, 465 U.S. at 41.

C. Claim 61: Proportionality

Sanchez contends that his death sentence is disproportionate to the sentences received by his co-defendants. Although Joey was originally charged with his parents' murders, all charges against him were dropped. *Sanchez*, 12 Cal. 4th at 84. Reyes pleaded guilty to all three murders and he received a sentence of 25 years to life in prison. *Id.* According to Sanchez, these disparate impositions of penalties violate the Eighth and Fourteenth Amendments and he is entitled to intra-case proportionality review.

The California Supreme Court denied this claim on direct appeal. *Sanchez*, 12 Cal. 4th at 84. The court determined that the Eighth Amendment did not require an intra-case comparison of a defendant's sentence with other culpable persons, whether charged or uncharged. *Id.* (citing *Pulley*, 465 U.S. at 53). When Sanchez re-raised the proportionality claim with new allegations of mental

impairments on state habeas review, the California Supreme Court summarily denied the claim.

The district court held that the California Supreme Court could have reasonably concluded that Sanchez's proportionality claim was foreclosed by *Pulley*. According to the district court, the state court therefore could have reasonably determined on habeas review that Sanchez did not establish that its prior rejection of this claim on the merits amounted to either an unreasonable application of clearly established federal law or an unreasonable determination of the facts.

In arguing that his sentence was disproportionate, Sanchez contends that the evidence that he intended to kill the Bocanegras was "far from overwhelming." According to Sanchez, he played no role in Juan's murder and he raised a reasonable doubt that he deliberately aided and abetted in Juanita's murder. Because deferential habeas review requires that clearly established federal law compel a result, Sanchez's argument fails.

In *Pulley*, the Supreme Court rejected the argument that the Eighth Amendment requires a state appellate court to compare the sentence in one case with the penalties imposed in similar cases. 465 U.S. at 43–44. The Supreme Court later held that, absent a showing that a capital punishment system operates in an arbitrary and capricious manner, habeas petitioners cannot prove a constitutional violation by showing that other defendants who may be similarly situated did not receive the death penalty. *McCleskey v. Kemp*, 481 U.S. 279, 306–07 (1987).

Sanchez contends that his case is distinct because his sentence is disproportionate in comparison to the outcomes realized by his co-defendants, rather than similarly situated

defendants in other cases. Sanchez asserts that although the Supreme Court rejected inter-case proportionality review in *Pulley*, it does not rule out a requirement of intra-case proportionality. But *Pulley* and *McCleskey* do not make the distinctions that Sanchez now asserts. Nothing in *McCleskey* compels the conclusion that the category of "other defendants who may be similarly situated" does not include co-participants in the same crimes. *McCleskey*, 481 U.S. at 306–07.

Defendants charged with the same crimes in the same case often appear before the court under different circumstances, which include their individual levels of participation in the criminal conduct, their criminal histories, individual aggravating and mitigating factors, and the extent to which they have taken responsibility for the crime. *See, e.g.*, *Gregg v. Georgia*, 428 U.S. 153, 198–99 (1976) (holding that a decision to afford an individual defendant mercy does not violate the Constitution so long as "the decision to impose it [is] guided by standards so that the sentencing authority [will] focus on the particularized circumstances of the crime and the defendant."). We acknowledge that Sanchez's sentence is severe given the results obtained by Joey and Reyes. But we cannot grant relief based on broad principles of fairness applicable to all capital cases. There is no clearly established federal law requiring intra-case proportionality review.

Sanchez argues that the Supreme Court in *Pulley* still assumed that some form of meaningful appellate review is required. *See Pulley*, 465 U.S. at 45. However, the California Supreme Court provided meaningful appellate review when it rejected Sanchez's proportionality claim. It concluded that multiple circumstances pertained to Sanchez individually, including his criminal history and his status as

a recent parolee following imprisonment for two assaults, and any comparisons to the outcomes obtained by his co-participants do not accrue in his favor. *Sanchez*, 12 Cal. 4th at 85. We affirm the district court's denial of habeas relief on Sanchez's proportionality claim.

IV. CONCLUSION

Under the highly deferential standards imposed on us by AEDPA, we cannot conclude that the California Supreme Court's inferred conclusions were "an unreasonable application of, clearly established Federal law" or "based on an unreasonable determination of the facts." 28 U.S.C. § 2254(d). For the foregoing reasons, on the issues discussed in this opinion, we affirm the district court's denial of Sanchez's petition.

AFFIRMED.

FILED

FEB 10 2022

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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

FILED

FEB 10 2022

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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 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 DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

TEDDY BRIAN SANCHEZ,

Petitioner,

v.

KEVIN CHAPPELL, Warden of San Quentin State Prison,

Respondent.

Case No. 1:97-CV-06134-AWI-SAB

DEATH PENALTY CASE

MEMORANDUM AND ORDER (1) DENYING PETITION FOR WRIT OF HABEAS CORPUS, and (2) ISSUING CERTIFICATE OF APPEALABILITY FOR CLAIMS 8, 59 AND 61
(ECF No. 38)

ORDER DENYING MOTION FOR EVIDENTIARY HEARING
(ECF No. 120)

ORDER DENYING MOTION AND REWEWED MOTION TO PRESERVE TESTIMONY
(ECF No. 150 & 160)

ORDER DENYING MOTION FOR CASE MANAGEMENT CONFERENCE
(ECF No. 159)

ORDER GRANTING REQUEST TO SEAL AND PROTECT SUPPLEMENTAL LODGED DOCUMENTS
(ECF No. 162)

CLERK TO FILE DOCUMENTS UNDER SEAL

CLERK TO SUBSTITUTE RON DAVIS AS RESPONDENT 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 Nina Rivkind, Esq., California Bar Number 79173, and David Harshaw III, Esq. of the Office of the Federal Defender.

Respondent Kevin Chappell[1] is named as Warden of San Quentin State Prison. He is represented in this action by Jamie Scheidegger, Esq., and Rachelle Newcomb, Esq., of the Office of the California Attorney General.

Before the court for a decision on the merits is the petition (ECF No. 38). Also before the Court are Petitioner's motions for evidentiary hearing (ECF No. 120) and to preserve testimony (ECF No. 150).

I.

BACKGROUND

Petitioner is currently in the custody of the California Department of Corrections and Rehabilitation pursuant to a judgment of the Superior Court of California, County of Kern, following his conviction by court trial on August 3, 1988 of the first degree murders of Juan Bocanegra ("Mr. Bocanegra") and Juanita Bocanegra ("Mrs. Bocanegra") (Cal. Pen. Code § 187), and of the separate (non-capital) first degree murder of Woodrow Tatman ("Mr. Tatman") (Cal. Pen. Code § 187). The multiple-murder special-circumstance allegation (Cal. Pen. Code § 190.2, subd. (a)(3)) as to the murders of Mr. Bocanegra and Mrs. Bocanegra was found true. The trial court also found Petitioner used a deadly and dangerous weapon in the murders of the Mr. Bocanegra and Mrs. Bocanegra (Cal. Pen. Code § 12022, subd. (b)), and that Petitioner was guilty of the robbery of Mr. Tatman. (Cal. Pen. Code § 211.)

On September 21, 1988, a penalty phase jury was empaneled. During the penalty phase, the prosecution introduced evidence (see Cal. Pen. Code § 190.3) that in 1982 Petitioner was involved in the use of, or attempted use of, force or violence against a store owner, Mr. Ammarie, and against a friend, Mr. Pena. Defendant in turn offered evidence of his

[1] Pursuant to Fed. R. Civ. Proc. 25(d), Ron Davis, Acting Warden of San Quentin State Prison, is substituted as Respondent in place of his predecessor wardens.

dysfunctional and impoverished upbringing and use of drugs and alcohol and mental issues and conditions.

On October 6, 1988, the jury returned a verdict of death. On October 31, 1988, the trial court denied Petitioner's motion to modify the verdict (Cal. Pen. Code § 190.4) and sentenced Petitioner to death for aiding and abetting the stabbing deaths of Mr. & Mrs. Bocanegra; to 25 years to life for the Tatman murder; to 5 years for the Tatman robbery; and to 2 years for the weapon enhancement.

On December 14, 1995, the California Supreme Court affirmed the judgment and sentence on direct appeal. People v. Sanchez, 12 Cal.4th 1 (1995). The California Supreme Court denied petition for rehearing but modified its opinion on February 21, 1996. People v. Sanchez, 12 Cal.4th 825b (1996). Petitioner's petition for writ of certiorari was denied by the United States Supreme Court on October 7, 1996. Sanchez v. California, 519 U.S. 835 (1996).

Petitioner filed a petition for writ of habeas corpus in the California Supreme Court. The state petition was summarily denied on October 22, 1997. In re Sanchez, S049502.

On September 17, 1998, Petitioner filed his federal petition for writ of habeas corpus arguing insufficient evidence, actual innocence, prosecutorial misconduct and ineffective assistance of counsel based on allegations he did not assist Joey Bocanegra ("Joey") in killing Mr. Bocanegra, Joey's father, and that his assistance in the murder of Mrs. Bocanegra, Joey's mother, does not make him eligible for the death penalty.

Respondent filed an answer on October 19, 1998 and an amended answer on February 8, 1999, admitting jurisdictional and procedural allegations (except paragraphs, 1, 16, 18-20), asserting procedural defenses, and denying all claims 1 through 61.

On December 9, 1998, the Court found all claims to be fully exhausted.

On April 5, 1999, Petitioner filed a memorandum of points and authorities in support of the petition. On July 1, 1999, Respondent filed a memorandum of points and authorities in support of his answer. On August 16, 1999, Petitioner filed a reply to Respondent's memorandum.

Petitioner was granted discovery of law enforcement records relating to: the Bocanegra crime scene, Petitioner's jail records, jailhouse informants Charles Seeley ("Seeley") and Rufus Hernandez ("Hernandez"), and coroner Dr. Holloway's autopsy notes. Petitioner was also authorized to take the deposition of Kern County District Attorney Investigator Dwight Pendleton regarding Seeley, and the deposition of Bakersfield Police Detective Stratton regarding Hernandez's heroin use.

Petitioner's request to expand the record was granted (ECF No. 134) for Exhibits 144-151 (declarations), Exhibits 421-434 (law enforcement records), Exhibits 527-528 (depositions), Exhibits 529-532 (Kern County court records), Exhibits 604-608 (Kern County jail records), and Exhibits 818-819 (other documents regarding Charles Seeley). Expansion of the record was denied for Exhibits 524-526 (court orders), but with judicial notice to be taken of proceedings in the Northern District of California in Ashmus v. Woodford, Case No. C93-0594 THE regarding the constitutionality of California's death penalty statute.

Petitioner filed a motion for evidentiary hearing on March 18, 2003 (ECF No. 120), seeking a hearing on forty-one of the sixty-one claims in his petition, twenty-six guilt and special circumstance phase claims and fifteen penalty phase claims.[2]

On March 3, 2004, Petitioner filed a second motion to expand the record to rebut Respondent's arguments in opposition to the motion for evidentiary hearing. The motion to expand the record was granted on September 27, 2005 (ECF No. 145) as to the supplemental declaration of defense psychologist, Dr. Froming, and as to records of Mr. Huffman, who was Petitioner's lawyer on unrelated burglary charges.

On June 25, 2014, Petitioner filed a motion to preserve testimony (ECF No. 150), seeking to depose seven witnesses, each of whom filed a declaration in support of instant petition. Petitioner filed a renewed motion to preserve testimony on May 1, 2015.

On May 1, 2015, Petitioner filed a motion requesting a case management conference

[2] The claims for which Petitioner seeks evidentiary hearing are: 2, 4, 6 - 18, 20 - 22, 24, 25, 28, 30 - 34, 36 - 38, 40, 43 - 48, 50 - 52, 54 and 60.

(ECF No. 159) to discuss the above motion for evidentiary hearing.

On June 23, 2015, Respondent filed a supplemental notice of lodging newly obtained state court documents, California Penal Code § 987.9 records # EE through # QQ, (ECF No. 161), and filed notice of his request to seal lodged documents # II and # QQ, (ECF No. 162).

II.

STATEMENT OF FACTS

This factual summary is taken from the California Supreme Court's summary of the facts in its December 14, 1995 opinion. Pursuant to 28 U.S.C. §§ 2254(d)(2), (e)(1), the state court's summary of facts is presumed correct. Petitioner does not present clear and convincing evidence to the contrary; thus, the Court adopts the factual recitations set forth by the state appellate court. See Vasquez v. Kirkland, 572 F.3d 1029, 1031 n.1 (9th Cir. 2009) ("We rely on the state appellate court's decision for our summary of the facts of the crime.").

A. *Guilt Phase Facts*

1. *The Bocanegra Murders*

> On the afternoon of February 3, 1987, the police found the bodies of Juan and Juanita Bocanegra in their home. Juanita was found in her sewing room, and Juan was found in the kitchen. Both had sustained extensive stab wounds and head injuries. A piece of fabric was tied loosely around Juanita's neck, and another piece of cloth was found on her right wrist.
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> Kern County Sheriff's criminalist Gregory Laskowski analyzed the blood found at the scene and concluded that both victims were killed where their bodies were found. The blood splatter evidence showed that the attack began in the hallway near the bathroom. The fight then moved to the kitchen where large amounts of blood indicated that a struggle took place throughout the room. The evidence indicated a fierce struggle occurred throughout the house. Small amounts of diluted blood in the bathroom suggested that someone cleaned up after the attack.
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> Laskowski also found evidence of two types of shoe tracks on the floor of the Bocanegra kitchen; one print had a "chevron pattern" and another, partial print, contained a "wavy sole design." A full wavy design shoe track in the bathroom was consistent with the print found in the kitchen. Both victims were found without shoes; Juanita's bloodstained slippers were found in the hallway.
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> Police found a knife block with four empty spaces in the kitchen. Two knives, without bloodstains, were in the kitchen sink. There were slash marks on the cabinets directly above the knife holder. That same evening, the police recovered a knife and sharpening stone that appeared to have blood on them. No fingerprints were found on these items. But police did find a bloody palm print belonging to defendant's accomplice Robert Reyes on the doorknob inside the Bocanegra front

door. Autopsies performed on both Juan and Juanita revealed that they died as a result of massive hemorrhaging due to multiple stab wounds, although the type of instrument that inflicted the wounds could not be conclusively determined.

On February 4, 1987, the Bocanegras' Dodge Colt station wagon was found abandoned. There were extensive bloodstains on both the interior and exterior of the car. Fingerprints belonging to Joey Bocanegra were found on the interior driver's and right rear door windows and on the right rear door handle.

Two items of evidence linked defendant to the crimes. The missing Bocanegra television set was found in the same room at the Bakersfield Inn where defendant stayed at the time of the murders, and defendant sold the Bocanegras' vacuum cleaner to Maria Rodriguez, a clerk employed by the inn. The remaining evidence used to convict defendant was based primarily on the circumstances of the crime, and incriminating statements made by defendant to police investigator Bob Stratton, jailhouse informant Rufus Hernandez, and newspaper reporter Michael Trihey.

2. *The Tatman Murder*

Woodrow Wilson Tatman was a frail, undernourished, 72-year-old man who often drank alcohol and was confined to a wheelchair. He rented a room at the Bakersfield Inn, and spent his days drinking alcohol and watching television. Rose McGrew was employed by the inn as a maid and she also lived on the premises. She helped care for Tatman and had last been in his room on February 1, 1987. Maria Charboneau also worked and lived at the inn, and she took care of Tatman's Social Security checks, and managed his finances. In the first week of February, Tatman received two Social Security checks. On February 2, Charboneau gave Tatman between $80 and $100. That was the last time she saw him alive.

On the afternoon of February 4, 1987, McGrew noticed that Tatman's drapes were still drawn and that he had not yet picked up his mail, which included his Social Security check. McGrew entered the room and found Tatman's body, lying on the floor near his bed. He was covered with a bedspread. Tatman's television, radio and electric skillet were missing from the room.

The autopsy report indicated that Tatman was killed by “massive blunt force injury to the left chest” which collapsed his left lung and caused substantial hemorrhaging. The blow to the chest was consistent with a heel stomp or with the application of an instrument approximately two inches by three inches in size.

Tatman also sustained several superficial stab wounds to the chest and lower abdomen, as well as a head injury. It appeared that the superficial injuries had been inflicted intra or post mortem, and none contributed to death. It could not be determined what instrument caused the lower abdominal injuries, although it appeared that the chest wounds were inflicted by a screwdriver. Dr. John Holloway, the forensic pathologist who performed the autopsy, could not determine whether the wounds were caused by one or more individuals.

a. *Statements Made to Jailhouse Informant Hernandez*

Rufus Hernandez was incarcerated with defendant for two months during 1987. He had been charged with receiving stolen property and second degree burglary. Defendant spoke to Hernandez about the Bocanegra murders and Hernandez entered into a plea bargain whereby he received six months in county jail and

three years' probation in exchange for his testimony.

Hernandez testified that defendant told him he went with Joey Bocanegra to the Bocanegra house. Hernandez's testimony was inconsistent as to whether defendant said they went with the plan of robbing the Bocanegras or only with the plan of borrowing money from Juan Bocanegra. Defendant waited outside for Joey, but entered the house when he heard Joey and Juan arguing in the hallway. Defendant claimed he tried unsuccessfully to stop the fight by hitting Juan with a curved metal bar. He thereafter threw the bar in the front yard. Defendant did not say whether Joey had stabbed Juan before or after defendant hit him.

Juanita, who heard the commotion from another room, came out of the bedroom yelling. Defendant slipped in a puddle of blood as he jumped over Juan to reach Juanita. He thereafter grabbed Juanita and told Joey that he should "shut up" his mother. Joey then stabbed his mother repeatedly and pushed her into the sewing room, where she was found. Defendant did not tell Hernandez that he did anything other than hold Juanita; instead defendant claimed that he saw Joey stab both victims with a kitchen knife. Defendant ended his story with the comment that after the murders he threw the bar into the front yard, and that the knife was thrown into a canal. Defendant noted that Joey took the television, a toolbox, and his parents' hatchback automobile. Hernandez thereafter reported defendant's statements to police investigator Stratton.

b. *Statements Made to Police Investigator Stratton*
On February 19, 1987, Stratton met with defendant in the Kern County jail. Defendant had contacted the police through his attorney because he wished to offer statements about the Bocanegra crimes. Before commencing the interview, defendant waived his right to counsel after receiving the admonitions required by Miranda v. Arizona (1966) 384 U.S. 436 [16 L.Ed.2d 694, 86 S. Ct. 1602, 10 A.L.R.3d 974]. Thereafter, he told Stratton that about 10 a.m., on the day of the Bocanegra murders, he met Joey Bocanegra on the street and spoke to him for a few minutes before Joey walked home. Defendant then walked by the Bocanegra house and observed Joey leaving the home. At that point, the interview with Stratton ended.

One week later, Stratton again spoke to defendant. At this point, defendant asked Stratton a series of hypothetical questions, including: "What if I was present in the house; what if Joey hit his dad after his dad had refused to give him some money; and what if Joey's dad hit him back and what if Joey got real mad and grabbed a knife and started stabbing his dad; what if Joey's mother didn't know what was happening because she was in another room?"

c. *Statements Made to Homicide Detective Boggs*
On March 27, 1987, after waiving his *Miranda* rights, defendant was interviewed about the Tatman murder by Homicide Detective Boggs. Defendant had already been arrested for the Bocanegra murders and agreed to talk to the officer because he believed he could be spending the rest of his life in prison.

Boggs testified that defendant told him he wanted to rob Tatman of his refrigerator because he needed one. Defendant told Boggs that, because he was so intoxicated (from ingesting alcohol and drugs) at the time of the robbery, he could not remember the sequence of events.

According to Boggs, defendant asked Reyes to pry open Tatman's bathroom window with Reyes's screwdriver. Once inside, Reyes removed the contents of

Tatman's refrigerator, and defendant moved it to a room next door that had been rented by Vicky Ornalez, a friend of the perpetrators.

Defendant told Boggs that when he returned to Tatman's room, Tatman was awake and Reyes was standing over him with a screwdriver in his hand. Defendant claimed he had no idea why Reyes was acting this way because both men had discussed trying not to awaken Tatman while they removed his property. Reyes then hit Tatman in the chest, pulled Tatman off the bed and onto the floor, and made multiple lunging movements downward with the screwdriver in his hand. Defendant asserted that the bed partially blocked his view, but he nonetheless believed Reyes was stabbing Tatman. After Reyes completed the murder, both defendant and Reyes returned to Vickie Ornalez's room.

d. *Defendant's Post-Arrest Comments to Michael Trihey*

Michael Trihey was a reporter for the Bakersfield Californian. Prior to trial, he interviewed defendant five times about the charges pending against him. On April 25, 1988, the paper published a Trihey article entitled, *Accused Asks for Own Death, System Says No*. According to Trihey, defendant told him that he was a "triple murderer" and that the Bocanegras and Tatman were killed for their Social Security checks.

B. *Penalty Phase Evidence*

The prosecution introduced evidence of defendant's criminal activity involving the use or attempted use of force or violence. (§ 190.3, factor (b).) On May 7, 1982, defendant assaulted store owner Hassan Ahmad Ammarie after defendant asked Ammarie to "get him some bacon" and Ammarie refused. Defendant stabbed Ammarie in the left shoulder and neck. Ammarie was hospitalized for two weeks following the attack.

On June 2, 1982, defendant attacked an acquaintance, Arthur Melendez Pena, after Pena refused to comply with defendant's demand for money.

Several witnesses who had testified at the preliminary hearing also testified at the penalty phase. Homicide Detective Boggs testified defendant had told him that after removing Tatman's possessions to Ornalez's room, he and Reyes "kicked back, drank some whiskey, smoked some dope, ate some food and just relaxed for the rest of the evening." Informant Rufus Hernandez and Police Detective Stratton also testified that defendant told Hernandez that he took an active role in the Bocanegra and Tatman slayings-including beating Juan and Juanita Bocanegra, and beating and assisting Reyes in stabbing Tatman. Stratton repeated Hernandez's statements to him that defendant and Joey Bocanegra went to Juan and Juanita's house and planned to rob them and that Tatman was robbed for his Social Security check. Rose McGrew, the Bakersfield Inn maid, repeated her guilt phase testimony about how she discovered Tatman's body.

With regard to the Bocanegra murders, Hernandez testified that defendant entered the house with a bar and "ran up to Joey's father and grabbed him and held him there until Joey went and got the knife and they just beat him and stabbed him." When Juanita walked out of her sewing room, defendant "rushed" her: "That's when they both started killing her.... They just stabbed her numerous times and hit her in the head a few times with the bar, and the time, at the same time of doing that I guess Joey somehow managed to get her back inside the room, I guess, while he was hitting her...." The prosecution also introduced six color photographs of the victims and forty-eight other color photographs of the

> Bocanegra and Tatman crime scenes. Criminalist Greg Laskowski testified that the blood splatter in the hallway of the Bocanegra house was consistent with the prosecution's theory that multiple stabbings occurred there.
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> Defendant's penalty phase evidence consisted of testimony by friends, relatives, and a social anthropologist to the effect that defendant's dysfunctional and poverty-stricken, migratory family life severely hampered his ability to live a productive life. Defendant was rejected by his mother following his birth and was sent to live with his grandparents. When he was three years old, defendant's mother and stepfather unexpectedly wrenched defendant from his grandparents' home to move to Arkansas. Shortly thereafter, defendant's mother left defendant's stepfather, and took defendant and his half-brother to California. Defendant's mother remarried a man with three children, and the couple thereafter had five additional children.
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> Defendant's mother and his stepfather were alcoholics and drug abusers who were violent with each other and the children. His grandparents, who were often in charge of defendant, also drank heavily and abused drugs. Both defendant's mother and stepfather died in their middle 30's of acute alcoholism. Defendant tried to take care of his siblings, but took drugs to escape his difficult life. He eventually turned to crime because he had no marketable job skills to prepare him for life as an adult.
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> Penalty phase defense counsel Gary Frank attempted to persuade the jury that defendant should receive a sentence of life without the possibility of parole and "spend the remainder of his life in prison."

Sanchez, 12 Cal.4th 1, 17-23 (1995).

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. § 2254(a); 28 U.S.C. § 2241(c)(3); 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 jurisdiction of this Court. 28 U.S.C. § 2254(a); 28 U.S.C. § 2241(d).

This action was initiated on November 20, 1997. Because this action was initiated after April 24, 1996, the amendments to 28 U.S.C. § 2254 enacted as part of the Antiterrorism and Effective Death Penalty Act (AEDPA) apply. See Lindh v. Murphy, 521 U.S. 320, 336 (1997); Van Tran v. Lindsey, 212 F.3d 1143, 1148 (9th Cir. 2000), overruled on other grounds by

Lockyer v. Andrade, 538 U.S. 63, 71 (2003).

IV.

STANDARDS OF REVIEW

A. Legal Standard - Habeas Corpus

Under the AEDPA, relitigation of any claim adjudicated on the merits in state court is barred unless a petitioner can show that the state court's adjudication of his 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); Harrington v. Richter, 562 U.S. 86, 98 (2011); Lockyer, 538 U.S. at 70-71; Williams, 529 U.S. at 413.

As a threshold matter, this Court must "first decide what constitutes 'clearly established Federal law, as determined by the Supreme Court of the United States.'" Lockyer, 538 U.S. at 71 (quoting 28 U.S.C. § 2254(d)(1)). In ascertaining what is "clearly established Federal law," this Court must look to the "holdings, as opposed to the dicta, of [the Supreme Court's] decisions as of the time of the relevant state-court decision." Williams, 529 U.S. at 412. "In other words, 'clearly established Federal law' under § 2254(d)(1) is the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision." Id. In addition, the Supreme Court decision must "'squarely address [] the issue in th[e] case'; otherwise, there is no clearly established Federal law for purposes of review under AEDPA." Moses v. Payne, 555 F.3d 742, 754 (9th Cir. 2009) (quoting Wright v. Van Patten, 552 U.S. 120, 125 (2008)); see also Panetti v. Quarterman, 551 U.S. 930, 949 (2007); Carey v. Musladin, 549 U.S. 70, 74 (2006). If no clearly established Federal law exists, the inquiry is at an end and the Court must defer to the state court's decision. Carey, 549 U.S. 70; Wright, 552 U.S. at 126; Moses, 555 F.3d at 760. In addition, the Supreme Court has recently clarified that habeas relief is unavailable in instances where a state court arguably refuses to extend a governing legal principle to a context in which

the principle should have controlled. White v. Woodall, --- U.S. ---, 134 S. Ct. 1697, 1706 (2014). The Supreme Court stated: "'[I]f a habeas court must extend a rationale before it can apply to the facts at hand,' then by definition the rationale was not 'clearly established at the time of the state-court decision.'" Id. (quoting Yarborough v. Alvarado, 541 U.S. 652, 666 (2004)).

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

"Under the 'reasonable application clause,' a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." Williams, 529 U.S. at 413. "[A] federal court may not issue the writ simply because the court concludes in its independent judgment that the relevant state court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." Id. at 411; see also Lockyer, 538 U.S. at 75-76. "A state court's determination that a claim lacks merit precludes federal habeas relief so long as fair-minded jurists could disagree on the correctness of the state court's decision." Richter, 562 U.S. at 101, citing Yarborough, 541 U.S. at 664. The Supreme Court stated:

> As a condition for obtaining habeas corpus from a federal court, a state prisoner

> must 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.

Id. at 103. In other words, so long as fair-minded jurists could disagree on the correctness of the state courts decision, the decision cannot be considered unreasonable. Id. at 101. In applying this standard, "a habeas court must determine what arguments or theories supported . . . or could have supported the state court's decision; and then it must ask whether it is possible fair-minded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the Supreme Court]." Id. at 102. This objective standard of reasonableness applies to review under both subsections of 28 U.S.C. § 2254(d). See Hibbler v. Benedetti, 693 F.3d 1140, 1146-47 (9th Cir. 2012). If the Court determines that the state court decision is objectively unreasonable, and the error is not structural, habeas relief is nonetheless unavailable unless the error had a substantial and injurious effect on the verdict. Brecht v. Abrahamson, 507 U.S. 619, 637 (1993).

Petitioner has the burden of establishing that the decision of the state court is contrary to or involved an unreasonable application of United States Supreme Court precedent. Baylor v. Estelle, 94 F.3d 1321, 1325 (9th Cir. 1996). Although only Supreme Court law is binding on the states, Ninth Circuit precedent remains relevant persuasive authority in determining whether a state court decision is objectively unreasonable. See LaJoie v. Thompson, 217 F.3d 663, 669 n.6 (9th Cir. 2000); Duhaime v. Ducharme, 200 F.3d 597, 600-01 (9th Cir. 1999).

The AEDPA requires considerable deference to the state courts. "[R]eview under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits," and "evidence introduced in federal court has no bearing on 2254(d)(1) review." Cullen v. Pinholster, __ U.S. __, __, 131 S. Ct. 1388, 1398-99 (2011). "Factual determinations by state courts are presumed correct absent clear and convincing evidence to the contrary." Miller-El v. Cockrell, 537 U.S. 322, 340 (2003) (citing 28 U.S.C. § 2254(e)(1)). However, a state court factual finding is not entitled to deference if the relevant state court record is

unavailable for the federal court to review. Townsend v. Sain, 372 U.S. 293, 319 (1963), overruled by Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992).

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

In this case, many of Petitioner's claims were raised and rejected by the California Supreme Court on direct appeal. However, many of his claims were raised in his state habeas petition to the California Supreme Court, and summarily denied on the merits. In such a case where the state court decision is unaccompanied by an explanation, "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. The Supreme Court stated that "a habeas court must determine what arguments or theories supported or . . . *could have supported*, the state court's decision; and then it must ask whether it is possible fair-minded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." Id. at 786 (emphasis added). Petitioner bears "the burden to demonstrate that 'there was no reasonable basis for the state court to deny relief.'" Walker v. Martel, 709 F.3d 925, 939 (9th Cir. 2013) (quoting Richter, 562 U.S. at 98). "Crucially, this is not a de novo review of the constitutional question," id., as "even a strong case for relief does not mean the state court's contrary conclusion was unreasonable," Id. (quoting Richter, 562 U.S. at 102); (see also Murray v. Schriro, 745 F.3d 984, 996-97, (9th Cir. 2014)).

When reviewing the California Supreme Court's summary denial of a petition, this Court must consider that the California Supreme Court's summary denial of a habeas petition on the merits reflects that court's determination that:

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

Pinholster, 131 S. Ct. at 402 n.12 (quoting In re Clark, 5 Cal. 4th 750, 770 (1993) (citing People v. Duvall, 9 Cal. 4th 464, 474 (1995)). Accordingly, if this Court finds Petitioner has unarguably presented a prima facie case for relief on a claim, the state court's summary rejection of that claim would be unreasonable. Taylor v. Maddox, 366 F.3d 992, 1000 (9th Cir. 2004); Nunes v. Mueller, 350 F.3d 1045, 1054-55 (9th Cir. 2003).

For any habeas claim that has not been adjudicated on the merits by the state court, the federal court reviews the claim de novo without the deference usually accorded state courts under 28 U.S.C. § 2254(d)(1). Chaker v. Crogan, 428 F.3d 1215, 1221 (9th Cir.2005); Pirtle v. Morgan, 313 F.3d 1160, 1167 (9th Cir. 2002). In such instances, however, the provisions of 28 U.S.C. § 2254(e) still apply. Pinholster, 131 S. Ct at 1401 ("Section 2254(e)(2) continues to have force where § 2254(d)(1) does not bar federal habeas relief."); Pirtle, 313 F.3d at 1167–68 (stating that state court findings of fact are presumed correct under § 2254(e)(1) even if legal review is de novo).

V.

PROCEDURAL BARS

All of Petitioner's claims have been raised to the California Supreme Court and denied on the merits. In addition, some of his claims were denied as procedurally barred. As to those claims, Respondent has argued that California's timeliness rule for state habeas petitions, California's rule barring claims on state habeas that could have been presented on direct appeal, and California's contemporaneous objection rule are all adequate and independent state grounds that bar federal habeas review. The Court will not address procedural default with this order because all of the claims lack merit, and the Court finds the question of procedural default to be relatively complicated in this case. See Franklin v. Johnson, 290 F.3d 1223, 1232 (9th Cir. 2002) (Courts may reach the merits of a case prior to addressing procedural default); Bell v. Cone, 543 U.S. 447, 451 n.3 (2005); Loggins v. Thomas, 654 F.3d 1204, 1215 (11th Cir. 2011).

VI.

REVIEW OF CLAIMS

A. Claims Relating to Conviction and Sentence

1. Sufficiency of the Evidence - Claims 1[3] and 3[4]

In claims 1 and 3, Petitioner states that he was convicted and sentenced for the first degree murders of Mr. Bocanegra and Mrs. Bocanegra on insufficient evidence that he acted with deliberation and premeditation, see People v. Anderson, 70 Cal.2d 15, 26-27 (1968), depriving him of due process under the Fourteenth Amendment.

a. Clearly Established Law

A federal habeas court reviews challenges to the sufficiency of the evidence by determining whether in "viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Lewis v. Jeffers, 497 U.S. 764, 781 (1990). "A reviewing court must consider all of the evidence admitted by the trial court, regardless whether that evidence was admitted erroneously." McDaniel v. Brown, 558 U.S. 120, 131 (2010). Sufficiency of the evidence claims raised in § 2254 proceedings must be measured with reference to substantive requirements as defined by state law. Jackson v. Virginia, 443 U.S. 307, 324 n.16 (1979). In cases where the evidence is unclear or would support conflicting inferences, the federal court "must presume -- even if it does not affirmatively appear in the record -- that the trier of fact resolved any such conflict in favor of the prosecution, and must defer to that resolution." Id. at 326. To prevail here, Petitioner must show "that the prosecution's case against him "was so lacking that the trial court should have entered a judgment of acquittal." McDaniel, 558 U.S. at 131.

The AEDPA adds another layer of deference over the already deferential Jackson standard. Under the AEDPA, the federal court may not grant a habeas petition unless it finds that the state court unreasonably applied the principles underlying the Jackson standard when reviewing the petitioner's claim. See e.g., Juan H. v. Allen, 408 F.3d 1262, 1275 n.12 (9th Cir. 2005); Jones v. Wood, 114 F.3d 1002, 1013 (9th Cir. 1997) (en banc) (recognizing that "unreasonable application" standard applies to insufficient evidence claim). "Expressed more

[3] The legal bases of the Fifth, Sixth and Eighth Amendments were stricken as unexhausted. ECF No. 60 at 8:25-26.
[4] The legal bases of the Fifth, Sixth and Eighth Amendments were stricken as unexhausted. ECF No. 60 at 9:1-3.

fully, this means a reviewing court faced with a record of historical facts that supports conflicting inferences must presume -- even if it does not affirmatively appear in the record -- that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution." McDaniel, 558 U.S. at 133.

Evidence is sufficient under the due process clause where "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson, 443 U.S. at 319; see also Payne v. Borg, 982 F.2d 335, 338 (9th Cir. 1992).

b. Review of Claims 1 and 3

The state supreme court, on direct appeal, considered claimed insufficiency of the evidence and rejected Petitioner's claim of "wading into [the] fight" and being ineffectual in the assaults; finding instead that the evidence clearly reflects that defendant aided and abetted Joey in killing both Mr. Bocanegra and Mrs. Bocanegra, as follows:

> [S]ubstantial evidence supports the trial court's finding that Joey Bocanegra intended to kill his parents, that he premeditated and deliberated the murders, and that defendant can be found vicariously liable for the murders as an aider and abettor. As we have observed, an aider and abettor must act with knowledge of the criminal purpose of the perpetrator and with an intent either of committing, or of encouraging or facilitating commission of, the offense. [Citation] We have also recognized that if the aider and abettor undertakes acts "with the intent that the actual perpetrator's purpose be facilitated thereby, he is a principal and liable for the commission of the offense." [Citation] Thus, the basis of liability for the perpetrator applies to the aider and abettor and extends to "the natural and reasonable consequences of the acts he knowingly and intelligently aids and encourages." [Citation] As we explain, we conclude that defendant shared Joey's intent to kill, and in assisting Joey in committing the crimes, understood, and facilitated, the full extent of Joey's criminal purpose.
>
> Hernandez testified, and defendant admitted to Detective Stratton, that defendant initially waited outside while Joey entered his parents' house. Defendant then entered the house after hearing the sounds of a fight between Joey and Juan. Defendant told Hernandez that he went inside the house to break up the fight between Joey and his father, but the facts belie his stated intent. When defendant entered the house, he saw Joey fighting with his father. Rather than come to Juan's aid, defendant grabbed a curved metal bar and commenced beating Juan.
>
> Joey's actions, according to defendant's statements to prosecution witnesses, indicated that Joey deliberated over his father's killing. Joey initially struck Juan in the hallway and then, in the kitchen, obtained a knife that he used to stab Juan. In our view, Joey formed a clear intent to kill, at the latest, during the altercation with his father, and obtained a kitchen knife to carry out that plan. Our cases hold

that planning activity occurring over a short period of time is sufficient to find premeditation. "'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 ....'" [Citation]

There was also ample evidence of motive. The evidence supports a strong inference that Joey entered his parents' house to rob them. When his father resisted the robbery, Joey was motivated to murder him in order to gain access to both money and tangible goods, including a television set. Substantial evidence supports a finding that Joey believed Juan stood in the way of his plan.

Finally, the trial court could infer from the evidence that the manner of killing tended to demonstrate Joey acted with premeditation and deliberation. The attack occurred in a series of rooms, indicating that Juan's repeated attempts to break away from his murderers were consistently thwarted by the attackers' relentless pursuit of him, even after he was gravely wounded. A rational finder of fact could infer that the manner of killing, when combined with Joey's retrieval of the knife in the kitchen, and defendant's retrieval of a metal bar used in clubbing a defenseless Juan, is sufficient to support the trier of fact's implied finding that Joey formed the plan to kill his parents during the altercation, located the murder weapon, and along with defendant, deliberately murdered his father. [Citation]

The same evidence supports the trial court's finding that defendant shared Joey's intent and plan to kill Juan, and thus was liable, as an aider and abettor, for Juan's murder. [Citation] The killing of Juan ended after a prolonged knife attack and beating from which Juan attempted to defend himself. Defendant's personal involvement in the murder was substantial. Far from merely acting as a lookout, or beating Juan after he was already dead, defendant was actively involved in assisting Joey in Juan's murder. Defendant's admitted act of arming himself with a curved metal bar before joining the altercation between Joey and Juan indicates he shared Joey's plan. [Citation] From this evidence, the trier of fact could reasonably infer defendant knowingly engaged or assisted in Juan's murder as an aider and abettor. [Citation]

As to Juanita's murder, defendant asserts the evidence similarly does not support the conviction. He claims that he "did not personally kill Juanita [because] she was stabbed to death by Joey." He asserts that there is "no evidence in the record that [he] held Juanita down, helped push her back to the sewing room, or had any contact with her while Joey was stabbing her." He contends that there is no evidence to support the People's theory that defendant aided Joey by hitting Juanita with a bar and that "[t]here is simply no evidence that [his] initial grabbing of Juanita actually aided, or even was intended to aid, Joey's subsequent stabbing of his mother." Finally, defendant asserts in his reply brief that his "efforts to tie and gag Juanita are altogether inconsistent with an intent to kill her."

Again, the evidence supports the court's verdicts and refutes defendant's contention. Hernandez testified defendant told him that during the murder of Juan, Juanita screamed. Defendant grabbed Juanita and told Joey to "shut her up." Joey then stabbed his mother 26 times. A bloodstained garment was wrapped around Juanita's neck, and her wrists had been tied together with a piece of fabric. The pathologist (Holloway) opined that Juanita died of the stab wounds and that the ligature constriction of her neck was a possible contributing cause. She also had severe scalp injuries that Holloway concluded were consistent with those inflicted

> by a long bar or pipe less than one-half inch in diameter, similar to the instrument used by defendant to inflict Juan's scalp wounds. The trial court could reasonably infer from the evidence that Juanita was killed in order to keep her from being a percipient witness to the murder of her husband. Thus, viewing the evidence in the light most favorable to the People, we conclude a "rational trier of fact" could have been persuaded "that the killing was the result of preexisting reflection and weighing of considerations rather than mere unconsidered or rash impulse." [Citation] Defendant's participation in Juanita's murder, like his aiding and abetting in Juan's killing, clearly supports a finding that defendant aided and abetted her murder. [Citation]
>
> Sanchez, 12 Cal.4th at 33-36.

Under California law, "[m]urder is the unlawful killing of a human being . . . with malice aforethought." Cal. Pen. Code § 187, subd. (a). "[A]ll murder which is perpetrated . . . by any kind of willful, deliberate, and premeditated killing . . . is murder of the first degree . . . ." Cal. Pen. Code § 189; see People v. Berryman, 6 Cal.4th 1048, 1085) (1993) (overruled on other grounds, People v. Hill, 17 Cal.4th 800, 822-23 (1998). Premeditation and deliberation are generally established by proof of (1) planning activity; (2) motive (established by a prior relationship and/or conduct with the victim); and (3) manner of killing. People v. Anderson, 70 Cal.2d 15, 26-27 (1968). The California Supreme Court "sustains verdicts of first degree murder typically when there is evidence of all three types and otherwise requires at least extremely strong evidence of (1) or evidence of (2) in conjunction with either (1) or (3)." Id., at 27.

A person "aids and abets the commission of a crime when he or she, acting with (1) knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose of committing, encouraging, or facilitating the commission of the offense, (3) by act or advice aids, promotes, encourages or instigates, the commission of the crime." People v. Beeman, 35 Cal.3d 547, 561 (1984).

The state court could reasonably have concluded that the fight with Mr. Bocanegra resulted from pursuit of the joint motive of Joey and Petitioner to obtain money from Mr. Bocanegra, the stated reason for their going to the Bocanegra home. (See Clerk's Transcript on Appeal, hereinafter "CT", 502-504.) After the murders, in furtherance of this motive, Petitioner assisted Joey in removing property from the Bocanegra home (CT 484.) Some of this property

was later found in Petitioner's room, or sold by him. (Reporter's Transcript on Appeal, hereinafter "RT", 25-29, 35-37, 67-69.)

Petitioner disclaims premeditation and deliberation in the murders, claiming Joey, and by extension Petitioner, acted rashly and on impulse. But the extended nature and duration of the struggles with Mr. Bocanegra and Mrs. Bocanegra, with Joey taking time to get a kitchen knife (CT 504; RT 2854), and Petitioner attempting to subdue and restrain each of the victims during Joey's assault on them, seeing Joey stab them, along with the multiple stab and blunt force wounds inflicted during room to room struggle with the victims, could reasonably suggest a plan to kill them. (CT112-120; 149-153; 181; 192-194; 357-383; 479-483; 488.) Each victim suffered multiple stab wounds, Mrs. Bocanegra was stabbed at least 26 times and had 6 scalp wounds and Mr. Bocanegra was stabbed at least eight times and had nine scalp wounds. (Id.) Both victims were left unassisted to bleed to death. (CT 112-114, 117-119.) There was evidence Mrs. Bocanegra's wrists had been tied together and that she had been gagged. (CT 113, 149-150, 153.) Jailhouse informant Hernandez consistently testified Petitioner told him that when fighting broke out between Joey and Mr. Bocanegra (CT 479-505), in the hallway (id.; RT 2843, 2852-2853), Petitioner responded by hitting Mr. Bocanegra on the head nine times with a curved bar (CT 479-505; CT 112-114; 117-119), that when Mrs. Bocanegra came out of a back bedroom and started yelling Petitioner grabbed her and told Joey to "shut her up." (CT 483, 488, 504.) Petitioner's claim that it was Joey who stabbed his parents to death (CT 488; RT 121-122), does not undermine evidence above that Petitioner aided and abetted Joey to that end.

The physical evidence is consistent with Hernandez's testimony. The evidentiary record reasonably suggests that Mr. Bocanegra was initially assaulted in the hallway and then murdered in the kitchen (CT 355-381). The coroner, Dr. Holloway, opined Mr. Bocanegra died from multiple stab wounds and that other conditions were the multiple blunt force trauma wounds to Mr. Bocanegra's head (CT 117-119); that Mrs. Bocanegra died from multiple stab wounds and had six wounds to her scalp (CT 112-115;, 153-154); that the scalp wounds were caused by an instrument different from that used to inflict the stab wounds; and that ligature construction was

a possible contributing cause. (CT 112-119.)

Both at the preliminary hearing and the penalty phase, Hernandez testified that Petitioner struck Mr. Bocanegra with a bar (CT 479-482, 500-501, RT 2843-2844, 2854), and that he grabbed or "rushed" Mrs. Bocanegra, a witness to Mr. Bocanegra's murder (id.; RT 153, 189) and told Joey to "shut her up" (CT 483, 504; RT 2844). Hernandez testimony that the altercation between Mr. Bocanegra and Joey started in the hallway and moved to the kitchen is consistent with the bloodstain pattern evidence, (CT 355-383; 479, 487-488, 500-501; RT 2843-2845) and other crime scene evidence. (Id.) Petitioner's claim that a third person, Robert Reyes ("Reyes"), was in the house during the murders and may have aided Joey in the murders, is not substantially supported by the evidentiary record. (Id.; CT 131-133)

Petitioner attempts to discount testimony that he intended to rob the Bocanegras prior to their murder. Petitioner correctly notes that the trial court did not find him guilty of robbing the Bocanegras and found the robbery-murder special circumstance untrue on grounds Petitioner's intent to rob arose after the murders. (CT 906; RT 235-237.) Even so, Petitioner has not controverted evidence that he used a metal bar during the murders. (CT 479-482, 500-501, RT 2843-2844, 2854RT 236). The trial court rejected Hernandez testimony, favorable to Petitioner, that Petitioner merely grabbed Mrs. Bocanegra. (CT 483.)

No facts or discrepancies between the testimony and the physical evidence establish or compel the conclusion that Hernandez, by virtue of his alleged substance addiction, his plea deal, or otherwise, was motivated to and did testify falsely or inaccurately. For reasons discussed in claim 7, the state court could reasonably have found Hernandez received no undisclosed sentence concession in return for his testimony. (State Habeas Corpus Petition, hereinafter "SHCP", Ex. 900, pp. 4, 11; State Court Response to Petition, hereinafter "SResp.", Ex. B.)

The state court could reasonably conclude that Petitioner, sharing Joey's motive of obtaining money from Mr. Bocanegra, took Joey's side in the struggles with Mr. Bocanegra and Mrs. Bocanegra, verbally assisting and encouraging him and physically restraining and assaulting both victims. Petitioner's statements to Hernandez, Detective Stratton and reporter

Trihey, and the physical evidence in the Bocanegra home are evidence of his guilt. Any inconsistencies in Hernandez's preliminary hearing testimony and his penalty phase testimony are not substantially material or probative of and do not preclude the possibility of his guilt and sentence to death.

Moreover, Petitioner inculpated himself in the murders. He asked Bakersfield detective Stratton "what if [he] was present at the Bocanegra home during the murders." (CT 77-78). He told newspaper reporter Trihey he was a "triple murderer." (RT 16-18.)

A rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt based on the evidence in the record. The state court's denial of these claims was not contrary to, or an unreasonable application of, clearly established federal law, or 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); Jackson, 443 U.S. at 319.

Claims 1 and 3 are denied.[5]

2. Actual Innocence - Claims 2 and 4

In claims 2 and 4, Petitioner claims actual innocence of the first degree murders of Mr. Bocanegra and Mrs. Bocanegra based on evidence existing before trial and later discovered evidence, such that his conviction and sentence represent a fundamental miscarriage of justice violating the Fifth, Sixth, Eighth and Fourteenth Amendments.

a. Clearly Established Law

i. Actual Innocence

The showing required for a free standing claim of actual innocence, i.e., a claim irrespective of constitutional error at trial or sentencing, is "extraordinarily high" and must be "truly persuasive." Herrera v. Collins, 506 U.S. 390, 417, (1993). To carry this burden Petitioner must affirmatively prove he is innocent. See Carriger v. Stewart, 132 F.3d 463, 476-77 (9th Cir. 1997).

[5] Reyes pled guilty to first degree murder in the three homicides and to the robberies of Tatman and the Bocanegras and was sentenced to three consecutive terms of 25 years to life. People v. Robert Gabriel Reyes, Kern County Superior Court Case No. 34638. Charges against Joey Bocanegra were dismissed for insufficient evidence. People v. Jose Juan Bocanegra, Kern County Superior Court Case No. 34638.

In Schlup v. Delo, 513 U.S. 298 (1995) the Supreme Court reached actual innocence as a gateway claim to consideration of otherwise barred Constitutional claims. "If a habeas petitioner . . . presents evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of non-harmless constitutional error, the petitioner should be allowed to pass through the gateway and argue the merits of his underlying claims." Schlup at 316. The Schlup court held that the proper standard is that a procedurally defaulted petitioner must show that a constitutional violation has *probably* resulted in the conviction of one who is actually innocent. Schlup at 326.

"The petitioner must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." Schlup at 327. Petitioner's burden is to demonstrate that more likely than not, any reasonable juror would have reasonable doubt. House v. Bell, 547 U.S. 518, 538 (2006). See Sawyer v. Whitley, 505 U.S. 333, 346 (1992) (holding that in order to prove actual innocence, petitioner must show fair probability that rational trier of fact would have entertained reasonable doubt regarding the existence of facts which are prerequisites under state or federal law for imposition of the death penalty).

ii. State Law Aider/Abettor

California law requires an aider and abettor to share the specific intent of the perpetrator. Beeman, 35 Cal.3d at 560. An aider and abettor shares the perpetrator's specific intent by knowing the full extent of the perpetrator's criminal purpose and giving aid or encouragement with the intent or purpose of facilitating the commission of the crime. Id. California's 1978 death penalty statute requires finding an independent intent to kill as part of the special circumstance for an aider or abettor of felony-murder. People v. Anderson, 43 Cal. 3d 1104, 1141-42 (1987). This is consistent with the Eighth Amendment which prohibits the death penalty for an aider and abettor of felony murder who does not actually kill, attempt to kill, intend that a killing or lethal force occur, or act with reckless indifference to human life. Enmund v. Florida, 458 U.S. 782, 797 (1982); Tison v. Arizona, 481 U.S. 137, 157-58 (1987). Federal court review of instructional error under Beeman is subject to the standard from Brecht,

507 U.S. at 637, whether the error had a substantial or injurious effect on the verdict.

b. Review of Claims 2 and 4

The California Supreme Court denied these claims as raised in Petitioner's state petition for habeas corpus (State Petition for Habeas Corpus, hereinafter "SHCP" or "SPet.", Claims A & B), to the extent they duplicated sufficiency of evidence claims rejected on appeal.

To the extent Petitioner's actual innocence claims are free standing claims based on the state record, they fail for the reasons stated in claims 1 and 3. To the extent these claims are free standing claims based on alleged newly discovered evidence, the claims not cognizable (see Herrera, 506 U.S. at 400) (the Supreme Court held that free standing claims of "actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding.").

The actual innocence claims also fail as gateway claims because it is not likely any reasonable juror would have reasonable doubt that the essential elements of the criminal counts could have been found beyond a reasonable doubt. Petitioner's statements to jailhouse informant Hernandez, Detective Stratton and reporter Trihey, and the physical evidence in the Bocanegra home all are substantial evidence of his guilt.

Hernandez's testimony at both preliminary hearing and penalty phase that the altercation between Mr. Bocanegra and Joey started in the hallway and moved to the kitchen is consistent with the bloodstain evidence. (CT 355-383; 479, 487-488, 500-501; RT 2843-2845) and other crime scene evidence. (CT 355-380.) His preliminary hearing testimony that Petitioner heard Joey and Mr. Bocanegra arguing, "walked into the house, tried to break 'em up" (CT 479) and that he (Petitioner) hit Mr. Bocanegra with the bar is not materially inconsistent with Hernandez's penalty phase testimony that Petitioner grabbed and held Mr. Bocanegra until Joey got the knife and that Petitioner beat Mr. Bocanegra with a bar.

Hernandez testimony at the preliminary hearing and the penalty phase was consistent that during Joey's struggles with Mr. Bocanegra, Petitioner struck Mr. Bocanegra with a bar (CT

479-482, 500-501, RT 2843-2844, 2854), and that he grabbed or "rushed" Mrs. Bocanegra and told Joey to "shut her up" during his struggles with Mrs. Bocanegra (CT 483, 504; RT 2844). Petitioner saw Joey wield a knife during these assaults. (CT 483, 487-489, 504; SPet. Ex. 419, 5, 17; RT 121-122.) Mr. Bocanegra and Mrs. Bocanegra succumbed to the multiple stab wounds. (CT 112-119.)

As to the Tatman homicide, Hernandez's preliminary hearing testimony that Petitioner and Joey "hit a black guy in an alley" (CT 488, 497-99) is not, as Petitioner alleges, inconsistent with penalty phase testimony that Petitioner and two other men entered Mr. Tatman's room at the Bakersfield Inn, and beat him, and the other two stabbed Mr. Tatman with a screwdriver, and that they took Mr. Tatman's money. There is no evidence Hernandez's testimony at the preliminary hearing related to the same incident he testified to at the penalty phase.

Petitioner's assertion that there were actually 3 non-victim shoeprints in the kitchen where Mr. Bocanegra was murdered, so as to implicate Reyes in the Bocanegra murders is not sufficiently supported in the record. As discussed in claims 8 and 10, *post*, the state court could reasonably have found that the bloodstain evidence and testimony of Hernandez contradicts jailhouse informant Seeley's account that Petitioner observed Mr. Bocanegra's murder from the hallway.

No facts or discrepancies between the testimony and the physical evidence establish or compel the conclusion that Hernandez, by virtue of his alleged substance addiction, his plea deal, or otherwise, was motivated to and did testify falsely or inaccurately. (See claim 7, *ante*.) Petitioner has not demonstrated Hernandez received undisclosed sentence concession(s). (SPet. Ex. 900, pp. 4, 11; SResp. Ex. B.)

In contrast, the testimony of jailhouse informant Seeley inculpating Reyes in the murders, is inconsistent with the physical evidence. Seeley's testimony that the altercation with Mr. Bocanegra started and ended in the kitchen (SPet. Ex. 419, pp.5-6, 17-20) is not reasonably consistent with the blood stain patterns that suggest the assault on Mr. Bocanegra began in the hallway. (CT 355-383.)

The physical evidence, Petitioner's statements to Detective Stratton, and Petitioner's statements to Reporter Trihey are not persuasive of actual innocence for the reasons discussed in claims 10, 12, 15 and 27, *post*.

Petitioner alleges his severe neurological and psychiatric impairments precluded him from planning the murder and carrying out the plan. But as explained in claim 6, there is no sufficient evidence that Petitioner suffered from neurological or psychiatric impairment precluding, as an aider and abettor, his knowingly and intentionally assisting Joey in the Bocanegra murders.

Finally, Petitioner's assertion that he merely restrained Mrs. Bocanegra is nonetheless sufficient to support a first degree murder conviction as an aider and abettor, especially given that Petitioner had just observed Joey stab his father to death. (CT 483; RT 2843-2854.) It could reasonably be concluded that Petitioner's restraining Mrs. Bocanegra just after Mr. Bocanegra's murder satisfied the requirement that an aider or abettor knows the full extent of the perpetrator's criminal purpose and gives aid to facilitate the commission of the crime. Beeman, 35 Cal. 3d at 560.

For the reasons stated, a fair-minded jurist could conclude it unlikely any reasonable juror would have reasonable doubt that the essential elements of the criminal counts against Petitioner could have been found beyond a reasonable doubt.

The California Supreme Court's denial of these claims was not contrary to, or an unreasonable application of, clearly established federal law, or based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. See 28 U.S.C. § 2254(d).

Claims 2 and 4 are denied.

3. State Appellate Error - Claim 5

In this claim Petitioner alleges that the California Supreme Court committed appellate review error by making an unconstitutional change in the definition of first degree murder (Cal. Pen. Code 189) violating the Fifth, Sixth, Eighth and Fourteenth Amendments.

a. Clearly Established Law

A defendant has a due process right to fair notice of the elements of the crime for which he was convicted. Bouie v. City of Columbia, 378 U.S. 347, 352 (1964).

A state's capital punishment scheme must "minimize the risk of wholly arbitrary and capricious action." Gregg v. Georgia, 428 U.S. 153, 189 (1976).

Absent specific constitutional error, federal habeas review is limited to determining whether the state supreme court's statutory review was "so arbitrary and capricious as to constitute an independent due process or Eighth Amendment violation." Lewis v. Jeffers, 497 U.S. 764, 780 (1990), citing Donnelly v. DeChristoforo, 416 U.S. 637, 642-43 (1974) (absent a specific constitutional violation, federal habeas review of trial error is limited to whether the error "so infected the trial with unfairness as to make the resulting conviction a denial of due process). The essential function of state appellate court jurisdiction is to ensure "evenhanded, rational, and consistent imposition of death sentences under law." Campbell v. Blodgett, 997 F.2d 512, 522 at n.12 (9th Cir. 1992), citing Pulley v. Harris, 465 U.S. 37, 45 (1984).

b. Review of Claim 5

Petitioner contends that the state supreme court retroactively eliminated the distinction between intentional first and second degree murders. He reasons this is so because, prior to his appeal, California law required that premeditated and deliberated first degree murder be shown to be the "result of careful thought and weighing of considerations," and that conversely "a sudden killing in the course of an argument and struggle" would not be premeditated and deliberated murder. See People v. Lasko, 23 Cal.4th 101, 104 (2000); see Anderson, 70 Cal. 2d at 26-27 (stating types of evidence which might support a finding of premeditation and deliberation). Yet here, he claims, the trial court found the murder of Mr. Bocanegra satisfied the premeditation and deliberation standard even though the killer formed the intent to kill during the fatal altercation and killed with a weapon found at hand. Petitioner alleges there was no evidence of planning activity, no evidence of a preexisting motive, and that multiple stab wounds alone are insufficient to prove premeditation and deliberation. See People v. Caldwell, 43 Cal.

2d 864, 869 (1955).

The state supreme court denied this claim when raised in "supplement to existing habeas corpus petition" (claim ZZ), In re Sanchez, S049502, (DD), because that court found substantial evidence that Joey intended to kill his parents and that Petitioner could be found vicariously liable for these murders as an aider and abettor, as follows:

> Joey's actions, according to defendant's statements to prosecution witnesses, indicated that Joey deliberated over his father's killing. Joey initially struck Juan in the hallway and then, in the kitchen, obtained a knife that he used to stab Juan. In our view, Joey formed a clear intent to kill, at the latest, during the altercation with his father, and obtained a kitchen knife to carry out that plan. Our cases hold that planning activity occurring over a short period of time is sufficient to find premeditation. "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 . . . ." [Citation]
>
> There was also ample evidence of motive. The evidence supports a strong inference that Joey entered his parents' house to rob them. When his father resisted the robbery, Joey was motivated to murder him in order to gain access to both money and tangible goods, including a television set. Substantial evidence supports a finding that Joey believed Juan stood in the way of his plan.
>
> Finally, the trial court could infer from the evidence that the manner of killing tended to demonstrate Joey acted with premeditation and deliberation. The attack occurred in a series of rooms, indicating that Juan's repeated attempts to break away from his murderers were consistently thwarted by the attackers' relentless pursuit of him, even after he was gravely wounded. A rational finder of fact could infer that the manner of killing, when combined with Joey's retrieval of the knife in the kitchen, and defendant's retrieval of a metal bar used in clubbing a defenseless Juan, is sufficient to support the trier of fact's implied finding that Joey formed the plan to kill his parents during the altercation, located the murder weapon, and along with defendant, deliberately murdered his father. [Citation]
>
> The same evidence supports the trial court's finding that defendant shared Joey's intent and plan to kill Juan, and thus was liable, as an aider and abettor, for Juan's murder. [Citation] The killing of Juan ended after a prolonged knife attack and beating from which Juan attempted to defend himself. Defendant's personal involvement in the murder was substantial. Far from merely acting as a lookout, or beating Juan after he was already dead, defendant was actively involved in assisting Joey in Juan's murder. Defendant's admitted act of arming himself with a curved metal bar before joining the altercation between Joey and Juan indicates he shared Joey's plan. [Citation] From this evidence, the trier of fact could reasonably infer defendant knowingly engaged or assisted in Juan's murder as an aider and abettor.

Sanchez, 12 Cal.4th at 33-34.

The Court finds that, contrary to Petitioner assertion, and for the reasons discussed in

claims 1-4, the state court's analysis could reasonably rely upon evidence before it of a pre-existing motive to obtain money from Mr. Bocanegra, involving a joint criminal design of multiple and prolonged stab wounds, aided and abetted by Petitioner's participation with the metal bar, sufficient to find premeditation and deliberation both by Joey and Petitioner. Id. Given the state court's analysis and the record, there appears to be no risk of arbitrary and capricious verdict.

This Court does not find the state court rejection of the claim was contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme Court, or that the state court's ruling was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding, viewed most favoring the prosecution, Jackson, 443 U.S. at 319. See 28 U.S.C. § 2254(d); Lewis, 497 U.S. at 780 (absent a specific constitutional error, federal habeas review is limited to determining whether the state Supreme Court's performance of its statutory review was "so arbitrary and capricious as to constitute an independent due process or Eighth Amendment violation.")

Claim 5 is denied.

4. Ineffective Assistance of Counsel in Guilt And Special Circumstance Phase - Claims 6 through 18

In claims 6 through 18, Petitioner alleges various instances during the guilt and special circumstance phase where defense counsel provided ineffective assistance.

Eugene Toton ("Toton") was appointed as lead defense counsel. Gary Frank ("Frank") was appointed as defense co-counsel. By their agreement, Toton was responsible for the guilt and special circumstance phase and Frank was responsible for the penalty phase. (SHCP Exhs. 113, ¶ 4; 137, ¶ 3.) The record before the state court does not demonstrate that defense attorney Frank performed any substantial defense function during the guilty and special circumstance phase.

a. Clearly Established Law

The Sixth Amendment right to effective assistance of counsel, applicable to the states

through the Due Process Clause of the Fourteenth Amendment, applies through the sentencing phase of a trial. See Murray, 745 F.3d at 1010-11: U.S. Const. amend. VI; U.S. Const. amend. XIV, § 1; Gideon v. Wainwright, 372 U.S. 335, 343–45 (1963); Silva v. Woodford, 279 F.3d 825, 836 (9th Cir. 2002).

The Supreme Court explained the legal standard for assessing a claim of ineffective assistance of counsel in Strickland v. Washington, 466 U.S. 668, 685–87 (1984). Strickland propounded a two prong test for analysis of claims of ineffective assistance of counsel. First, the petitioner must show that counsel's performance was deficient, requiring a showing that counsel made errors so serious that he or she was not functioning as the "counsel" guaranteed by the Sixth Amendment. Strickland, 466 U.S. at 687. The petitioner must show that "counsel's representation fell below an objective standard of reasonableness," and must identify counsel's alleged acts or omissions that were not the result of reasonable professional judgment considering the circumstances. Richter, 562 U.S. at 104 (citing Strickland, 466 U.S. at 688); United States v. Quintero-Barraza, 78 F.3d 1344, 1348 (9th Cir. 1995).

Petitioner must show that counsel's errors were so egregious as to deprive defendant of a fair trial, one whose result is reliable. Strickland, 466 U.S. at 688. Judicial scrutiny of counsel's performance is highly deferential, and the habeas court must guard against the temptation "to second-guess counsel's assistance after conviction or adverse sentence." Id. at 689. Instead, the habeas court must make every effort "to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Id.; see also Richter, 562 U.S. at 107. A court indulges a "'strong presumption' that counsel's representation was within the 'wide range' of reasonable professional assistance." Richter, 562 U.S. at 104 (quoting Strickland, 466 U.S. at 687); Sanders v. Ratelle, 21 F.3d 1446, 1456 (9th Cir. 1994). 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 possible reasons [defense] counsel may have had for proceeding as they did." Pinholster, 131 S. Ct. at 1407.

The Supreme Court has "declined to articulate specific guidelines for appropriate attorney conduct and instead ha[s] emphasized that '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" Wiggins v. Smith, 539 U.S. 510, 521 (2003) (quoting Strickland, 466 U.S. at 688). However, "general principles have emerged regarding the duties of criminal defense attorneys that inform [a court's] view as to the 'objective standard of reasonableness' by which [a court must] assess attorney performance, particularly with respect to the duty to investigate." Summerlin v. Schriro, 427 F.3d 623, 629 (9th Cir. 2005). "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." Strickland, 466 U.S. at 690.

However, strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgment. Wiggins, 539 U.S. at 521 (quoting Strickland, 466 U.S. at 690–91); see also Thomas v. Chappell, 678 F.3d 1086, 1104 (9th Cir. 2012) (counsel's decision not to call a witness can only be considered tactical if he had "sufficient information with which to make an informed decision"); Reynoso v. Giurbino, 462 F.3d 1099, 1112–1115 (9th Cir. 2006) (counsel's failure to cross-examine witnesses about their knowledge of reward money cannot be considered strategic where counsel did not investigate this avenue of impeachment); Jennings v. Woodford, 290 F.3d 1006, 1016 (9th Cir. 2002) (counsel's choice of alibi defense and rejection of mental health defense not reasonable strategy where counsel failed to investigate possible mental defenses).

Second, the petitioner must demonstrate prejudice, that is, he must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result . . . would have been different." Strickland, 466 U.S. at 694. "It is not enough 'to show that the errors had some conceivable effect on the outcome of the proceeding.'" Richter, 562 U.S. at 104 (quoting

Strickland, 466 U.S. at 693). "Counsel's errors must be 'so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.'" Id. (quoting Strickland, 466 U.S. at 687). Under this standard, we ask "whether it is 'reasonably likely' the result would have been different." Richter, 562 U.S. at 111 (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 errors were "so serious as to deprive the defendant of a fair trial." Id., at 104 (quoting Strickland, 466 U.S. at 687). A court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the petitioner as a result of the alleged deficiencies. Strickland, 466 U.S. at 697. Since the defendant must affirmatively prove prejudice, any deficiency that does not result in prejudice must necessarily fail.

Under the AEDPA, the Court does not apply Strickland de novo. Rather, the Court must determine whether the state court's application of Strickland was unreasonable. Richter, 562 U.S. at 99-100. Establishing that a state court's application of Strickland was unreasonable under 28 U.S.C. § 2254(d) is very difficult. Richter, 562 U.S. at 100. Since the standards created by Strickland and § 2254(d) are both "highly deferential" when the two are applied in tandem, review is "doubly" so. Richter, 562 U.S. at 105 (quoting Knowles v. Mirzayance, 556 U.S. 111, 123 (2009)). Further, because the Strickland rule is a "general" one, courts have "more leeway . . . in reaching outcomes in case-by-case determinations" and the "range of reasonable applications is substantial." Id. at 101; Premo v. Moore, 562 U.S. 115, 127 (2011).

If the petitioner makes an insufficient showing as to either one of the two Strickland components, the reviewing court need not address the other component. Strickland, 466 U.S. at 697.

b. Review of Claim 6

In this claim, Petitioner alleges ineffective assistance of counsel by failure to investigate and present evidence of mental state defenses, violating his Fifth, Sixth, Eighth and Fourteenth Amendment rights.

Petitioner raised this claim in his state petition for habeas corpus. (SPet. claim C.) The California Supreme Court summarily denied the claim in a decision unaccompanied by explanation. In re Sanchez, S049502 (DD.) In such a case where the state court denied Petitioner's state petition for habeas corpus without an explanation, "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, and this Court "must determine what arguments or theories supported or . . . *could have supported*, the state court's decision; and then it must ask whether it is possible fair-minded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." Id. (emphasis added).

Petitioner contends that a reasonable investigation would have revealed his organic brain difficulties and psychiatric impairments relating to childhood abuse and trauma and deprivations and his long history of substance abuse. During the week prior to the homicides, Petitioner alleges he drank alcohol and smoked PCP continually and in large amounts, triggering a post-traumatic stress reaction, precluding his forming an intent to kill and premeditation and deliberation during the Bocanegra homicides. He claims his substance abuse led to long-term brain dysfunction. (SHCP Ex. 114, ¶¶ 67-70.)

The evidence proffered by Petitioner suggests chronic substance abuse beginning as early as 1977. (SPet. Exhs. 105, pp. 64-65, 74-75; 110, p. 1; 119, p. 8; 123, p. 1; and 128,at pp. 1-2.) Petitioner offers evidence that he engaged in substance abuse during the weeks prior to the murders. (SPet. Ex. 105, pp. 85-87.) However, Respondent correctly notes the absence of competent evidence that Petitioner ingested and/or was under the influence of phencyclidine, marijuana, or alcohol on the days the Bocanegra and Tatman murders occurred. Based on the record before it, the state court could reasonably have found that Petitioner was not under the influence of phencyclidine (PCP), marijuana, or alcohol at the time of the Bocanegra and Tatman murders.

The state court could have reasonably concluded that Petitioner' statements to jailhouse informant Hernandez (CT 479-484, 487-489, 495, 500-505), detective Stratton (CT 77-78), and

reporter Trihey (RT 16-20; 175-181; SPet. Exhs. 700-701) demonstrated Petitioner's intentional and deliberate aiding and abetting of Joey in the Bocanegra murders. This being the case, a tactical decision not to investigate and present such a defense could be reasonable where evidence is lacking, or it could go toward aggravation. See Strickland, 466 U.S. at 690-91.

Post-offenses jail records and medications Petitioner allegedly was given while incarcerated (SHCP Exhs. 601, 602) do not show his emotional and mental state at the time of the crimes.

Defense psychologist Donaldson, who evaluated Petitioner in May 1987, found that although there were indications of organic difficulties in perceptual motor integration, Petitioner was of average intelligence. Specifically, Donaldson stated that:

> There were no indications through the testing of deficits in reality testing, nor of a thought disorder of any kind. There were no indications of significant anxiety or depression. In spite of his socially and educationally deprived background . . . Mr. Petitioner is a highly sociopathic individual.

(SPet. Ex. 106, pp. 1-2.)

Petitioner claims effective counsel would have been aware of the evidence showing serious mental problems and would have investigated this evidence. He points to a 1995 neuropsychological evaluation by psychologist Froming finding severe diffuse organic brain damage and localized brain dysfunction. (SHCP Ex. 114, ¶¶ 39-60.) He points to post-offense jail records which showed continuing mental problems including paranoia, depression, stress, insomnia, inability to eat and a suicide attempt, and that he was given medication for these conditions. He also notes his 1995 evaluation by defense psychiatrist, Dr. Foster, finding depression, mental impairment and post-traumatic stress disorders from childhood trauma and deprivation of basic necessities, exacerbated by substance abuse, all possibly extending back to the time of the instant homicides. (SHCP Ex. 111, ¶¶ 16-17, 20-23, 79-95.) He alleges defense counsel missed this opportunity to show lack of premeditation and deliberation, and also mistakenly believed voluntary intoxication would be no defense to felony murder. He further alleges that his impairments made him more likely to follow counsel's advice to waive a full

defense and also affected his ability to understand the consequences of doing so.

Respondent views these allegations as speculation. Respondent contends that Petitioner's statements to reporter Trihey did not necessarily imply that Petitioner believed his dead mother was alive. Respondent contends that Hernandez's observation that Petitioner was suicidal is mere conjecture. Respondent contends that the 1995 opinions of psychiatrist Foster and psychologist Froming of a high probability of mental disorders and impairments at the time of the crimes and subsequent trial are likewise speculation and surmise.

This Court agrees that Petitioner's proffer is not sufficient evidence of mental impairment at the time of the murders and subsequent trial. As discussed in claims 1-4, *ante*, the substantial evidence shows Petitioner knowingly and intentionally assisted Joey in the Bocanegra murders and confessed the same to reporter Trihey. Significantly, Petitioner told detective Boggs of his involvement in the Tatman murder (CT 288-320) and acknowledged that "he was going to prison for the rest of his life anyway" for his role in the Bocanegra murders. (CT 314.)

The Court does not find post-custody psychological and psychiatric reports sufficient evidence that, at the time of the crimes and trial thereon, Petitioner suffered neurological or psychological impairments. Significantly, there is no evidence defense psychiatrist Donaldson recommended to Toton that a neuropsychological evaluation be performed. Psychiatrist Matychowiak, following his November 1987 court-ordered examination, found that Petitioner was not suicidal or delusional or suffering memory gaps (SPet. Ex. 520, p. 5); that Petitioner planned to tell the judge he was guilty (id. at 2); and that Petitioner understood the proceedings and could cooperate with counsel. (Id. at 6.) Petitioner told Matychowiak that he planned to tell the jury he was guilty and "get it over with." (SPet. Ex. 520, p. 2.) Dr. Matychowiak found Petitioner competent to stand trial.

Additionally, Petitioner cannot establish prejudice from defense counsel's alleged ineffectiveness because a change in the outcome had mental defenses been further investigated and presented is not reasonably likely given the substantial evidence against him and his expressed desire to plead guilty. That is, mental state defenses would not have been sufficient to

undermine confidence in the trial outcome. See U.S. v. Lewis, 786 F.2d 1278, 1283 (5th Cir. 1986). Defense psychologist Donaldson found Petitioner to be of average intelligence and though there were indications in perceptual motor integration, no deficits in reality testing or thought disorder was detected. (SPet. Ex. 106, p.2.) Court appointed psychiatrist Matychowiak came to essentially the same conclusions. (SPet. Ex. 520, p.1; CT 646.) Toton could reasonably have believed Donaldson's negative findings were not relevant at the guilt and special circumstance phase. (SPet. Ex. 137, p. 2.)

Petitioner never alleged during trial proceedings that he was mentally impaired or that he did not knowingly participate in the homicides. Rather he admitted his knowing participation to reporter Trihey (RT 181; see SPet. Exhs. 700-701), detective Stratton (CT 77-78) and informant Hernandez (CT 479-484, 487-489). Such a defense was contrary to Petitioner's stated desire to plead guilty to the Bocanegra murders (SPet. Ex. 520, pp. 2-4) and "dying for his crimes but dying with a clear conscience" (SPet. Ex. 700). In fact, Petitioner proceeded to waive jury trial on the guilt and special circumstances phase and submit on the preliminary hearing transcript and testimony of additional prosecution witnesses. (See Sanchez, 12 Cal.4th at 23-30.) The evidence does not suggest a reasonable probability that Petitioner would have agreed to go forward on a mental defense, or that if he had, it would have been successful given his incriminating statements.

For the reasons stated, a fair-minded jurist could have found that Petitioner failed to establish that defense counsel's performance fell below an objective standard of reasonableness and that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland, 466 U.S., at 687-694.

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

Claim 6 is denied.

c. Review of Claim 7

Petitioner alleges ineffective assistance of counsel by failure to investigate and impeach informant Hernandez, the principal witness against him, violating his Fifth, Sixth, Eighth and Fourteenth Amendment rights.

The California Supreme Court summarily denied this claim (SPet. Claim D) raised in Petitioner's state petition for habeas corpus. In re Sanchez, S049502 (DD.) As noted, in such a case "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, and this Court "must determine what arguments or theories supported or . . . *could have supported*, the state court's decision; and then it must ask whether it is possible fair-minded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." Id. (emphasis added).

Petitioner claims that, though Hernandez's history of drug abuse and heroin addiction was available to defense counsel, counsel deficiently failed to investigate these matters or interview Hernandez. (SHCP Exhs. 137, ¶ 12; 113, ¶ 11.) This even though Hernandez's allegedly inconsistent testimony may have been related to drug use and the plea deal he received in exchange for his testimony. Petitioner claims additional evidence discovered might have motivated Toton to put on a full defense. (SHCP Ex. 137, ¶ 18.)

This Court is unconvinced. For the reasons and upon consideration of the evidence discussed in claims 1 through 4, *ante*, the state court could reasonably have determined there was no basis upon which Petitioner could have effectively impeached Hernandez. Petitioner has not shown that Hernandez gave materially contradictory, inconsistent or false testimony, or that Hernandez was motivated by an undisclosed plea bargain. No facts or discrepancies between the testimony and the physical evidence establish or compel the conclusion that Hernandez, by virtue of his alleged substance addiction, his plea deal, or otherwise, was motivated to and did testify falsely or inaccurately. (SPet. Ex. 900, pp. 4, 11; SResp. Ex. B.)

Defense counsel Toton could have made a reasoned tactical decision not to interview

Hernandez. Having cross-examined Hernandez at the preliminary hearing, Toton determined on that basis not to interview him. (SPet. Ex. 137, pp. 3-4.) Moreover, Toton did ask Hernandez about any undisclosed plea deal during cross-examination in the guilt and special circumstances phase. Hernandez's testimony was consistent with Petitioner's statements and the physical evidence, that he had not been offered any disposition of then pending criminal matters prior to agreeing to testify at the Petitioner prosecution. (CT 576-577.) Toton later cross-examined Hernandez during the penalty phase. Hernandez admitted a deal on a then pending charge in exchange for his testimony in Petitioner's proceeding. (RT 2850-2851.) The Court does not find that Hernandez's testimony was false or misleading in this regard.

Defense counsel Frank was not responsible for the guilt and special circumstance phase. It was not unreasonable that Frank did not interview Hernandez relative to his statements therein. (SPet. Ex. 113, p. 4.)

Additionally, given the speculative nature of impeachment, Petitioner's desire to plead guilty, and the incriminating evidence, all as discussed in claims 1-4, *ante*, Petitioner was not prejudiced from any allegedly deficient performance. There was not a reasonable probability of a different outcome from further attempted impeachment of Hernandez.

Also, such a defense was contrary to Petitioner's stated desire to plead guilty to the Bocanegra murders (SPet. Ex. 520, p. 2) and "dying for his crimes but dying with a clear conscience" (SPet. Ex. 700). Petitioner waived jury trial and submitted the guilt and special circumstances phase on the preliminary hearing transcript and on the testimony of additional prosecution witnesses. See Sanchez, 12 Cal.4th at 23-30. The evidence does not suggest a reasonable probability impeachment would have been successful given his incriminating statements to detective Stratton and reporter Trihey and the crime scene evidence corroborated by Hernandez's testimony. (See claims 1-4, *ante*.)

For the reasons stated, it is clear that a fair-minded jurist could have found that Petitioner failed to establish that defense counsel's performance fell below an objective standard of reasonableness and that, but for counsel's unprofessional errors, the result of the proceeding

would have been different. Strickland, 466 U.S., at 687-694.

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

Claim 7 is denied.

d. Review of Claim 8

Petitioner claims ineffective assistance of counsel by failure to investigate and present testimony of jailhouse informant Seeley, violating his Sixth, Eighth and Fourteenth Amendment rights.

The California Supreme Court summarily denied this claim (SPet. Claim E) raised in Petitioner's state petition for habeas corpus. In re Sanchez, S049502 (DD.) As noted, in such a case "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, and this Court "must determine what arguments or theories supported or . . . *could have supported*, the state court's decision; and then it must ask whether it is possible fair-minded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." Id. (emphasis added).

Petitioner claims that Seeley had conversations both with him and Reyes and would have testified that: Reyes was in the Bocanegra home at the time of the their murders; it was Reyes, not Petitioner, who struck Mr. Bocanegra; that the assault on Mrs. Bocanegra by Petitioner and Reyes was unconnected to Joey's subsequent killing of her; that Petitioner and Reyes did not intend to rob the Bocanegras; that Petitioner and Reyes had no plan to kill the Bocanegras; and that their deaths resulted from the sudden quarrel between Joey and Mr. Bocanegra. (SHCP Ex. 419.) Toton, Petitioner claims, was aware of Seeley's statement, (SCHP Ex. 420), but did not interview him or investigate. (SHCP Ex. 137, ¶ 12.) This even though counsel for Reyes in his separate proceedings did attempt to investigate and interview Seeley (SHCP Ex. 136, ¶¶ 7, 8),

consistent with the local professional practice of interviewing informants. (SHCP Ex. 127 ¶ 6.)

This Court finds that the record could reasonably support a tactical decision by Toton not to investigate Seeley's possibly exculpating testimony. Toton, who had experience with Seeley on at least one other case, did not believe Seeley had actually spoken with Petitioner (SPet. Ex. 137, ¶ 4), did not believe Seeley was credible, and doubted the prosecution would call Seeley. (SPet. Ex. 137, p. 4.) Moreover, Seeley's version of events could have been viewed as contrary to the physical evidence at the Bocanegra crime scene. (SPet. Ex. 419, pp. 5-6, 17; CT 355-382.) See e.g., Denham v. Deeds, 954 F.2d 1501, 1505-06 (9th Cir. 1992) (defense counsel not ineffective where decision not to call witness based on inconsistencies in witness's testimony).

Seeley's testimony was in some ways more inculpating of Petitioner than were Hernandez's statements. Under Seeley's version of events, Petitioner actively participated in attempts to subdue Mrs. Bocanegra. Seeley apparently would have testified that Petitioner struck several blows to Mrs. Bocanegra's head with a piece of rebar whereupon Joey stabbed her to death. (SPet. Ex. 419, pp. 6-8, 18-19.) Furthermore, testimony by Seeley likely would have been subject to rebuttal by significant contrary evidence from Hernandez, Stratton, Trihey, as well as by the bloodstain evidence and Petitioner's professed desire to plead guilty. All this likely obviating any prejudice to Petitioner for not investigating and presenting Seeley.

Evidence of Petitioner's shoeprint in the kitchen undermines Seeley's July 27, 1987 statements to district attorney investigator Pendleton that Petitioner watched the assault on Mr. Bocanegra from the hallway. (SPet. Ex. 419.) Seeley's version also could be viewed as inconsistent with Petitioner's above noted statements to Hernandez and detective Stratton and to reporter Trihey, where Petitioner omits any mention of Reyes's involvement in the assault by Joey on Mr. Bocanegra.

In addition to these considerations of credibility and corroboration, the record reflects that Seeley refused to speak with counsel for Reyes, (SPet. Ex. 136, pp.1-3), who characterized Seeley as "a professional jailhouse snitch." (SPet. Ex. 139, p. 2.) It is uncertain that he would have agreed to speak with Toton. Even if, as Petitioner alleges, Toton had an unusual practice of

not talking to jailhouse informants except on the witness stand, Toton's alleged failure in this case to investigate and present evidence from Seeley could nonetheless have been a reasonable trial tactic. Strickland permits counsel to "make a reasonable decision that makes particular investigations unnecessary." Richter, 562 U.S. at 106 (citing Strickland, 466 U.S. at 691).

Accordingly, it was at least arguable that a reasonable attorney could decide to forego investigation into Seeley's testimony in similar circumstances. Toton was allowed to formulate a strategy, reasonable at the time, and to balance limited resources consistent with effective trial tactics and strategies. See Richter, 562 U.S. at 107. Toton was not required to pursue an investigation that would have been fruitless, or worse, harmful to the defense. Id. at 108.

As to defense counsel Frank, he could reasonably have decided not to interview Seeley to the extent any evidence to be provided by Seeley related only to the guilt and special circumstances phase, handled by Toton. (See SPet. Ex. 113, p. 4.)

This claim, to the extent based on insufficiency of the evidence and actual innocence, is unpersuasive for reasons discussed in claims 1 through 4, *ante*. For the reasons discussed therein, Petitioner has not established that Hernandez's testimony was materially unreliable or inconsistent with the testimony of Stratton and Trihey and the physical evidence found at the Bocanegra crime scene, or that Hernandez testimony was given in exchange for an undisclosed favorable (to Hernandez) plea deal.

Nor has Petitioner made an evidentiary showing of prejudice. For the reasons discussed above, the state court could have determined there was no reasonable probability of a different outcome from investigating Seeley and presenting him as a witness. Fundamentally, such a defense was contrary to Petitioner's stated desire to plead guilty to the Bocanegra murders, (SPet. Ex. 520, p. 2), and "dying for his crimes but dying with a clear conscience." (SPet. Ex. 700.) Based on that desire, Petitioner waived jury trial and submitted guilt and special circumstances phase on the preliminary hearing transcript and the testimony of additional prosecution witnesses. See Sanchez, 12 Cal.4th at 23-30; CT 891-892; RT 108a-115a.) The evidence does not suggest a reasonable probability that impeachment would have been

successful given Petitioner's incriminating statements to detective Stratton and reporter Trihey and the crime scene evidence corroborated by Hernandez's testimony. (See claims 1-4, *ante*.)

The Court concludes that a fair-minded jurist could have found that Petitioner failed to establish that defense counsel's performance fell below an objective standard of reasonableness and that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland, 466 U.S., at 687-694.

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

Claim 8 is denied.

e. Review of Claim 9

In this claim, Petitioner alleges ineffective assistance of counsel by failure to investigate and present evidence about Joey, violating his Sixth, Eighth and Fourteenth Amendment rights.

The California Supreme Court summarily denied this claim (SPet. Claim F) raised in Petitioner's state petition for habeas corpus. In re Sanchez, S049502 (DD.) As noted, in such a case "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, and this Court "must determine what arguments or theories supported or . . . *could have supported*, the state court's decision; and then it must ask whether it is possible fair-minded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." Id. (emphasis added).

Petitioner, citing to the declaration of defense investigator Peninger, faults defense counsel for not investigating and presenting evidence of Joey's violent temper, threats and assaults against his parents, and smoking PCP the night before the Bocanegra murders. (SHCP 127, ¶ 5.) Petitioner claims such evidence would have shown that a sudden quarrel and a fear of Joey precipitated the killings rather than premeditation, deliberation and an intent to commit

robbery. He bases this claim upon facts allege in claims 1 through 4.

The Court is not persuaded. In June, 1988, prior to trial, defense investigator Peninger interviewed Joey. (SHCP Ex. 127, ¶ 5.) Though Toton conceded he could have investigated Joey further, and would have done so if a full defense had been mounted, (SHCP Ex. 137, ¶¶ 18, 21, 22), Petitioner waived a full defense.

Proffer of evidence that there was no robbery motive would not have changed the outcome. The trial court's found Petitioner was not guilty of robbery, and found not true the robbery-murder special circumstance. (CT 906; RT 236-237.) Therefore no prejudice arose from any failure to investigate and present evidence of Joey's temper and prior assaultive behavior relating to robbery-murder theory.

As discussed in claims 1-8, *ante*, there was sufficient evidence to convict Petitioner of aiding and abetting first degree murder based upon a finding of premeditation and deliberation. The state court could reasonably have concluded that, in the face of such substantial evidence of guilt, it was not reasonably likely that a showing of Joey's temper and prior assaultive conduct would have raised a reasonable doubt that Petitioner aided and abetted the premeditated and deliberate murders of Mr. Bocanegra and Mrs. Bocanegra.

Petitioner points out that counsel for Reyes, in Reyes's separate proceeding, did investigate Joey and subpoenaed trial witnesses based thereon. However, this alone does not suggest that, on the record in this proceeding, Toton's decision not to do so was an unreasonable trial tactic. Especially so given the above noted substantial evidence of Petitioner's guilt and Reyes's decision to plead guilty to three counts of first degree murder.

Petitioner has not made an evidentiary showing of prejudice, that there is a reasonable probability of a different outcome from investigating and presenting evidence about Joey. The state court could reasonably have found that, considering the record before it, evidence about Joey would not have changed the result. Petitioner gave incriminating statements to detective Stratton and reporter Trihey, corroborated by the crime scene evidence and Hernandez's testimony. (See claims 1-4, *ante*.) Here again, such a defense was contrary to Petitioner's stated

desire to plead guilty to the Bocanegra murders, (SPet. Ex. 520, p. 2), and "dying for his crimes but dying with a clear conscience." (SPet. Ex. 700.) Petitioner waived jury trial and submitted guilt and special circumstances phase on the preliminary hearing transcript and the testimony of additional prosecution witnesses. See Sanchez, 12 Cal.4th at 23-30.

Accordingly, a fair-minded jurist could have found that Petitioner failed to establish that defense counsel's performance fell below an objective standard of reasonableness and that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland, 466 U.S., at 687-694.

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

Claim 9 is denied.

f. Review of Claim 10

Petitioner next claims ineffective assistance of counsel by failure to investigate and present physical evidence of Bocanegra murders, violating his Fifth, Sixth, Eighth and Fourteenth Amendment rights.

The California Supreme Court summarily denied this claim (SPet. Claim G) raised in Petitioner's state petition for habeas corpus. In re Sanchez, S049502 (DD.) As noted, in such a case "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, and this Court "must determine what arguments or theories supported or . . . *could have supported*, the state court's decision; and then it must ask whether it is possible fair-minded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." Id. (emphasis added).

Petitioner alleges that supplemental evidence from criminologist Laskowski and coroner Holloway would have shown three people, Reyes, Petitioner and Joey, were in the Bocanegra

house at the time of the murders and that the victims' scalp wounds could have been inflicted by different assailants using different implements. (SHCP Exhs. 417, pp.1-2; 120, ¶¶ 6-7.) Petitioner reasons this supplemental evidence would have rebutted the prosecution theory that only Petitioner and Joey were present in the Bocanegra home at the time of the murders, and would have caused defense counsel to take the matter to full trial on guilt, (SHCP Ex. 137, pp. 6-7) and thereby increased possibility of a negotiated plea more favorable than the conviction and sentence handed down.

The Court finds this claim unavailing. The evidence in the state record is consistent with Reyes, at some point, entering the Bocanegra home. Evidence of Reyes's bloody hand print on the front doorknob was admitted at Petitioner's preliminary hearing. (CT 202-203.)

Petitioner is correct that criminologist Laskowski testified at preliminary hearing to only two shoe tread patterns found at the Bocanegra crime scene, and that Laskowski (during his subsequent preparation for the separate Reyes trial) identified a third shoe tread pattern in the kitchen of the Bocanegra residence. However, Reyes admitted in this subsequent proceeding that he served as lookout during the murders and entered the residence only afterwards to assist Petitioner and Joey. (SResp. Ex. A., p. 3:1-11.)

Petitioner is also correct in noting that, while Dr. Holloway testified at the preliminary hearing that the same type of implement inflicted consistent scalp wounds on both Mr. Bocanegra and Mrs. Bocanegra, (CT 118-119), Holloway at the penalty phase stated that Mr. Bocanegra's scalp wounds were only "partially", rather than "entirely" consistent with Mrs. Bocanegra's scalp wounds; and that it appeared different objects were used to inflict these scalp wounds. (RT 2712-13, 2720-21, 2725.) However, Holloway qualified his preliminary hearing testimony by noting that the scalp wounds on Mr. Bocanegra and Mrs. Bocanegra were not necessarily inflicted by the same instrument. (CT 131-134.)

Holloway's testimony, as qualified, did not then preclude the possibility that more than one weapon and more than one perpetrator inflicted the wounds. Defense counsel Toton argued as much, that different individuals, using different weapons, could have inflicted the scalp

wounds on Mr. Bocanegra and Mrs. Bocanegra. (RT 189-191.)

The Court finds that, for the reasons discussed in claims 1-9, the state court could reasonably have found that there was sufficient evidence to convict Petitioner of aiding and abetting first degree murder based upon a finding of premeditation and deliberation. In the face of such substantial evidence, a further showing regarding physical evidence, that Reyes left a bloody shoe print, and that two different weapons may have inflicted the scalp wounds, would not have raised a reasonable doubt that Petitioner aided and abetted the premeditated and deliberate murders of Mr. Bocanegra and Mrs. Bocanegra. Additionally, evidence of Petitioner's shoeprint in the kitchen undermines Seeley's testimony that Petitioner watched the assault on Mr. Bocanegra from the hallway. (SHCP, Ex. 419, pp. 6, 7, 22-23.)

For the reasons stated, Petitioner has not made an evidentiary showing of prejudice, i.e., that there is a reasonable probability of a different outcome from investigating physical evidence of the Bocanegra murder scene. As noted, such a defense was contrary to Petitioner's stated desire to plead guilty to the Bocanegra murders (SPet. Ex. 520, p.2) and "dying for his crimes but dying with a clear conscience." (SPet. Ex. 700.) Petitioner waived jury trial and submitted guilt and special circumstances phase on the preliminary hearing transcript and the testimony of additional prosecution witnesses. See Sanchez, 12 Cal.4th at 23-30.

Accordingly, the Court is not convinced of a reasonable probability that supplemental crime scene evidence would have prompted defense counsel to put on a further defense or would have resulted in a more favorable disposition for Petitioner given his incriminating statements to detective Stratton and reporter Trihey and the crime scene evidence corroborated by Hernandez's testimony. (See discussion of claims 1-9, *ante*.)

For the reasons stated, a fair-minded jurist could have found that Petitioner failed to establish that defense counsel's performance fell below an objective standard of reasonableness and that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland, 466 U.S., at 687-694.

It does not appear that the state court rejection of the claim was contrary to, or an

unreasonable application of, clearly established federal law, as determined by the Supreme Court, or that the state court's ruling was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. See 28 U.S.C. § 2254(d).

Claim 10 is denied.

g. Review of Claim 11

Petitioner next claims ineffective assistance of counsel by failure to pursue plea negotiations, violating his Sixth, Eighth and Fourteenth Amendment rights.

The California Supreme Court summarily denied this claim (SPet. Claim H) raised in Petitioner's state petition for habeas corpus. In re Sanchez, S049502 (DD). As noted, in such a case "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, and this Court "must determine what arguments or theories supported or . . . *could have supported*, the state court's decision; and then it must ask whether it is possible fair-minded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." Id. (emphasis added).

Petitioner alleges that defense counsel was deficient in failing to pursue plea negotiations given that the evidence supported the prosecution's theory that Joey was the actual killer of his parents. (RT 122, 155-156.) Petitioner points out that Reyes, whom the prosecution viewed to be of equal culpability, consummated a plea deal in his separate proceeding and avoided the death penalty. (Id.)

This claim fails. The state court could reasonably have found defense counsel Toton was not deficient in failing to pursue continuing plea negotiations. The record reflects that Toton attempted to obtain a plea deal for Petitioner on May 10, 1988. But the prosecutor rejected the plea deal when Petitioner refused to provide information of Joey's involvement in the Bocanegra murders, even though Petitioner had proposed to do just that in his plea bid. (SResp. Ex. B.)

Toton also made a pre-penalty phase overture for Petitioner to provide information regarding Joey's involvement in the Bocanegra murders in return for life without parole. Here

again, Petitioner ultimately refused to provide such information, ending any possible deal. Id.

Nothing reasonably suggests that persistence of counsel alone could have resulted in a plea deal without Petitioner's cooperation.

Prosecutor Ryals, who prosecuted both Petitioner and, in a separate proceeding, Reyes, based her "decisions regarding plea bargain agreements . . . on [her] evaluations of the evidence, the facts, and the circumstances of each case" and that "[t]he persistence and/or insistence of defense counsel in seeking a plea bargain agreement on behalf of their client [was] not a factor . . . ." (Id.) The Court notes that "[s]trict adherence to the Strickland standard" is "all the more essential when reviewing the choices an attorney made at the plea bargain stage." Premo, 562 U.S. at 124. "Plea bargains are the result of complex negotiations suffused with uncertainty, and defense attorneys must make careful strategic choices in balancing opportunities and risks." Id.

Additionally, for the reasons discussed in claims 1 through 4, *ante*, the evidence against Petitioner was substantial. In the face of such evidence and Petitioner's failure to support his negotiated plea offers, it is not reasonably probable that continuing attempts by defense counsel toward a negotiated plea would have been successful. See Burger v. Kemp, 483 U.S. 776, 785-86 (1987) (no ineffective assistance claim where prosecutor refuses to engage in plea bargaining).

Petitioner has not made an evidentiary showing of prejudice given the improbability of a plea deal without his cooperation. Petitioner expressly stated his desire to plead guilty to the Bocanegra murders (SPet. Ex. 520, p. 2) and "dying for his crimes but dying with a clear conscience." (SPet. Ex. 700; see Jones, 114 F.3d at 1012 (denying factual development where improbable petitioner would have accepted plea offer). As noted, Petitioner waived jury trial and submitted the guilt and special circumstances phase on the preliminary hearing transcript and the testimony of additional prosecution witnesses. See Sanchez, 12 Cal.4th at 23-30. The evidence does not suggest a reasonable probability that further plea negotiation would have resulted in a more favorable disposition for Petitioner given his incriminating statements to detective Stratton and reporter Trihey and the crime scene evidence corroborated by Hernandez's testimony.

For the reasons stated, a fair-minded jurist could have found that Petitioner failed to establish that defense counsel's performance fell below an objective standard of reasonableness and that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland, 466 U.S., at 687-694.

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

Claim 11 is denied.

h. Review of Claim 12

Petitioner claims ineffective assistance of counsel by counsel's failure to move to exclude jailhouse statements by Petitioner to the police implicating him in the Bocanegra homicides, violating his Fifth, Sixth, Eighth and Fourteenth Amendment rights.

The California Supreme Court summarily denied this claim (SPet. Claim I) raised in Petitioner's state petition for habeas corpus. In re Sanchez, S049502 (DD). As noted, in such a case "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, and this Court "must determine what arguments or theories supported or . . . *could have supported*, the state court's decision; and then it must ask whether it is possible fair-minded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." Id. (emphasis added).

Petitioner supports this claim with facts alleged in claim 6, *ante*. He alleges that he suffered organic brain damage, psychiatric disorders (post-traumatic stress disorder, depression, and paranoia), and that he expected favorable treatment when, at the request of his then attorney, Mr. Huffman, Petitioner waived Miranda rights and gave incriminating statements to detective Stratton, (CT 75-78) (Bocanegra murders), and detective Boggs (CT 308-319) (Tatman murder). Petitioner claims that his Miranda waiver was not intelligent and voluntary.

In Miranda v. Arizona, 384 U.S. 436, 444 (1966), the Supreme Court held that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." As to the procedural safeguards to be employed, "[p]rior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." Id. Nevertheless, "'[t]he defendant may waive effectuation' of the rights conveyed in the warnings 'provided the waiver is made voluntarily, knowingly and intelligently.'" Moran v. Burbine, 475 U.S. 412, 421 (1986) (quoting Miranda, 384 U.S. at 444, 475).

This claim fails for the same reasons discussed in claim 6. The state court could reasonably have found that the evidence did not show that prior to, during, or after the murders Petitioner suffered any material neurological and/or psychiatric impairment. The report of court-appointed psychiatrist Matychowiak states that on November 13, 1987, [Petitioner] was "able to discuss himself, his decisions and his reasoning for his decisions" and was "presently able to understand the nature and purpose of the proceedings taken against him" and "to cooperate in a rational manner with counsel in presenting a defense." (SPet. Ex. 520, pp.5-6.)

Under Miranda, if a suspect indicates "at any time prior to or *during* questioning, that he wishes to remain silent, the interrogation must cease." Miranda, 384 U.S. at 473-74 (emphasis added). Petitioner does not point to evidence supporting coercive tactics by Stratton and Boggs or showing Petitioner was promised any concession in his then pending charge of burglarizing Joey's residence. See Colorado v. Connelly, 479 U.S. 157, 167 (1986) (confession not involuntary absent coercive police activity). Petitioner apparently did not attempt to make any evidentiary showing of police coercion. The state court could have reasonably concluded Petitioner's Miranda waiver was not involuntary.

Additionally, it was Petitioner who initiated contact with the police, offering testimony on the Bocanegra murders in exchange for "some type of consideration" in the burglary charge

against him. (SPet. Ex. 412; CT 76.)

The Court finds that, in the face of such lack of evidence, it is not reasonably probable that a motion to exclude jailhouse statements based upon invalid waiver would have been successful. See Kimmelman v. Morrison, 477 U.S. 365, 381 (1986) (counsel's failure to make a futile motion is not ineffective assistance). Even assuming impaired mental status, such alone is not sufficient reason to suppress a confession. See Connelly, 479 U.S. at 167 (coercive police conduct necessary to find confession involuntary under Due Process Clause).

Petitioner has not made an evidentiary showing of prejudice, that there is a reasonable probability of a different outcome had defense counsel moved to exclude jailhouse statements based on invalid waiver. As discussed, such a defense was contrary to Petitioner's stated desire to plead guilty to the Bocanegra murders (SPet. Ex. 520, p.2) and "dying for his crimes but dying with a clear conscience." (SPet. Ex. 700.) Petitioner waived jury trial and submitted the guilt and special circumstances phase on the preliminary hearing transcript and the testimony of additional prosecution witnesses. See Sanchez, 12 Cal.4th at 23-30. The evidence does not suggest a reasonable probability that a motion to exclude jailhouse statements would have resulted in a more favorable disposition for Petitioner given his incriminating statements to reporter Trihey and the crime scene evidence corroborated by Hernandez's testimony. (See claims 1-4, *ante*.)

For the reasons stated, a fair-minded jurist could have found that Petitioner failed to establish that defense counsel's performance fell below an objective standard of reasonableness and that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland, 466 U.S., at 687-694.

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

Claim 12 is denied.

i. Review of Claim 13

In this next claim, Petitioner alleges ineffective assistance of counsel by failure to seek sufficient continuance to adequately prepare for trial, violating his Sixth, Eighth and Fourteenth Amendment rights.

The California Supreme Court summarily denied this claim (SPet. Claim J) raised in Petitioner's state petition for habeas corpus. In re Sanchez, S049502 (DD.) As noted, in such a case "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, and this Court "must determine what arguments or theories supported or . . . *could have supported*, the state court's decision; and then it must ask whether it is possible fair-minded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." Id. (emphasis added).

Petitioner supports this claim with facts alleged in claims 2, 4, and 6 through 10. He alleges that, as of May 16, 1988, when a three-week pre-trail continuance was requested and granted through June 27, 1988, defense counsel had done no guilt investigation, except for consulting a serologist and obtaining a sanity evaluation, (SHCP, Ex. 127, ¶ 4), and had not done any investigation for the penalty phase. (SHCP, Ex. 127, ¶¶ 4, 11.) He claims competent counsel would have begun trial preparations sooner. (Id., ¶ 12.)

Petitioner's trial began on July 7, 1988. He alleges that had defense counsel requested, consistent with local practice, required a continuance longer than the three weeks, there is a reasonable probability that a plea bargain could have been negotiated, or a full trial on guilt and special circumstances would have been sought.

For the reasons discussed in claims 1-12, the evidence does not support a reasonable possibility that Petitioner would have received a more favorable disposition even with a longer continuance. Petitioner relies on defense investigator Peninger's declaration regarding the extent to which she was aware of the defense investigation and her view that further investigation should have been done. (SPet. Ex. 127, pp. 1-2.) Even if evidence, the Peninger declaration

does not demonstrate the actual extent and tactical appropriateness of defense counsel's trial preparations.

The record suggests that defense counsel timely began trial preparations, retaining defense expert(s) as early as November 1987. (RT [5/16/88] 3-4.) Petitioner concedes defense counsel retained serology and psychological experts prior to the request for continuance. The continuance request was partially opposed by the prosecution, (RT [5/16/88] 5-6; CT 713-714), suggesting a further continuance was unlikely.

There state court could reasonably have determined that Petitioner did not want or need a continuance. Petitioner initially refused to waive time for beginning trial, stating his intention to enter a guilty plea. (RT [5/16//88] 7.) Petitioner agreed to waive time only after discussions with counsel. (RT [5/16/88] 7-8.) Petitioner continued to express his desire to plead guilty to the Bocanegra murders. (SPet. Exhs. 520, p.2; 700.)

On July 11, 1988, Toton requested submission of guilt and special circumstance phase on the preliminary hearing transcript. Defense counsel Frank had no expressed need for a further continuance to prepare his penalty phase case. Frank stated his preparations would be complete by July 25, 1988. (RT [5/16/88] 6.) The penalty phase did not start until September 21, 1988, almost two month later. (CT 949; RT 2583.) It does not reasonably appear the defense needed and would have been granted further pre-trial continuance. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight . . . and to evaluate the conduct from counsel's perspective at the time." Strickland, 466 U.S. at 689.

For the reasons stated, a fair-minded jurist could have reasonably have determined that, based on the evidence, a longer continuance would not have resulted in a more favorable disposition for Petitioner. His incriminating statements to detective Stratton and reporter Trihey and the crime scene evidence that was corroborated by Hernandez's testimony reasonably suggest otherwise. (See claims 1-12, *ante*.)

Petitioner has failed to establish that defense counsel's performance fell below an objective standard of reasonableness and that, but for counsel's unprofessional errors, the result

of the proceeding would have been different. Strickland, 466 U.S., at 687-694.

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

Claim 13 is denied.

j. Review of Claim 14

Petitioner next claims ineffective assistance of counsel by the decision to waive jury trial, confrontation and presentation of a defense, violating his Fifth, Sixth, Eighth and Fourteenth Amendment rights.

The California Supreme Court summarily denied this claim (SPet. Claim K) raised in Petitioner's state petition for habeas corpus. In re Sanchez, S049502 (DD.)

The state supreme court, on direct appeal, addressed the merits of the validity of submission on the Preliminary Hearing Transcript as follow:

> [Petitioner's] chief guilt phase trial counsel, Toton, informed the court that the submission proposal was a compromise made by defendant at Toton's request. Defendant originally had wanted to plead guilty to the capital charges, but Toton would not consent to such a plea, believing that a guilty plea would amount to ineffective assistance of counsel . . . . [Citation]

Sanchez, 12 Cal.4th at 24.

Defendant repeatedly acknowledged that he was waiving his constitutional rights and that his decision was entered "freely and voluntarily." Id., at 25. Once the waivers were taken, the following exchange occurred between the trial court and Petitioner:

> "The Court: I take it that . . . Mr. Frank and Mr. Toton have talked to you at some length about the waivers?
> "The Defendant: Yes, sir.
> "The Court: Do you feel you understood them?
> "The Defendant: Yes, sir, I believe I do.
> "The Court: And you have had some time to think about it, at least since about 10:30 this morning, and they talked to you later, I take it?
> "The Defendant: Yes, sir.
> "The Court: And you have thought about it?

"The Defendant: Yes, sir.
"The Court: So far as you are losing your right to confront witnesses, those witnesses whose testimony will be presented to the court through the preliminary examination, you won't get a chance to cross-examine them in this court. You understand that?
"Defendant: Yes sir.
"The Court: And you are giving that right up then?
"The Defendant: Yes, sir.
"The Court: Now, so far as the witnesses called . . . to augment the People's case and/or in your behalf, the live witnesses called in this case, you will have the right to confrontation and you understand that?
"The Defendant: Yes, sir.
"The Court: I have to tell you that some of the cases in the state of California say that when you present a case to the judge to determine the guilt or innocence on the basis of the preliminary hearing transcript, that's sometimes called a slow guilty plea.
"The Defendant: Yes, sir.
"The Court: I don't know whether you have heard that language before, but it's used in the cases.
"The Defendant: Yes, sir.
"The Court: And I want you to be aware of that. I am not telling you how I am going to decide this case, but there is an aura of that in the cases and you should be aware of that fact.
"The Defendant: Yes, sir.
"The Court: And do you understand that?
"The Defendant: Yes, sir.
"The Court: And you are willing to give up your right to a trial by jury both as to the guilt of the two homicides alleged and of the other enhancements and the special circumstances; is that right?
"The Defendant: Yes.
"The Court: And you know you have the right, and we are ready to give you a jury on all those issues.
"The Defendant: Yes, your Honor, I understand all that.
"The Court: And you nonetheless give it up?
"The Defendant: Yes, sir."

Id., at 25-26.

The trial court later confirmed the waivers:

"The Court: Are you satisfied with your decision?
"The Defendant: Yes, sir, I am very confident.
"The Court: Because you know we have got a record of everything here. It's going to be kind of hard to tell somebody else, gee, I didn't think about it. The judge coerced me. The [d]istrict [a]ttorney growled at me. My lawyers kicked me around. You know, it's going to be kind of hard to say that after you have been very candid with us here. Are you satisfied with that?
"The Defendant: Yes, sir, I am very satisfied.
"The Court: You seem satisfied. I believe you are satisfied. I will make that kind of a finding."

Id., at 27.

Petitioner confirmed his intent to waive his jury trial and confrontation rights the following morning, but no mention was made by the court or counsel of defendant's right against self-incrimination. Even so, the California Supreme Court went on to find Petitioner's submission on the preliminary hearing transcripts was not a "slow (guilty) plea" that would have required an on the record waiver of the right against self-incrimination, as follows:

> Defense counsel Toton conducted substantial cross-examination of the prosecution witnesses during the preliminary hearing. Toton also called prosecution witnesses Hernandez and Detective Stratton to testify for the defense, and questioned Hernandez about whether he had agreed to testify against defendant with the intent of making a deal in his own case.
>
> In addition, following the close of the prosecution's guilt phase presentation, Toton renewed his motions to strike portions of the trial testimony of Maria Rodriguez, Detective Boggs, and William Freeman (the patrolman who seized two screwdrivers from defendant that had been stolen from the Bocanegra residence), and then moved for a judgment of acquittal of all the charges.
>
> In arguing the motion for acquittal, Toton asserted there was insufficient evidence of defendant's guilt of the robbery and murder charges, and that the People failed to charge properly the special circumstance allegations. In addition, Toton asserted that no physical evidence linked defendant to the Bocanegra murders. He argued that the prosecution presented no evidence of premeditation in those murders, and that defendant's hypothetical questions to Detective Stratton should not be used as evidence of murder. Toton also pointed out that defendant's incriminating statements to newsman Trihey implied knowledge of the crime, but not intent to kill, that there was no evidence that defendant robbed the Bocanegras or that defendant had the specific intent to kill either the Bocanegras or Tatman.
>
> Toton's closing argument following the guilt phase was equally extensive. He asserted there was insufficient evidence, as a matter of law, to prove beyond a reasonable doubt that defendant committed the charged robberies and the Bocanegra murders because the testimony of Hernandez and Trihey was not credible. At best, he argued, the evidence in the Bocanegra murders supported a verdict of voluntary manslaughter. He also asserted that the prosecution had failed to prove the specific intent to kill necessary to support the special circumstance allegations.
>
> It therefore appears that defense counsel's cross-examination was substantial, and that he argued constantly that the facts as presented at the preliminary hearing should be viewed as not supporting first degree murder convictions. These facts support the People's assertion that defendant's submission on the preliminary hearing transcripts for the guilt and special circumstance phases of the trial was not tantamount to a guilty plea. [Citation]
>
> For submissions not tantamount to a guilty plea, a trial court's failure to advise the defendant of his right against self-incrimination is implicated only to the extent

> defendant surrendered the right. [Citation] Through the submission stipulated to here, defendant never surrendered his self-incrimination privilege because he chose not to testify during the guilt phase proceedings. Because defendant never surrendered his right against self-incrimination, there was no requirement of a personal, on-the-record waiver. [Citation]

Id., at 29-30.

The state supreme court also concluded there was no requirement that Petitioner be advised of ramifications of submission and waiver and the probability of conviction in light of defendant's reservation of his right to present additional evidence and to contest his alleged guilt in argument to the court. That is, a defendant must be advised of the probability that his submission will result in a conviction of the offenses only "[i]f a defendant does not reserve the right to present additional evidence and does not advise the court that he will contest his guilt in argument to the court . . . ." Bunnell, 13 Cal.3d 592, 605 (1975).

Petitioner contends that reasonably competent counsel defending a capital case would not have submitted without a full trial. He supports this claim with facts alleged in claims 2, 4 and 6 through 10. He reiterates his above claims that Toton and Frank did not conduct sufficient trial investigation and preparation. He claims Toton's agreement to allow additional evidence upon submission negated Toton's theory that submission on the preliminary hearing would limit damaging evidence. (See SHCP Ex. 137, ¶¶ 14-16.) He claims that Frank had reservations about waiving full defense, but did not express them to the trial court. (SHCP Ex. 113, ¶ ¶ 13-19.) However, this Court finds that, for the reasons and based on the evidence discussed in claims 1-13, *ante*, the state court could reasonably have found that defense counsel were not deficient in preparing for trial and that the trial waiver was not necessarily inform on this basis..

Petitioner alleges mental impairments prevented him from knowingly, voluntarily, and intelligently entering the waiver with complete knowledge of the relevant circumstances and likely consequences. See Brady v. United States, 397 U.S. 742, 747–48 and n.4 (1970). However, the mental defense claim is unavailing for reasons discussed in claim 6. Petitioner agreed to submit the case following "several long discussions" with Toton, (SPet. Ex. 137, p.5) and in compromise of Petitioner's expressed desire to plead guilty (RT [5/16/88] 7), and Toton's

refusal to consent to a guilty plea. The trial judge discussed the submission with Petitioner in some detail, including how it might impact his case (CT 889, 891-892; RT – 65a-71a, 85a-89a, 98a-115a.) and the waiver of any conflict of interest Toton might have had relating to his debarment proceedings. (RT [7/27/88] 6.) Petitioner waived his trial rights on the record. (RT 107a-111a.) The prosecution also examined him regarding the waivers. (RT 108a-114a.) It was not unreasonable for the state court to conclude that Petitioner understood and freely entered the waivers.

Petitioner also fails to make an evidentiary showing of prejudice. He had expressed his intention to enter a guilty plea (RT [5/16/88] 7) and waive jury trial. (RT [7/27/88] 6.) Defense counsel Frank's preparation of penalty phase defense was nearly complete at time of the trial waiver and was not adversely affected. (SPet. Ex. 113, pp. 5-7.) Defense counsel could have reasonably believed that, as a matter of trial strategy, submission on the preliminary hearing transcripts would limit damaging evidence, (SPet. Exhs. 137, pp. 4-5; 113, pp.4-5), keeping "some of the blood and gore of the homicides away from the penalty jury." (SPet. Ex. 113, ¶ 16.) Especially so given Toton's concern that Reyes might testify against Petitioner, and Toton's belief the aider and abettor theory might be more favorably decided by the court rather than a jury. (SPet. Ex. 137, p. 5.)

In sum, the evidentiary record does not support a reasonable possibility that Petitioner would have received a more favorable disposition had the matter gone to jury trial at the guilt and special circumstance phase. Had Petitioner testified before a jury as to lack of knowledge and intent in aiding and abetting the murders, he likely would have been impeached for reasons discussed in claims 1-13.

For the reasons stated, Petitioner has not established that defense counsel's performance fell below an objective standard of reasonableness and that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland, 466 U.S., at 687-694.

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

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

Claim 14 is denied.

k. Review of Claim 15

Petitioner next claims ineffective assistance of counsel by failing to cross-examine newspaper report Trihey, violating Petitioner's Fifth, Sixth, Eighth and Fourteenth Amendment rights.

The California Supreme Court summarily denied this claim (SPet. Claim L) as it was raised in Petitioner's state petition for habeas corpus. In re Sanchez, S049502 (DD.) That court also rejected on appeal Petitioner's contention that Toton's failure to cross-examine Trihey before closing argument denied him the effective assistance of counsel, finding that:

> Toton convinced the court during his closing argument that Trihey's testimony should not be given substantial weight; his decision not to cross-examine Trihey as to the contents of the published material was sound strategy, given the nature of defendant's alleged contradictory statements. Defendant does not establish that cross-examination would have revealed any new information, or that any additional information about the interviews would have influenced the court's judgment. Hence, we cannot find counsel's failure to cross-examination Trihey to be deficient. In any event, given the fact that the court dismissed the robbery charges against defendant, and found not true the robbery-murder special-circumstance allegation, we discern no prejudice to defendant based on counsel's performance. [Citation]

Sanchez, 12 Cal.4th 59.

Petitioner supports this claim with facts alleged in claims 2 and 4. He alleges that had Toton cross-examined Trihey on the published newspaper articles he could have called into question the version of events offered by Trihey and Hernandez, and supported Petitioner's mental defenses. (Pet. ¶ 306-314.)

Strickland provides that "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." Strickland, 466 U.S. at 690-91. "[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." Id.

Petitioner argues cross-examination regarding the contents of the newspaper articles, cross-examination Toton refused under conditions imposed by the Court (limiting such to the printed articles – see RT 57-59) would have been beneficial, but he does not demonstrate how or why this is so given his contradictory statements of the crimes and his involvement.

Trihey testified at the guilt and special circumstance phase that during the course of five interviews, Petitioner stated he was "a triple murderer" and that the victims were killed for their "Social Security checks." (RT 17-18). These statements were included in the published articles. (Id.) Based on the record before it, the state court could reasonably have found that any claimed advantage that would have resulted from cross-examination of Trihey was speculative. It follows that the decision of defense counsel not to cross-examine Trihey could be seen as neither unreasonable nor prejudicial.

The trial judge limited any cross-examination to the confession and information published by Trihey in the newspaper. Unable to impeach Trihey, defense counsel could reasonably have concluded that cross-examination might highlight inconsistencies in Petitioner's versions of how the murders occurred, bolstering both the direct examination and the damaging testimony of Hernandez. Moreover, defense counsel Toton, during closing argument, argued effectively to limit the impact of Trihey's testimony regarding robbery, (RT 175-183), and the robbery-murder special circumstance. Petitioner cannot show prejudice where he fails to state with specificity the nature of the proposed testimony. Alcala v. Woodford, 334 F.3d 862, 872-73 (9th Cir. 2003); see also Bragg v. Galaza, 242 F.3d 1082, 1088 (9th Cir. 2001) (mere speculation of possible helpful information from potential witnesses is not sufficient to show ineffective assistance of counsel).

Additionally, for the reasons discussed in claims 1 through 4 and 6, the evidence does not support a reasonable possibility that Petitioner would have received a more favorable disposition on sufficiency of the evidence, actual innocence and mental states defenses by cross-examining Trihey. Instead, defense counsel could have reasonably believed that cross-examining Trihey as to mental state defenses, unsupported in the record, might serve only to reinforce the published

confession.

Petitioner was not prejudiced by failing to Toton's failure to cross-examine Trihey. The trial court's guilt phase verdicts, rejecting robbery and robbery special circumstance counts in the Bocanegra homicides, reflect its acceptance of Toton's argument that Trihey's testimony should not be given substantial weight. (RT 235-236.) Trihey's testimony likely would not have changed the outcome.

Accordingly, the Court finds the state court rejection of the claim was neither contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme Court, nor based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding, viewed most favoring the prosecution. See 28 U.S.C. § 2254(d).

Claim 15 is denied.

l. Review of Claim 16

In his next claim, Petitioner alleges ineffective assistance of counsel by failure to argue for second degree Murder in Bocanegra homicides, violating his Fifth, Sixth, Eighth and Fourteenth Amendment rights.

The California Supreme Court summarily denied this claim (SPet. Claim M) raised in Petitioner's state petition for habeas corpus. In re Sanchez, S049502 (DD). As noted, in such a case "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, and this Court "must determine what arguments or theories supported or . . . *could have supported*, the state court's decision; and then it must ask whether it is possible fair-minded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." Id. (emphasis added).

Petitioner claims that Toton should have argued for lesser included second degree murder because evidence he premeditated the murders was insufficient. (RT 168-196.) He supports this claim with facts alleged in claims 2 and 4, *ante*. However, Petitioner has not established actual innocence, or that the evidence was insufficient to support the premeditated and deliberate

murder of the Bocanegras. (See claims 1 through 4, *ante*.) Second degree murder was in any event a lesser included option, necessarily rejected by the trial court in its finding of first degree murder. (RT 235-236.)

The Court finds it was not unreasonable for Toton to argue voluntary manslaughter (RT 168-196), foregoing argument of second degree murder, given his theory that a sudden heated argument between Mr. Bocanegra and Joey led to the killings. (CT 77-78, 479, 487, 500, 590; RT 97, 132-33, 188-193, 195-96.) Given the support in the evidentiary record for the manslaughter argument, the state court could reasonably have determined Toton's failure to argue for second degree murder was not ineffective assistance.

The state court could reasonably have determined that Petitioner was not prejudiced by Toton's failure to argue for second degree murder. Though Petitioner contends in this claim that he was willing to accept any non-capital conviction, this position is not consistent with his stated desire to plead guilty to the Bocanegra murders. (SPet. Ex. 520, p. 2; 700.) Petitioner waived jury trial and submitted guilt and special circumstances phase on the preliminary hearing transcript and the testimony of additional prosecution witnesses. See Sanchez, 12 Cal.4th at 23-30. The evidence does not suggest a reasonable probability that argument for second degree murder would have resulted in a more favorable disposition for Petitioner given the substantial evidence against him, his incriminating statements to detective Stratton and reporter Trihey and the crime scene evidence corroborated by Hernandez's testimony. (See claims 1-10.)

The Court notes that Toton's motion for acquittal based upon sufficiency of the evidence was denied by the trial court. (RT 140-141.) Toton's argument in closing, revisiting insufficiency of the evidence, was also unsuccessful.

Accordingly, a fair-minded jurist could have found that Petitioner failed to establish that defense counsel's performance fell below an objective standard of reasonableness and that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland, 466 U.S., at 687-694.

It does not appear that the state court rejection of the claim was contrary to, or an

unreasonable application of, clearly established federal law, as determined by the Supreme Court, or that the state court's ruling was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. See 28 U.S.C. § 2254(d).

Claim 16 is denied.

m. Review of Claim 17

Petitioner next claims ineffective assistance of counsel by failure to object to improper prosecution closing at the guilt and special circumstances phase, violating his Fifth, Sixth, Eighth and Fourteenth Amendment rights.

The California Supreme Court summarily denied this claim (SPet. Claim N) raised in Petitioner's state petition for habeas corpus. In re Sanchez, S049502 (DD.) As noted, in such a case "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, and this Court "must determine what arguments or theories supported or . . . *could have supported*, the state court's decision; and then it must ask whether it is possible fair-minded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." Id. (emphasis added).

Petitioner alleges that the prosecutor's argument, that there were only two people, other than the Bocanegras, present at the time of the killings, was false and misleading. Petitioner states that the prosecution presented evidence of Reyes's bloody palm print on the door knob inside the Bocanegra home. (CT 202-203.) Yet Toton failed to object because he wrongly assessed the evidence. (SHCP Ex. 137, ¶ 30.) Defense counsel Frank did not object because he was responsible only for the penalty phase. (SHCP Ex. 113, ¶ 27.)

This Court is not convinced. Physical evidence that Reyes was in the Bocanegra home is not inconsistent with the evidence that Reyes served as a lookout and entered the Bocanegra home after the homicides to assist Joey and Petitioner. (SResp. Ex. A, pp.3-4; see claim 10.) The prosecution's argument then was not inconsistent with the evidence. Toton could reasonably have concluded that the prosecution's "two person" argument was not objectionable

as false or misleading based on the record. (SPet. Ex. 137, pp. 9-10.)

Moreover, Petitioner did not challenge the evidence that he struck Mr. Bocanegra with a bar (CT 481-82; RT 169, 184-85, 188, 196, 207), and that he grabbed Mrs. Bocanegra and told Joey to "shut her up". (CT 482-483, 504; RT 190-91.) Counsel is not ineffective for failing to make an objection that would be overruled. See United States v. Steele, 785 F.2d 743, 750 (9th Cir. 1986). "In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." Strickland, at 691.

Petitioner does not demonstrate by evidence in the record that Toton failed to reasonably investigate these matters. "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." Strickland, 466 U.S at 690-91. Even if he had, "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." Id. Toton could reasonably have concluded further investigation would have been futile given the weight of the evidence against Petitioner.

Toton could have considered the prosecution argument, that there was no evidence anyone other than Joey and Petitioner committed the Bocanegra homicides, to be consistent with the evidence and not unreasonable. Moreover, Toton did argue an inference from the evidence, that Mrs. Bocanegra's scalp wounds were inflicted by someone other than Petitioner, (RT 191), and that there was insufficient evidence to show Petitioner inflicted the wounds.

There is no sufficient showing that Petitioner was prejudiced by Toton's alleged failure to object to the prosecutor's guilt and special circumstance closing argument that there were only two perpetrators in the Bocanegra homicides. The evidentiary record contains substantial evidence against Petitioner, his incriminating statements to detective Stratton and reporter Trihey and the crime scene evidence corroborated by Hernandez's testimony. (See claims 1-10.)

For the reasons stated, a fair-minded jurist could have found that Petitioner failed to establish that defense counsel's performance fell below an objective standard of reasonableness

and that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland, 466 U.S., at 687-694.

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

Claim 17 is denied.

n. Review of Claim 18

Petitioner next claims ineffective assistance of counsel by cumulative ineffectiveness during the guilt phase violating his Fifth, Sixth, Eighth and Fourteenth Amendment rights.

The California Supreme Court summarily denied this claim (SPet. Claim O) raised in Petitioner's state petition for habeas corpus. In re Sanchez, S049502 (DD). As noted, in such a case "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, and this Court "must determine what arguments or theories supported or . . . *could have supported*, the state court's decision; and then it must ask whether it is possible fair-minded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." Id. (emphasis added).

Petitioner claims that Toton's failure to seek a continuance to conduct guilt phase investigation, and failure to present complete defenses based on physical evidence, mental state, and testimony from Joey, Seeley, and Hernandez had the cumulative effect of denying Petitioner a full trial at the guilt and special circumstance phase and possibility of a plea bargain. Petitioner bases this claim on facts alleged in claims 2, 4, and 6 through 17, *ante*.

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

The cumulative effect of trial court errors can be a basis for habeas relief in certain circumstances:

> Although individual errors looked at separately may not rise to the level of reversible error, their cumulative effect may nevertheless be so prejudicial as to require reversal. United States v. Necoechea, 986 F.2d 1273, 1282 (9th Cir. 1993). However, the fact that errors have been committed during a trial does not mean that reversal is required. [W]hile a defendant is entitled to a fair trial, [she] is not entitled to a perfect trial, for there are no perfect trials. United States v. Payne, 944 F.2d 1458, 1477 (9th Cir. 1991).

U.S. v. de Cruz, 82, F.3d 856, 868 (9th Cir. 1996).

Here, there is not a need to employ cumulative error analysis because review has detected no error, for the reasons discussed in claims 2, 4 and 6-17. Petitioner has not established that the evidence before the trial court showed defense counsel Toton was ineffective. These claims are insubstantial whether considered singlely or cumulatively. See United States v. Karterman, 60 F.3d 576, 580 (9th Cir.1995) ("Because each error is, at best, marginal, we cannot conclude that their cumulative effect was 'so prejudicial' to [defendant] that reversal is warranted."); see also Rupe v. Wood, 93 F.3d 1434, 1445 (9th Cir. 1995); Detrich v. Ryan, 740 F.3d 1237, 1273 (9th Cir. 2013). Cumulative error analysis applies where there are two or more actual errors. It does not apply . . . to the cumulative effect of non-errors." Moore v. Gibson, 195 F.3d 1152, 1175 (10th Cir. 1999) (quoting Castro v. Ward, 138 F.3d 810, 832 (10th Cir. 1998)).

Accordingly, Petitioner has not established that defense counsel's cumulative performance fell below an objective standard of reasonableness and that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland, 466 U.S., at 687-694. Petitioner's reliance on Cargle v. Mullin, 317 F.3d 1196, 1210 (10th Cir. 2003), a case readily distinguished on the facts of ineffective assistance, is misplaced.

Respondent contends this claim is not cognizable because it creates and retroactively applies a "new rule" of constitutional law within Teague v. Lane, 489 U.S. 288. However, the Court finds the claim fails not because Petitioner seeks to apply a new rule of criminal procedure under Teague, but rather on grounds the claim lacks merit for the reasons stated.

Claim 18 is denied.

5. Denial Of Effective Assistance Of Counsel – Claims 19-27

In claims 19 through 27, Petitioner alleges that during the guilt and special circumstance phase he was denied effective assistance of defense counsel.

a. Clearly Established Law

A breakdown in the attorney-client relationship can result in a denial of the right to effective assistance of counsel. Frazer v. United States, 18 F.3d 778, 782-83, 785 (9th Cir. 1994); see also Brown v. Craven, 424 F.2d. 1166, 1169-70 (9th Cir. 1970) (trial court's failure to conduct inquiry into irreconcilable conflict arising from the client's refusal to communicate or cooperate with counsel resulted in denial of effective assistance of counsel).

The Sixth Amendment requires an appropriate, on the record, inquiry into the grounds for such a motion, and that the matter be resolved on the merits before the case goes forward. Schell v. Witek, 218 F.3d 1017, 1025, citing *S*mith v. Lockhart, 923 F.2d 1314, 1320 (8th Cir. 1991)). The overarching constitutional question is whether the attorney-client conflict has become so great that "it resulted in a total lack of communication or other significant impediment that resulted in turn in an attorney-client relationship that fell short of that required by the Sixth Amendment." Id., at 1026.

b. Review of Claim 19

Petitioner claims trial court error by denial, without adequate investigation, of defense counsel's motions to withdraw depriving him of effective assistance of counsel, violating his Sixth, Eighth and Fourteenth Amendment rights.

The state supreme court considered this claim on appeal and found that the trial court did not abuse its discretion in denying defense counsel's two motions to withdraw, as follows:

> [I]mplicit in the court's denial of the motions is the finding that defendant's discussion of his case with the media was not an indication of his distrust or dissatisfaction with counsel. Rather, the conduct was merely indicative of his unwavering desire to admit culpability and to atone for his crimes. Indeed, allowing counsel to withdraw would not have alleviated any prejudice to defendant caused by his contact with the press, nor does the record indicate that denying the motion to withdraw influenced defendant's desire to submit the guilt

> issue on the basis of the preliminary hearing transcripts. Even though counsel were dissatisfied with defendant's failure to heed their advice and not discuss the case with the media, the record shows defendant's right to counsel was not jeopardized by counsel's continuing representation. Thus, because defendant does not show that any disagreement with counsel resulted in a complete breakdown in the attorney-client relationship that jeopardized his right to a fair trial, we conclude the trial court did not abuse its discretion in denying counsels' motions to withdraw. [Citation] In reviewing denial of motion to substitute attorneys, the court "focuses on the ruling itself and the record on which it is made. It does not look to subsequent matters . . . ."]

Sanchez, 12 Cal.4th at 37.

Petitioner alleges that his out-of-court actions revealed a complete breakdown in his relationship with counsel and that his lack of trust and confidence was not unfounded as counsel ignored his serious mental disturbances which should have been obvious. Petitioner notified defense counsel of his intent to speak to the media on February 2, 1988. Later that day counsel met with Petitioner and advised against contacting the media. After the meeting, counsel discovered Petitioner had given an interview to Michael Trihey, reporter for the Bakersfield Californian newspaper, earlier that day. That interview led to a front-page story published on February 12, 1988.

On February 16, 1988, defense counsel filed a motion to withdraw, asserting Petitioner had indicated he did not trust counsel and actively mislead them by failing to inform them he had already given an interview to Trihey, Petitioner's refusal to cooperate rendered his representation virtually impossible, and their attorney-client relationship was so tainted counsel's efforts would be of no assistance. However, the Court denied the motion because it found no breakdown in the attorney-client relationship and that any prejudice created by Petitioner's contacting the press against counsel's advice would not be ameliorated by counsel's withdrawal. On March 7, 1988 the trial court, before denying the initial motion to withdraw, questioned Petitioner about whether he trusted defense counsel. Petitioner responded that "[he was] willing to stay with them." (CT 690, 707-708; RT [3/7/88] 4-5.)

On April 25, 1988, another article by Trihey was published in the Bakersfield Californian that asserted that Petitioner said he was a triple killer who deserved to die and described Petitioner's legal predicament of not being able to plead guilty and accept the death penalty

without his counsel's consent.

On May 2, 1988, counsel again moved to withdraw, asserting continued representation would require unethical conduct by counsel. The trial judge met with defense counsel and Petitioner regarding counsel's renewed motions to withdraw. The court denied Toton's motion on the merits on that day. (CT 707; RT [5/6/88] 3.) Four days later the Court denied Frank's motion due to "nearness of the trial date." (CT 708; RT [5/10/88] 5.) The trial court had previously noted that substitution of counsel would not alleviate any prejudice to the case already resulting from Petitioner's discussions with report Trihey. (RT [3/7/88] 5.) On June 22, 1988, the Court of Appeal of the State of California, Fifth Appellate District, denied Petitioner's petition for writ of mandate and/or prohibition, seeking an order directing the trial court to grant counsel's motions to withdraw. (CT 768.)

Here, the state court could reasonably have found that any disagreement with counsel was not so great that it resulted in a complete breakdown in the attorney-client relationship jeopardizing his right to effective representation and a fair trial. (CT 690; RT [3/7/88] 4-5.) The contention of defense counsel in their initial (February 1988) motion that the newspaper article reflected a lack of trust and cooperation (RT March 7, 1988 at pp. 3-4; CT 685-686) was countered by Petitioner during his colloquy with the trial court. Petitioner stated to the trial judge that, "[t]here is a little bit of mistrust there, but you know, I'm willing to stay with them, if they want out, you know, I won't stop them." (RT March 7, 1988 at pp. 4-5; CT 685-686.)

Petitioner's assertion that the trial court erred by treating the newspaper interview as the sole issue, failing to investigate and address the more pervasive problem of mistrust, is unavailing. Toton's February 1988 withdrawal motion, which raised a lack of trust and confidence as a result of the newspaper article, was denied by the trial court on the merits (CT 707; RT May 6, 10, and June 24, 1988 at p. 3) following the trial court's above noted discussion of these very issues with Petitioner. (RT March 7, 1988 at pp. 4-5; CT 685-686.)

Petitioner also contends that the second motion to withdraw, brought by Frank in May 1988 and joined in by Toton, was improperly denied. He points out that this motion was

unopposed and that the trial court delayed reaching the motion and ultimately did not reach the merits. Frank's May 1988 withdrawal motion, brought on ethical grounds relating to possibly perjurous testimony, (CT 694-696; URT[6] (Frank) [5/6/88] 2-8), joined in by Toton, was denied by the trial court following ex parte in camera hearing because it was too close to trial. (CT 708-710; RT May 6, 10, and June 24, 1988, at p. 5.) However, the request was devoid of facts showing the nature and basis for relief requested. (RT May 10, 1988, pp. 4-5, 7-8.) Any ethical dilemma involving perjurous testimony would not likely have been resolved by appointing replacement counsel, and the trial court recognized as much. (URT (Frank) [5/6//88] 4-6.) Petitioner does not allege or support an ethical violation. Even if he had, a lawyer's violation of ethical norms does not make the lawyer per se ineffective. Burt v. Titlow, 134 S. Ct. 10, 18 (2013).

Moreover, as with the earlier motion to withdraw, Petitioner was ambivalent, neither seeking nor objecting to withdrawal. (URT (Frank) [5/6/88] 9; RT [5/6/88] 2.) Petitioner's contention his defense waiver was a product of ineffective assistance (Pet. ¶¶ 377-380) is refuted by his expressed desire to plead guilty. (RT [7/27/88] 6-7; URT (Toton) [5/6/88] 2.)

Petitioner's suggestion that he lacked confidence in counsel because they ignored his mental disturbance was not communicated by him to the court and counsel and is not supported by any proffer in the evidentiary record. Petitioner neither sought nor objected to withdrawal of defense counsel Toton and Frank, (RT [5/6/88]2), and had expressed his desire to enter a guilty plea. (RT [5/16/88] 7.) In accordance therewith, trial was waived on the guilt and special circumstances phase. (RT [7/27/88] 6-7.) The state court could reasonably have determined that withdrawal would not have ameliorated any prejudice from Petitioner's contacting the press, or affected Petitioner's submission on the preliminary hearing. Sanchez, 12 Cal.4th at 36-37. On this basis Petitioner's right to counsel was not placed by jeopardy by the continued representation of defense counsel.

Respondent contends this claim is not cognizable because it creates and retroactively

[6] The term "URT" is a reference to Unsealed Reporter's Transcripts of ex parte in camera proceedings.

applies a "new rule" of constitutional law within Teague v. Lane, 489 U.S. 288. However, the Court finds the claim fails not because Petitioner seeks to apply a new rule of criminal procedure under Teague, but rather on grounds the claim lacks merit for the reasons stated.

For the reasons stated, the state court rejection of the claim was neither contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme Court, nor an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. See 28 U.S.C. § 2254(d).

Claim 19 is denied.

c. Review of Claim 20

In claim 20, Petitioner alleges ineffective assistance of counsel by complete breakdown in the attorney/client relationship violating his Sixth, Eighth and Fourteenth Amendment rights.

The California Supreme Court summarily denied this claim (SPet. Claim Q) raised in Petitioner's state petition for habeas corpus. In re Sanchez, S049502 (DD). The state supreme court, in its decision on direct appeal, considered Toton's disciplinary proceedings and noted the following trial court discussion:

> "The Court: One of the things that concerns me about this incident is the fact of the date of August 25th and the fact that a jury trial was waived in this case, and now we're at that stage of the case where a [Penal Code section] 1118.1 is under submission. And I suppose somebody reviewing this case could say one of the reasons maybe that Mr. Toton suggested that the jury trial be waived was the fact that the trial could be completed prior to the time that the Californian suggests that there's going to be some kind of a ruling in his case. As-and clearly if we had had a jury, we would still have been going at that time, and I really seriously doubt whether we would have been in a position even to have begun to take evidence as of the 25th day of August. That situation worried me a little bit.
>
> "And I wonder if you have discussed this with your client.
>
> "Mr. Frank: Yes, your Honor. I advised [defendant] that the article certainly did imply that Mr. Toton's motivation for pursuing the presentation of the case in the manner in which he has, at least indicated, that perhaps he did that because of his own personal problems, plans or agenda.
>
> "I advised [defendant] that he had the right to be represented by an attorney who was completely and absolutely free from any sort of conflict, that [defendant] had the right to have an attorney whose decision-making process was unfettered by any of his own personal plans or problems, and that he had the right to have an attorney whose representation and whose decision-making process was based not on any of the attorney's considerations but on the best interests of [defendant], the

client in this case."

Sanchez, 12 Cal.4th at 38.

Petitioner revisits allegations in claim 19 regarding Toton's disciplinary issues, and proffers an unsigned declaration of defense expert Isabel Wright that defense counsel disbelieved and disregarded Petitioner. (SHCP Ex. 131, Att. B, ¶ 6-9.) However, even if competent evidence, Wright's testimony is controverted by that of defense counsel Toton (SHCP Ex. 137, p. 8) and Frank (SHCP Ex. 113, ¶ 6), that apart from the media interview issue, the attorney-client relationship was a cooperative one. Moreover, the record shows that the trial court questioned Petitioner to verify that he had spoken to Frank about the disciplinary proceedings, that he had read the Bakersfield Californian article, and that he was unaware of any disciplinary action against Toton prior to the date of the article. The court asked Petitioner if he believed the article implied that "one reason Mr. Toton was pushing this case forward was because of his own personal time considerations." Petitioner replied: "Not really sir, because we had discussed-you know, this was part- I wanted to go this way in the beginning anyway. So there was really-I never really felt that he was doing it for his own incidences [sic]." Sanchez, 12 Cal.4th at 39.

The trial court discussed with Petitioner his earlier position that it was his idea alone to "waive the jury under any circumstances." Petitioner told the trial court that he wanted to waive jury trial on the guilty and special circumstances phase and that the idea started with him and not defense counsel. (RT [7/27/88] 6-7.)

The trial court discussed with Petitioner whether he wanted to make a motion for mistrial "and for certain other motions in view of the publicity that this has gotten?" The following colloquy took place:

> "The Court: What I'm concerned [about] is that something will happen down the line and then you will say, gee, I didn't know what I was doing; I should have asked for a mistrial at that point in time. That would probably be too late, because I'm probably getting an indication that you want to waive any problems that Mr. Toton's difficulties might have in this case. Is that right?
> "The Defendant: Yes.
> "The Court: I didn't make that very clear.
> "The Defendant: Yeah.
> "The Court: What I'm saying is, I don't want you to go down the line and then all

> of a sudden say, gee, I've changed my mind.
> "The Defendant: Yeah.
> "The Court: Probably you can't do that. You understand that?
> "The Defendant: Yes, I understand that.
> "The Court: Are you satisfied with the state of the record at this point?
> "The Defendant: Yes sir. I'm very satisfied.
> "The Court: Nobody threatened you to get you to say this?
> "The Defendant: No, sir ....
> "The Court: Are you satisfied, sir, that Mr. Toton's dilemma with the State Bar had nothing to do with the waiver of the jury trial?
> "Mr. Frank: I am, yes.
> "The Court: And are you, Mr. Sanchez?
> "The Defendant: I am too."

Sanchez, 12 Cal.4th at 39-40.

Based on the foregoing, and for the reasons discussed in claim 19, the state court could reasonably have determined Petitioner did not established ineffective assistance of counsel through complete breakdown of the attorney/client relationship. As noted by the state supreme court, "[i]n order to establish a violation of the right to effective assistance of counsel, a defendant must show that counsel's performance was inadequate when measured against the standard of a reasonably competent attorney, and that counsel's performance prejudiced defendant's case in such a manner that his representation "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686. The record above does not support such a finding.

Moreover, "a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." Strickland, 466 U.S. at p. 697. Prejudice is shown when there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." In re Sixto (1989) 48 Cal.3d 1247, 1257; Strickland, 466 U.S. at p. 694. If defendant fails to show that he was prejudiced by counsel's performance, the ineffective assistance claim may be rejected without determining whether counsel's performance was inadequate. Strickland, 466 U.S. at p. 697.)"

Petitioner has not established prejudice. Toton was licensed to practice law until his

disbarment on March 31, 1989, after Petitioner's trial was completed. In rejecting this claim on appeal, the state supreme court pointed out that:

> [Petitioner] does not assert that Toton's pending discipline prejudiced his case. The record would not support such an argument. Toton vigorously cross-examined prosecution witnesses at the preliminary hearing and during the guilt phase, made several defense motions, including one for appointed assistant counsel, which was granted, and motions for pretrial discovery, severance and additional motions that indicated he was vigorously representing his client. In addition, Toton made a comprehensive closing argument at the guilt phase. Thus, there is no indication on the record that counsel's representation was anything less than competent, and defendant fails to persuade us that counsel's representation was ineffective solely on the basis of the disciplinary action pending against him . . . Toton was a member of the State Bar at all times during his representation of defendant. " 'Erring morally or by a breach of professional ethics does not necessarily indicate a lack of knowledge of the law.'" [Citation] We simply are not persuaded that Toton's unrelated disciplinary problems in any way influenced his representation of defendant or otherwise rendered him unfit as a matter of law. [Citation]

Sanchez, 12 Cal.4th at 43-45.

Petitioner's contention that defense counsel found him uncooperative is refuted by Mr. Frank's declaration where he said that, except for the media interviews, Petitioner was cooperative with defense counsel. (SPet. Ex. 113, p. 3.) As to the alleged ethical dilemma, as noted a lawyer's violation of ethical norms does not make the lawyer per se ineffective. Burt, 134 S. Ct. at 18.

Respondent contends this claim is not cognizable because it creates and retroactively applies a "new rule" of constitutional law within Teague v. Lane, 489 U.S. 288. However, the Court finds the claim fails not because Petitioner seeks to apply a new rule of criminal procedure under Teague, but rather on grounds the claim lacks merit for the reasons stated.

The Court finds that, the reasons discussed, the state court rejection of the claim was neither contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme Court, nor an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. See 28 U.S.C. § 2254(d).

Claim 20 is denied.

d. Analysis - Claims 21-24

Petitioner claims denial of effective assistance of counsel through the appointment of Toton as lead counsel and the failure to replace him notwithstanding his conflicts of interest and Petitioner's insufficient waiver thereof, violating his Sixth, Eighth, and Fourteenth Amendment rights.

The California Supreme Court summarily denied claims 21, 23 and 24 (SPet. Claims P, R and S respectively) raised in Petitioner's state petition for habeas corpus. In re Sanchez, S049502 (DD). As noted, in such a case "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, and this Court "must determine what arguments or theories supported or . . . *could have supported*, the state court's decision; and then it must ask whether it is possible fair-minded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." Id. (emphasis added).

The state supreme court, in reviewing these issues on direct appeal, noted that:

> Defendant's claim that Toton's disciplinary proceedings rendered him incompetent is no more persuasive if considered under the rubric of conflict of interest. A criminal defendant's right to effective assistance of counsel, guaranteed by both the state and federal Constitutions, includes the right to representation free from conflicts of interest. [Citation] To establish a violation of the right to unconflicted counsel under the federal Constitution, 'a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance.' [Citation] To establish a violation of the same right under our state Constitution, a defendant need only show that the record supports an 'informed speculation' that counsel's representation of the defendant was adversely affected by the claimed conflict of interest. [Citation]
>
> [W]e also observed that "[c]onflicts of interest may arise in various factual settings. Broadly, they 'embrace all situations in which an attorney's loyalty to, or efforts on behalf of, a client are threatened by his responsibilities to another client or a third person or by his own interests.'" [Citation]
>
> Defendant contends that the alleged conflict of interest between himself and Toton was caused by Toton's "own interest" in expediting the trial prior to his disbarment, to the defendant's prejudice. Defendant asserts that the fact of the pending disciplinary action gave Toton a strong incentive to finish defendant's case as quickly as possible, implying that Toton's desire to end the case led to a constitutionally deficient performance.
>
> Based on the appellate record, we are not persuaded by defendant's arguments. As we have observed, the record shows that Toton was not disbarred until eight months after the court and defendant learned of the proceedings against him, and

one month after completion of the penalty phase of defendant's trial. There is no indication that the disciplinary proceedings influenced the pace of Toton's representation, and, indeed, there is substantial evidence on record that would support the opposite conclusion.

First and foremost, it was Toton who advised defendant not to plead guilty and instead to submit the guilt and special circumstance issues on the basis of the preliminary hearing transcripts. This alternative to a guilty plea allowed counsel to contest the People's case, present various defense motions to the court, and generally make a stronger case for defendant than would have been available following a guilty plea. Thus, counsel Toton actually prolonged the trial notwithstanding defendant's desire to proceed directly to the penalty phase.

Moreover, even if we were to perceive either an actual conflict of interest, as required by federal law, or to conclude the record supports an "informed speculation" of a conflict as required under our state Constitution, defendant intentionally and knowingly waived any conflict on the record. [Citation]

In addition, defense counsel Frank informed the court he was satisfied that Toton's pending discipline "had nothing to do with the waiver of the jury trial." At a later in camera hearing attended by defense counsel Frank, defendant admitted that, in partially submitting his case, it was his desire to waive jury trial "under any circumstances," that he had had a "lengthy discussion" regarding his rights with defense counsel Frank, and that he wanted to maintain the status quo.

The fact that defendant did not discuss Toton's pending discipline with him does not assist defendant's conflict claim. Here, defendant asserts that his "discussion with Frank could not substitute for a discussion with Toton. By his own admission, Frank knew nothing about his co-counsel's impending [discipline] until the news appeared on the front page of the Bakersfield newspaper . . . . Toton hid this important fact from his own assistant counsel until the news became public. Nothing in the record indicates that Frank knew any more about the [discipline] than did the readers of the Bakersfield Californian. Frank simply was not able to speak for Toton in discussing the impact of the [disciplinary proceedings] on the future conduct of the defense [nor was] Frank in [a] position to discuss with [defendant] how the [disciplinary] proceedings already might have affected Toton's guilt phase strategy." Defendant fails to show, however, how Toton's assurances or perspective would have assisted him in determining whether he wanted to waive the conflict, or how Toton would have provided him with a better explanation than that given by the court about the potential drawbacks of Toton's continued representation.

Defendant next asserts that the trial court failed in its duty to ensure that he knowingly and intelligently waived any conflict with counsel. "When a trial court knows or should know that defense counsel has a possible conflict of interest with his client, it must inquire into the matter [citations] and act in response to what its inquiry discovers [Citation]." If the court determines that a waiver of a conflict is necessary, it must satisfy itself that " '(1) the defendant has discussed the potential drawbacks of [potentially conflicted] representation with his attorney, or if he wishes, outside counsel, (2) that he has been made aware of the dangers and possible consequences of [such] representation in his case, (3) that he knows of his right to conflict-free representation, and (4) that he voluntarily wishes to waive that right.'" [Citation] A trial court's failure to inquire into the conflict or to adequately respond to its inquiry amounts to reversible error if the defendant can show "that an actual conflict of interest existed and that

> that conflict adversely affected counsel's performance." [Citation]
>
> Defendant asserts that the trial court "never asked [defendant] in clear, unambiguous language whether he was willing to waive his right to unimpaired counsel." He also complains of the court's failure to "determine whether [Toton's] alleged misuse of client funds might indicate that Toton had financial difficulties which might affect his work or handling of funds in [defendant's] case, [nor did the court] ask Toton about the timetable of state bar proceedings [or ask] how the bar proceeding might affect, or might have affected, Toton's conduct of [defendant's] case."
>
> In deciding whether a defendant understands the nature of a possible conflict of interest with counsel, the trial court need not explore each foreseeable conflict and consequence. [Citation] Nor does a defendant's waiver of conflict-free counsel extend merely to matters discussed on the record. [Citation] As we observed in [Citation] "[r]ules that are that strict seem neither necessary nor workable." [Citation] (waiver found adequate even though all conceivable ramifications of conflict not explained). Thus, looking at the whole record, we must determine whether defendant was aware of the potential drawbacks and possible consequences of retaining Toton, and whether he understood his right to conflict-free counsel and knowingly waived that right.
>
> It is clear that the record belies defendant's argument. The court's response to the asserted conflict of interest was appropriate under the circumstances; it was immediate and informed petitioner of his rights under the facts. As the record indicates, the court discussed the conflict with the parties, was careful to ensure defendant was aware that a conflict existed, and confirmed that his waiver of the conflict was voluntary and knowing. [Citation] Defendant even declined the court's invitation to make a motion for mistrial, emphasizing that he was satisfied with the state of the record. Thus, in light of all the circumstances, we conclude the court gave defendant an opportunity to declare a mistrial, to relieve counsel, and to voice his objections on the record. In our view, the trial court conducted an adequate inquiry into the conflict, and we are satisfied that defendant's waiver was knowing and voluntary. [Citation]

Sanchez, 12 Cal.4th at 45-48.

The Sixth Amendment provides that a criminal defendant shall have the right to "the Assistance of Counsel for his defense." As a general matter, a defendant alleging a Sixth Amendment violation must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694.

An exception exists for cases in which counsel actively represents conflicting interests. Mickens v. Taylor, 535 U.S. 162, 166 (2002); Cuyler v. Sullivan, 446 U.S. 335, 345-50 (1980). In such a case, prejudice is presumed. Id. However, Petitioner must establish that "an actual

conflict of interest actually affected the adequacy of [defense counsel's] representation." Sullivan, 446 U.S. at 348-49. Thus, "until a defendant shows that his counsel *actively represented* conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance." Id. at 350 (emphasis in original).

Petitioner supports these claims in part with facts alleged in claims 5 and 6. He contends that Toton, who had state bar disciplinary proceedings pending against him at the time he was appointed to Petitioner's case. He contends Toton obtained his bar license by fraud. He contends that Toton had conflicts of interest relating to disbarment proceedings which should have resulted in replacement lead counsel and a jury trial at the guilt and special circumstance phase. However, there is no competent evidence Toton obtained his law license by fraud (SHCP Ex. 133, Att. A), or that he engaged in the practice of law prior to his admission to the bar. (SHCP Exhs. 514; 516-18.) Toton was not disbarred until March 31, 1989, five months after the penalty phase verdict. (SHCP Ex. 519.)

Petitioner faults the trial court for failure to conduct an adequate inquiry into Toton's possible conflict of interest, noting Toton was never questioned. (Sealed RT July 26, 1988, at pp. 80-84.) However, the trial judge did look into the pending disciplinary proceedings against Toton and discussed such with the parties and Petitioner. See Sanchez, 12 Cal.4th at 47. The Court provided Petitioner the opportunity to "declare a mistrial, to relieve counsel, and to voice his objections to the record." Id. In response Petitioner voluntarily, knowingly and intentionally waived any conflict of interest on the record following a discussion with co-counsel Frank and the trial court as to his rights to conflict free representation and potential drawbacks and consequences of staying with Toton (RT [7/27/88] 3, 4-10), as reflected by his statement he wanted to maintain the status quo. (RT [7/27/88] 8.) He refused the court's invitation for mistrial, to relieve counsel, and to object to the record. Sanchez, 12 Cal.4th at 47.

The evidentiary record does not reflect that Toton's litigation of the case was influenced by an actual conflict arising from the disciplinary proceedings. See Burger, 483 U.S. at 783. Petitioner's argument that, had the trial court pressed the inquiry, Toton would have withdrawn

or been replaced and a full defense then mounted, is based upon speculation. The trial court could reasonably have found that there was no actual unwaived conflict of interest. The state court could have concluded that Petitioner understood what he was waiving, was "very satisfied" with the record and acting voluntarily, (RT [7/27/88] 8), and that Toton's situation had "nothing to do with his waiver of the jury trial." (RT [7/27/88] 9-10.)

Petitioner's contention that he should have been allowed to discuss Toton's alleged conflict with Toton himself or outside counsel is unaccompanied by any evidentiary proffer how that would have resulted in a more favorable outcome. The state supreme court found that "the fact disciplinary proceedings were pending against counsel Toton did not automatically render Toton's performance inadequate or prejudice [Petitioner's] right to effective counsel." Sanchez, 12 Cal.4th at 44. The court further found that Toton engaged in vigorous witness examination and cross-examination (CT 518-625; RT 2664-2670), pre-trial discovery (CT 649-663, 769), preemptory challenges (CT 836-840) evidentiary motions (CT 841-45, 846-53, 854-58, RT 80, 97-113), and closing argument. (RT 169-96.) All this supported the conclusion that Toton's representation was adequate. The state supreme court also found "no indication that the disciplinary proceedings influenced the pace of Toton's representation." Sanchez 12 Cal.4th at 45:2). Nothing in the state record suggests otherwise.

For the reasons discussed in claims 19 and 20, *ante*, Petitioner has not established denial of effective assistance of counsel through denial of defense counsel motions to withdraw, breakdown of the attorney-client relationship by virtue of Toton's debarment proceedings, or waiver of jury trial at the guilt and special circumstance phase. The assertion in claims 21-24, that the trial court did not sufficiently investigate defense counsel's alleged conflict of interest similarly fails for the same reasons.

Petitioner expressed his desire to plead guilty, to stay with Toton following discussion with the court and defense counsel. Toton, assisted by co-counsel Frank, vigorously cross-examined witnesses and made a variety of pretrial and trial motions and made a detailed guilt phase closing argument, thereby distinguishing this matter from Petitioner's cited People v.

Williams, 93 Ill.2d 309 (1982) and People v. Rainge, 112 Ill.App.3d 396 (1983). Petitioner was aware of the possible problems with Toton's continued representation and his right to conflict free representation, having discussed these matters with co-counsel Frank for approximately an hour, and Petitioner thereafter expressly waived any such conflict. (RT [7/27/88] 4-10.) Petitioner argues that defense counsel Frank lacked sufficient information about Toton's disciplinary proceedings to discuss the matter with Petitioner, (SHCP Ex. 137, ¶ 16), but makes no proffer of how and why this was so and cause him prejudice. Frank believed that Toton's disciplinary issues did not affect the proceedings. (Sealed RT July 27, 1988, at p. 9-10.)

Petitioner's re-argument that neuropsychological deficits (organic impairments) and neurological and psychiatric disorders (psychiatric impairments) prevented him from competently waiving the conflict fails substantively for the reasons stated in claims 1-4 and 6. As discussed in those claims, Dr. Foster's 1995 opinion of Petitioner's mental state, that there is a high probability Petitioner suffered neuropsychological and psychiatric disorders and impairments during the pretrial and trial period, does not demonstrate the trial court decision to allow Toton to continue as lead counsel was unreasonable.

At bottom, Petitioner has not demonstrated Toton had an actual conflict of interest. See Garcia v. Bunnell 33 F.3d 1193, 1198 (9th Cir. 1994) (no actual conflict where record discloses no active representation of competing interest); see also Burger, 483 U.S.at 783; Mickens, 535 U.S. at 171 ("[A]n actual conflict of interest [means] precisely a conflict that affected counsel's performance—as opposed to a mere theoretical division of loyalties."). To meet this standard, he must show "that the attorney's behavior seems to have been influenced by the conflict," which, though not a showing of actual prejudice, "remains a substantial hurdle." Lockhart v. Terhune, 250 F.3d 1223, 1231 (9th Cir. 2001). Even if he had demonstrated actual conflict, Petitioner has not demonstrated that his waiver the conflict was invalid. Garcia, 33 F3d at 1195 (9th Cir. 1994);

Respondent contends claims 21, 22 and 24 are not cognizable because each creates and retroactively applies a "new rule" of constitutional law within Teague v. Lane, 489 U.S. 288.

However, the Court finds the claims fail not because Petitioner seeks to apply a new rule of criminal procedure under Teague, but rather on grounds the claims lack merit for the reasons stated.

A fair-minded jurist could have found that rejection of these claims was neither contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme Court, nor an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. See 28 U.S.C. § 2254(d).

Claims 21-24 are denied.

e. Review of Claims 25-26

Petitioner next claims that he was not competent to waive trial by jury and confrontation and cross-examination of witnesses and presentation of a defense, and that he was not competent to stand trial, violating his Sixth, Eighth, and Fourteenth Amendment rights. He supports these claims with facts alleged in denied claims 6 through 10 and 14.

The California Supreme Court summarily denied claims 25 and 26 (SPet. Claims W and T respectively) raised in Petitioner's state petition for habeas corpus. In re Sanchez, S049502 (DD). As noted, in such a case "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, and this Court "must determine what arguments or theories supported or . . . *could have supported*, the state court's decision; and then it must ask whether it is possible fair-minded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." Id. (emphasis added).

i. Trial Waivers

The state supreme court found Petitioner knowingly, voluntarily and intelligently waived rights when it considered the matter on direct appeal. This Court agrees, for the reasons discussed in claims 6, 14 and 21-24. The trial court allowed Toton to inform Petitioner of his constitutional rights, which Petitioner acknowledged he was waiving "freely and voluntarily." Sanchez, 12 Cal.4th at 24-25. Petitioner's suggestion he did not receive a sufficient narrative

explanation of rights waived is refuted by the evidentiary record. Toton informed the trial court he had discussed the guilt and special circumstance submission and waiver with Petitioner, who agreed to the procedure. (RT-10a.) Petitioner expressly declined the offer of more time to consider the waiver decision, stating that he was "very confident" of his decision. See Sanchez, 12 Cal.4th at 26; CT 889-892; RT-10a, 98a-100a.). Petitioner then entered jury trial, compulsory process, confrontation and cross-examination and presentation of evidence waivers on the record. (CT 891; RT- 108a-114a.) Petitioner confirmed the waivers the next day, July 14, 1988. (CT 892; RT-115a.) Petitioner's argument that medication he received during his incarceration impacted the waivers (SHCP Exhs. 111, ¶ 64; 601) is not sufficiently supported in the evidentiary record.

ii. Slow Guilty Plea

The State Supreme Court also considered on direct appeal Petitioner's argument that the submission for court trial was a "slow plea" unaccompanied by waivers sufficient under Boykin-Tahl. That court found no "slow plea" because defense counsel called and cross-examined witnesses, retained the right to present additional evidence, attempted to impeach Hernandez, moved to strike testimony, moved for judgment of acquittal on insufficiency of the evidence, argued against first degree murder, and made an extensive closing argument. Sanchez, 12 Cal.4th at 28-30. That court also ruled there was no surrender of the rights against self-incrimination (because Petitioner chose not to testify at the guilt phase) and no prejudicial error from any failure to advise Petitioner of the consequences of conviction, noting that:

> Defendant had been thoroughly advised by counsel of the consequences of pleading guilty and of the consequences of waiving his constitutional rights. He was well aware that he faced a possible death sentence, and, according to reporter Trihey, even asked for his own death. It is clear from the record that defendant would have waived his right to a jury trial and insisted on the submission of the guilt phase on the preliminary hearing transcripts even if he was specifically told by the court that he faced a possible death sentence.

Sanchez, 12 Cal.4th at 30-31.

At trial, Petitioner was questioned about the charges pending and consequences of conviction:

> "Mr. Toton: And you also understand the nature of the charges against you in this proceeding; is that correct?
> "The Defendant: Yes, sir.
> Mr. Toton: All right, and that there are three counts of homicide alleged with special circumstances.
> The Defendant: Yes.
> Mr. Toton: Thank you, your Honor.
> The Court: And I take it, sir, that you have done all this freely and voluntarily?
> The Defendant: Yes, sir.
> The Court: No one has threatened you?
> The Defendant: No, sir.
> The Court: And you have done this after consultation with both of your lawyers?
> The Defendant: Yes, sir.
> The Court: Thank you.

(CT 889; RT- 65a-68a.)

Petitioner was given time to consider the waiver which did not become final until the following day, when he confirmed the waiver and that it was made freely and voluntarily. (CT 891-892; RT-115a.)

The Court finds the "slow plea" claim is not adequately supported by the state record. Petitioner consulted with defense counsel prior to the waivers and submission to court trial; repeatedly stated his desire to plead guilty; and acquiesced to counsel's urging to allow cross-examination and argument in his defense. The California Supreme Court's determination of facts was not unreasonable in light of the evidence above and Petitioner's desire to plead guilty. (RT – 87a.) That court's rejection of Petitioner's claims neither contrary to, nor an unreasonable application of, United States Supreme Court precedent.

iii. *Competency for trial*

Petitioner maintains Dr. Matychowiak, who conducted his psychiatric evaluation in November 1987, erred in finding him competent to stand trial because: (1) the opinion was based on a single, inefficient interview, (2) the conclusion relies almost exclusively on Petitioner's statements and are not corroborated by independent evidence, (3) insufficient information was obtained about several important factors, including Petitioner's history of severe

childhood trauma and extreme neurological deficits, (4) the effect of signs of potential brain damage, including history of head injury, paint sniffing and PCP use, as well findings of poor "theoretical and general judgment" were not considered, (5) the effect of signs of depression, suicidal intentions, and self-mutilation were not considered, (6) no questions were asked about Petitioner's understanding of the nature of the proceedings or his ability to consult with or assist counsel, and (7) the diagnosis of borderline personality disorder with a past history of substance abuse did not follow logically from findings of head injury, severe drug abuse, depression, suicidal tendencies and poor theoretical and general judgment.

A defendant is not competent to stand trial if he lacks "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding–and a rational as well as factual understanding of the proceedings against him." Dusky v. United Sates, 362 U.S. 402 (1960). A state may legislate the presumption that defendants are competent to stand trial and require defendants to bear the burden of proving that they are not. Medina v. California, 505 U.S. 437, 449 (1992).

Petitioner has not made a sufficient showing that he was erroneously deemed mentally competent. Petitioner's contention his neuropsychological deficits (organic impairments) and neurological and psychiatric disorders (psychiatric impairments) prevented him from competently standing trial and making the above waivers fails substantively for the reasons stated in claim 6. Petitioner did not suffer hallucinations or delusions memory lapse at this time. (SPet. Ex. 520, p. 5.) He wanted to enter a guilty plea, though his attorneys had not allowed him to do so. (Id. at p. 2-4.) Dr. Matychowiak found that Petitioner

> [Q]uite clearly understand(s) his situation and has the comprehension of the court processes. He is able to discuss himself, his decisions and his reasoning for his decisions . . . At the present time he shows evidence of a basic personality disorder. However, this does not make him unable to understand court procedures or his need for his own defense. It does not appear to significantly interfere with his capacity to cooperate with his attorney."

Id., at 5-6. Dr. Matychowiak found Petitioner "presently able to understand the nature and purpose of proceedings taken against him" and "to cooperate in a rational manner with counsel

in presenting a defense." (SPet. Ex. 520, p.6.)

As discussed above, defense psychologist Donaldson, who examined Petitioner prior to the preliminary hearing, found Petitioner to be of average intelligence with no deficits in reality testing or thought disorder. (SPet. Ex. 106, p. 2.) Defense counsel were entitled to rely on the expert's opinions, and were not obligated, without a request for information from the expert, to investigate further in these regards. Hendricks v. Calderon, 70 F.3d 1032, 1038 (9th Cir. 1995); cf., Silva v. Woodford, 279 F.3d 825, 842-43 (9th Cir. 2002) (trial counsel deficient if inadequate investigation into background and mental health: at guilt if expert requests information; and at penalty if the information is mitigating).

Petitioner points to declarations included with the state habeas petition by psychologists Doane and Froming (SHCP Exhs. 105 and 114 respectively) and psychiatrist Foster (SHCP Ex. 111). These experts opine that Petitioner had a history of heavy paint sniffing and PCP abuse (SHCP, Ex. 111, ¶ 90), and suffered significant organic brain damage and neuropsychological deficits and post-traumatic stress disorder at the time of his trial waivers. (SHCP Exhs. 105, ¶¶ 153-165; 111, ¶¶ 60-69). Petitioner contends that, as of December 1987, he was considered a "mentally unstable inmate' based on his bizarre behavior, overwhelming guilt and depression, instability, possible hallucinations and a suicide attempt. (SCHP Ex. 601.)

However, to the extent that these declarations can be considered evidence, they were not presented to the California Supreme Court in his appeal. As to claims adjudicated in the appeal, the Court cannot consider these declarations here. Pinholster, 131 S. Ct. at 1398. Even if they could be considered, they are not sufficient evidence in support of the claims for the reasons stated. Petitioner was mentally competent for reasons discussed in claims 6, and knowingly and voluntarily made the waivers for reasons discussed in claims 14 and 21through 24.

Due process requires a state to provide access to competent psychiatric assistance when a defendant demonstrates that his sanity at the time of the offense will be a significant factor at trial. Ake v. Oklahoma, 470 U.S. 68, 83 (1985). However, an indigent defendant does not have a constitutional right to hire the psychiatrist of his choice. Id. Petitioner's claim that the court-

hired psychiatrist, Dr. Matychowiak, was incompetent is foreclosed by Harris v. Vasquez, 949 F.2d 1497, 1517 (9th Cir. 1990), which refused to expand Ake to encompass a "battle of experts." Id., at 1517-18 (citing Silagy v. Peters, 905 F.2d 986, 1013 (7th Cir. 1990)). "Allowing such battles of psychiatric opinions during successive collateral challenges to a death sentence would place federal courts in a psycho-legal quagmire resulting in the total abuse of the habeas process." Id. at 1518.

Dr. Matychowiak was aware of Petitioner's history of substance abuse (SPet. Ex. 520, pp. 3-4), and found Petitioner competent to stand trial. (SPet. Ex. 520, pp. 2-6.) Dr. Matychowiak found that Petitioner understood his situation and the court process, had the capacity to cooperate with his attorney and wanted to plead guilty and "get it over with." (SPet. Ex. 520, pp. 2-6.) Moreover, Petitioner's coherent interaction with the trial court and counsel, and defense counsel's failure to raise any competency concern, are some evidence Petitioner was then competent. See United States v. Lewis, 991 F.2d 524, 528 (9th Cir. 1993). Petitioner's alleged facts are not sufficient to create real and substantial doubt as to his competency. See Boag v. Raines, 769 F.2d 1341, 1343, (9th Cir. 1985).

For the reasons stated, a fair-minded jurist could have found that the state court rejection of these claims was neither contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme Court, nor an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. See 28 U.S.C. § 2254(d).

Claims 25-26 are denied.

f. Review of Claim 27[7]

In his next claim, Petitioner alleges the trial court misapplied the California Shield Law to reporter Trihey's testimony, violating Petitioner's rights to confrontation, due process, a fair trial and compulsory process under the Sixth, Eighth, and Fourteenth Amendments.

The California Supreme Court rejected this claim on direct appeal. Sanchez, 12 Cal.4th at 52-58.

[7] The legal basis of the Eighth Amendment was stricken as unexhausted. ECF No. 60 at 9:4.

The California Shield Law[8] states in pertinent part that:

> A publisher, editor, reporter, or other person connected with or employed upon a newspaper, magazine, or other periodical publication, or by a press association or wire service, or any person who has been so connected or employed, shall not be adjudged in contempt by a judicial, legislative, or administrative body, or any other body having the power to issue subpoenas, for refusing to disclose the source of any information procured while so connected or employed for publication in a newspaper, magazine or other periodical publication, or for refusing to disclose any unpublished information obtained or prepared in gathering, receiving or processing of information for communication to the public. "As used in this subdivision, 'unpublished information' includes information not disseminated to the public by the person from whom disclosure is sought, whether or not related information has been disseminated and includes, but is not limited to, all notes, outtakes, photographs, tapes or other data of whatever sort not itself disseminated to the public through a medium of communication, whether or not published information based upon or related to such material has been disseminated."

The state supreme court considered this claim and noted the burden on Petitioner:

> Faced with a claim of privilege, the burden is on the party seeking to avoid the privilege competently to demonstrate not only that the evidence sought is relevant and necessary to his case, but that it is not available from a source less intrusive upon the privilege. Moreover, as with any attempt to discover evidence subject to a claim of privilege, a defendant must show a reasonable possibility that the evidence sought might result in his exoneration." [Citation]

Sanchez, 12 Cal.4th at 52.

Trihey testified during the guilt phase subject to invocation of the newsperson's shield law. He testified that during interviews that Petitioner had told him he was "triple murderer" and that "all three were killed for their Social Security checks." (RT 18.) These statements were published in the Bakersfield Californian on April 25, 1988. (RT 17-18.)

Toton objected to use of the newsperson's shield law to protect unpublished information in Trihey's possession. The trial court ruled for such protection, limiting Toton's cross-examination to only published information and finding that impeachment of Trihey was not at issue. (RT 57-59.) Toton then decline further cross-examination of Trihey. (RT 65.)

Petitioner alleges that the trial court's misapplication of California Shield Law to reporter Trihey's testimony caused defense counsel Toton to decline any cross-examination of Trihey, denying Petitioner an effective defense.

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[8] California Constitution, article I, section 2, subdivision (b); Cal. Evid. Code §1070 contains substantially similar language. See Delaney v. Superior Court, 50 Cal.3d 785, 796 (1990).

The state court found Petitioner failed to carry his burden:

> In attempting to meet his burden, defendant attacks his own credibility by claiming he made inconsistent statements during the course of the interviews that would have exposed his confused state of mind at the time the interviews took place. He asserts his alleged unpublished statements also could have been used to impeach Trihey's testimony that defendant had told him he was a "triple murderer" and that "all three were killed for their social security checks." But defendant never shows how the information he sought would materially assist his defense, or how it differed in content from the testimony and published information available for cross-examination, including defendant's statements that he was scared, that he had taken phencyclidine (PCP), and that he had not murdered anyone. Defendant simply asserts that he "needed discovery of, and cross-examination about, the unpublished records of the interviews to impeach Trihey's testimony. Unlike other statements attributed to [defendant] in the April 25th article, Trihey's 'triple murderer' assertion was not a direct quotation. Rather, it was a conclusion drawn by Trihey. Trihey's unpublished material might have shown that his 'triple murder' testimony was his own interpretation of [defendant's] account, not an actual admission. Moreover, discovery and cross-examination might have proven that Trihey's conclusion was not supported by the interviews. The tapes might have shown that [defendant] never said he was a 'triple murderer' or a 'triple killer'; that he did not hit either Juan or Juanita; that he did nothing to aid or abet Joey; that he did not intend that either Juan or Juanita be killed; that he tried to stop Joey from killing his parents; or that he feels guilty because he failed to prevent the homicides. Any of these possibilities would have bolstered [defendant's] insufficiency of the evidence argument."
>
> The alleged evidence defendant claims would have materially assisted his defense consists of nothing more than self-serving statements that a court could reasonably conclude were either too speculative to assist defendant or would harm, rather than materially assist, the defense. Indeed, this case is similar to [Citation], in which the court rejected the defendant's attempt to attack his own credibility by subpoenaing a reporter's unpublished interview notes. Based on this record, and under the more recent [citation] threshold test, we find that defendant has failed to make the threshold showing that publication of alleged unpublished interview information possessed by Trihey would have materially assisted the defense and defeated Trihey's claim of immunity under the shield law.
>
> In addition, for the same reasons noted above, we reject defendant's claim that he was denied his right to confront and cross-examine Trihey and to discover and present evidence under the Sixth and Fourteenth Amendments. The record shows the court rejected Trihey's statements as proof that defendant killed the victims for their Social Security checks. Moreover, the court found untrue the special circumstance allegations that the murders of Juan and Juanita Bocanegra were committed during a robbery and found defendant not guilty of the robbery in connection with that crime. Thus, it appears the court afforded little weight to Trihey's testimony, and defendant was not denied his federal constitutional right to a fair trial simply because the court allowed the testimony to be introduced.

Sanchez, 12 Cal.4th at 56-58.

The state supreme court also rejected Petitioner's assertion that counsel's failure to cross-

examine Trihey before closing argument denied him the effective assistance of counsel under article I, section 15 of the California Constitution, and the Sixth and Fourteenth Amendments to the federal Constitution, noting that:

> In order to succeed in his claim, "defendant must show (1) deficient performance under an objective standard of professional reasonableness and (2) prejudice under a test of reasonable probability of an adverse effect on the outcome." [Citation] Defendant does not satisfy either prong of the foregoing test.
>
> As discussed, Toton convinced the court during his closing argument that Trihey's testimony should not be given substantial weight; his decision not to cross-examine Trihey as to the contents of the published material was sound strategy, given the nature of defendant's alleged contradictory statements. Defendant does not establish that cross-examination would have revealed any new information, or that any additional information about the interviews would have influenced the court's judgment. Hence, we cannot find counsel's failure to cross-examination Trihey to be deficient. In any event, given the fact that the court dismissed the robbery charges against defendant, and found not true the robbery-murder special-circumstance allegation, we discern no prejudice to defendant based on counsel's performance. [Citation]

Sanchez, 12 Cal.4th at 58-59.

The state court was not unreasonable in rejecting the claim. Petitioner does not make an evidentiary showing identifying how and why unpublished interview information sought from Trihey differed from that in the record and would likely change the result in his proceeding. The state court, having found that impeachment of Trihey was not in issue, Sanchez, 12 Cal.4th 52, and giving only minimal weight to Trihey's testimony of a robbery motive, could reasonably have rejected Petitioner's speculation and desire to impeach himself by arguing that the interviews did not support the articles.

"[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Strickland, 466 U.S. at 691. "In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." Id. at 691.

Petitioners claim fails under this standard. The trial judge was able to evaluate Trihey's credibility and motivations in testifying, expressly found that impeachment of Trihey was not in

issue. (RT 59.) Toton was afforded the opportunity to cross-examine Trihey, both about Petitioner's statements and any inconsistency therein (RT 51, 54-57), as well published statements by Hernandez and by Seeley which alleged were attributed to Petitioner. (RT 51-53.)

The record does not support claimed denial of confrontation and fair trial. Any confrontation clause error was harmless, for reasons discussed in claims 1-4 there was substantial evidence of guilt even without Trihey's testimony.

The trial court verdict accorded only slight evidentiary value to Trihey's testimony. Defense counsel Toton successfully argued to minimize the significance of Trihey's testimony regarding robbery motive. (RT 175-183, 235-236.) Any claim of due process and compulsory process error fails because it is not reasonable to believe any evidence suppressed might have affected the outcome of trial for reasons discussed in claims 1-26.

Accordingly, the Court finds that the California Supreme Court's determination of facts was not unreasonable in light of the evidence, and its rejection of this claim was neither contrary to, nor an unreasonable application of, United States Supreme Court precedent.

Claim 27 is denied.

6. Prosecutorial Misconduct in Guilt and Special Circumstances Phase - Claims 28-33

In claims 28 through 33, Petitioner alleges instances of prosecutorial misconduct during the guilt and special circumstance phase

a. Clearly Established Law

i. Brady

The Supreme Court held that if the state fails to disclose exculpatory evidence in violation of Brady v. Maryland, 373 U.S 83 (1963), the conviction cannot stand if there is a reasonable probability that the evidence, considered cumulatively, would have produced a different result at trial. Kyles v. Whitley, 514 U.S. 419, 441 (1995). There are three components of a Brady violation: (1) the evidence at issue must be favorable to the accused either because it is exculpatory or because it is impeaching; (2) the evidence must have been suppressed by the

State either willfully or inadvertently; and (3) prejudice must have ensued. Banks v. Dretke, 540 U.S. 668, 691 (2004); Strickler v. Greene, 527 U.S. 263, 281–82 (1999). "Such evidence is material if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Strickler, 527 U.S. at 280, quoting United States v. Bagley, 473 U.S. 667, 682 (1985)). "[T]here is never a real Brady violation unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict." Strickler, 527 U.S. at 281.

The Supreme Court has held that a federal court can grant habeas relief on a constitutional trial error claim only if the error had a "substantial or injurious effect" on the verdict. Brecht, 507 U.S. at 637. A new trial is warranted only if prosecutorial misconduct resulted in a fundamental denial of due process. Darden v. Wainwright, 477 U.S. 168, 181 (1986). Where the issue is evenly balanced and the judge has doubts about whether the error had a "substantial and injurious effect" on the jury's verdict, then the judge must treat the error as if it were not harmless. O'Neal v. McAninch, 513 U.S. 432, 435 (1995). In California v. Roy, 519 U.S. 2 (1996), the Supreme Court ruled that the Ninth Circuit's application of a modified O'Neal harmless error standard ("the omission is harmless only if review of the facts found by the jury establishes that the jury necessarily found the omitted element") was too strict and remanded the case for further consideration in light of Brecht and O'Neal.

The Court in Kyles also held that once a habeas petitioner establishes the "reasonable probability" of a different result, the error cannot subsequently be found harmless under Brecht. Kyles, 514 U.S. at 436.

ii. Due Process

A petitioner is entitled to habeas corpus relief if the prosecutor's misconduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Donnelly, 416 U.S. at 643. To constitute a due process violation, the prosecutorial misconduct must be "of sufficient significance to result in the denial of the defendant's right to a fair trial." Greer v. Miller, 483 U.S. 756, 765 (1987) (quoting Bagley, 473 U.S. at 667). "'Before a federal court

may overturn a conviction resulting from a state trial . . . it must be established not merely that the [State's action] is undesirable, erroneous, or even 'universally condemned,' but that it violated some right which was guaranteed to the defendant by the Fourteenth Amendment." Smith v. Phillips, 455 U.S. 209, 221 (1982) (quoting Cupp v. Naughten, 414 U.S. 141, 146 (1973)).

Any claim of prosecutorial misconduct must be reviewed within the context of the entire trial. Greer, 485 U.S. at 765-66; United States v. Weitzenhoff, 35 F.3d 1275, 1291 (9th Cir. 1994). The court must keep in mind that "[t]he touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor" and "the aim of due process is not punishment of society for the misdeeds of the prosecutor but avoidance of an unfair trial to the accused." Phillips, 455 U.S. at 219. "Improper argument does not, per se, violate a defendant's constitutional rights." Thompson v. Borg, 74 F.3d 1571, 1576 (9th Cir. 1996) (quoting Jeffries v. Blodgett, 5 F.3d 1180, 1191 (9th Cir. 1993)). Furthermore, the Supreme Court has stated:

> [A]rguments of counsel generally carry less weight with a jury than do instructions from the 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 recognized, are viewed as definitive and binding statements of the law. Arguments of counsel which misstate the law are subject to objection and to correction by the court. This is not to say that prosecutorial misrepresentations may never have a decisive effect on the jury, but only that they are not to be judged as having the same force as an instruction from the court. And the arguments of counsel, like the instructions of the court, must be judged in the context in which they are made.

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

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

b. Review of Claim 28

In this claim, Petitioner alleges that information tending to undermine the credibility of

jailhouse informant Hernandez, that Hernandez was a heroin addict who gave testimony motivated by Detective Stratton's offer of a deal over pending heroin and probation violation charges and to avoid being suspected in the Bocanegra murders, was withheld by the prosecution.

The California Supreme Court summarily denied claim 28 (SPet. Claims U) raised in Petitioner's state petition for habeas corpus. In re Sanchez, S049502 (DD). As noted, in such a case "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, and this Court "must determine what arguments or theories supported or . . . *could have supported*, the state court's decision; and then it must ask whether it is possible fair-minded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." Id. (emphasis added).

Here the state court could reasonably have found that Petitioner was not prejudiced by alleged prosecution failure to disclose information about jailhouse informant Hernandez. The record in this matter shows that the defense had the benefit of Hernandez's arrest report and presumptively was aware of his criminal record including any matters relating to substance abuse. (SPet. Ex. 409, pp. 1-2.) The defense was aware of Hernandez plea deal and cross-examined Hernandez regarding it. (CT 576-577; RT 2850-51.) Facts surrounding Hernandez alleged heroin addiction were equally available to defense counsel through discovery. (CT 654-676.) See U.S. v. Pelullo, 399 F.3d 197, 202 (3d. Cir. 2005) (Brady challenge fails where information equally available). For the same reason, any alleged omission of Hernandez's probation status regarding charges plea bargained is unavailing.

Petitioner has not made any sufficient showing in the evidentiary record that Hernandez testified falsely by omitting charges covered by plea bargain. These "omitted" charges were resolved outside the plea bargain under which Hernandez testified. (SPet. Ex. 508, p. 6.) Contrary to Petitioner's assertion, the record reflects that it was Hernandez who initiated contact with the authorities. (RT 2857; CT 576-77; SResp. Ex. C, pp. 1-2.) Petitioner's allegation that

Hernandez's testimony was coerced by detective Stratton, and false, fails substantively for reasons discussed in claims 1-4, *ante*. As discussed in those claims, Hernandez testimony was not inconsistent with the physical evidence. (CT 355, 378-80.) See United States v. Cooper, 173 F.3d 1192, 1202 (9th Cir. 1999) (stating that to show Brady error, the petitioner must show that the evidence (1) was exculpatory, (2) should have been but was not produced, and (3) was material to guilt or innocence). Hernandez's unsigned declaration (SPet. Ex. 101, Att. A) is not evidence otherwise. 28 U.S.C. § 1746.

Given the foregoing and the extended cross-examination of Hernandez by Toton and the consistent physical evidence, the state court could reasonably have found it unlikely that allegedly undisclosed evidence would have affected assessment of witness' credibility and, given Petitioner desire to plead guilty, the result of the proceedings.

Respondent contends claim 28 is not cognizable because it creates and retroactively applies a "new rule" of constitutional law within Teague v. Lane, 489 U.S. 288. However, the Court finds the claim fails not because Petitioner seeks to apply a new rule of criminal procedure under Teague, but rather on grounds the claim lacks merit for the reasons stated.

For the reasons stated, a fair-minded jurist could have found that the state court rejection of the claim was neither contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme Court, nor an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. See 28 U.S.C. § 2254(d).

Claim 28 is denied.

c. Review of Claim 29

In this next claim, Petitioner alleges that Hernandez's notes of conversation with Petitioner, which might have provided a basis to impeach Hernandez, were not safeguarded by police and the prosecution and were lost.

The California Supreme Court summarily denied claim 29 (SPet. Claims V) raised in Petitioner's state petition for habeas corpus. In re Sanchez, S049502 (DD). In such a case, "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, and this Court "must determine what arguments or theories supported or . . . *could have supported*, the state court's decision; and then it must ask whether it is possible fair-minded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." Id. (emphasis added).

According to the court in Arizona v. Youngblood, 488 U.S. 51, 57 (1988) the failure of a state to preserve evidence "of which no more can be said than it could have been subjected to tests, the results of which might have exonerated the defendant," is not a denial of due process of the law "unless a criminal defendant can show bad faith on the part of the police."

The Ninth Circuit used the Youngblood standard for a claim of bad faith destruction of evidence in U.S. v. Hernandez, 109 F.3d 1450, 1455 (9th Cir. 1997), stating "[t]he mere failure to preserve evidence which could have been subjected to tests which might have exonerated the defendant does not constitute a due process violation", citing Mitchell v. Goldsmith, 878 F.2d 319, 322 (9th Cir. 1989).

Where the government fails to preserve evidence that is only potentially exculpatory, the right to due process is violated only if [the evidence] possesses "an exculpatory value that was apparent before the evidence was destroyed, and [is] of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." California v. Trombetta, 467 U.S. 479, 489 (1984).

The state court could reasonably have found there was no bad faith failure to preserve potentially useful evidence. The record does not readily suggest Hernandez made the notes for the prosecution or as their agent, (CT 74, 477-499, 503, 575-577; SResp. Ex. C, pp. 1, 3), or prosecutorial bad faith in failing to take custody of and preserve potentially material evidence. Youngblood, 488 U.S. at 58. Additionally, Petitioner has not demonstrated that the materiality and exculpatory value of such notes was anything more than speculative. (CT 484-487, 503; SResp. Ex. C, p. 3.)

Respondent contends claim 29 is not cognizable because it creates and retroactively

applies a "new rule" of constitutional law within Teague v. Lane, 489 U.S. 288. However, the Court finds the claim fails not because Petitioner seeks to apply a new rule of criminal procedure under Teague, but rather on grounds the claim lacks merit for the reasons stated.

For the reasons stated, a fair-minded jurist could have found that the state court rejection of the claim was neither contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme Court, nor an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. See 28 U.S.C. § 2254(d).

Claim 29 is denied

d. Review of Claim 30

Petitioner next claims that criminalist Laskowski, who testified to two different sets of footprints during Petitioner's proceeding, subsequently identified a third set during Reyes's separate trial for his role in the Bocanegra murders, undermining the prosecution's argument at Petitioner's trial that Petitioner and Joey were the only two who struck blows to the victims.

The State Supreme Court reviewed this claim in Petitioner state petition for habeas corpus (SPet. Claim X) and summarily denied it. In re Sanchez, S049502 (DD). In such a case, "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, and this Court "must determine what arguments or theories supported or . . . *could have supported*, the state court's decision; and then it must ask whether it is possible fair-minded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." Id. (emphasis added).

The knowing use of false or perjured testimony against a defendant to obtain a conviction is unconstitutional. Napue v. Illinois, 360 U.S. 264 (1959). In Napue, the Supreme Court held that the knowing use of false testimony to obtain a conviction violates due process regardless of whether the prosecutor solicited the false testimony or merely allowed it to go uncorrected when it appeared. Id. at 269. The Court explained that the principle that a State may not knowingly use false testimony to obtain a conviction - even false testimony that goes only to the credibility

of the witness - is "implicit in any concept of ordered liberty." Id.

A conviction obtained by the knowing use of perjured testimony "must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." Bagley, 473 U.S. at 678. Nevertheless, simple inconsistencies in testimony are insufficient to establish that a prosecutor knowingly permitted the admission of false testimony. United States v. Zuno-Arce, 44 F.3d 1420, 1423 (9th Cir. 1995). "Discrepancies in . . . testimony . . . could as easily flow from errors in recollection as from lies." Id.

To warrant habeas relief, Petitioner must establish that: 1) The testimony was actually false; 2) The prosecution knew or should have known it to be false; and 3) There is a reasonable likelihood that the false testimony could have affected the jury's verdict. Tayborn v. Scott, 251 F.3d 1125, 1130 (7th Cir. 2001).

There is no sufficient showing Petitioner was prejudiced by presenting the testimony of criminologist Laskowski regarding the shoe tread pattern photographs taken at the Bocanegra crime scene. The state court could reasonably have found that, during Petitioner's trial, Laskowski and prosecutor Ryals were unaware of a third set of different footprints in the Bocanegra home. (CT 376; SResp. Ex. B.) Moreover, there is not a reasonable possibility that testimony of a third set of footprints would have affected the outcome of Petitioner's trial. See U.S. v. Agurs, 427 U.S. 97, 103 (1976). Reyes admitted he served as lookout and entered the home after the murders to assist Joey and Petitioner. (SResp. Ex. A, pp.3-4; see claim 10, *ante.*) His bloody palm print was in evidence. (CT 202-203.)

Any attempt by defense counsel to argue that Reyes rather than Petitioner struck blows to the victims is rebutted by the record (CT 77-78, 479-84, 487-89, 495, 500-05; RT 181; SPet. Exhs. 700-701) and Petitioner's express desire to plead guilty. (SPet. Ex. 520, p. 2; see CT 891-92; RT [5/16/88] 7; RT-108a-155a.) Petitioner's statements that he assisted Joey in murdering Mr. Bocanegra and Mrs. Bocanegra combined with Petitioner's desire to plead guilty suggests no reasonable likelihood of a different result had evidence of a third footprint been presented. The state record in this matter does not demonstrate that Reyes guilty plea was prompted by

discovery of the third shoe print. (SPet. Ex. 139, p. 2.)

Petitioner fails to demonstrate that no reasonable jurist could have found that he failed to make a prima facie case that the prosecution knowingly used false or perjured evidence with respect to Laskowski's testimony.

Respondent contends claim 30 is not cognizable because it creates and retroactively applies a "new rule" of constitutional law within Teague v. Lane, 489 U.S. 288. However, the Court finds the claim fails not because Petitioner seeks to apply a new rule of criminal procedure under Teague, but rather on grounds the claim lacks merit for the reasons stated.

For the reasons stated, a fair-minded jurist could have found that the state court rejection of these claims was neither contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme Court, nor an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. See 28 U.S.C. § 2254(d).

Claim 30 is denied.

e. Review of Claim 31

Petitioner alleges in this claim that pathologist Holloway's testimony was untruthful because Dr. Holloway stated at the preliminary hearing that victims' scalp wounds were "entirely" consistent with one weapon wielded by one person, but later stated at the penalty phase he found only "partial" consistency in these matters.

The State Supreme Court reviewed this claim in Petitioner state petition for habeas corpus and alternatively denied it on the merits and as procedurally barred. In re Sanchez, S049502 (DD). In such a case, "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, and this Court "must determine what arguments or theories supported or . . . *could have supported*, the state court's decision; and then it must ask whether it is possible fair-minded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." Id. (emphasis added).

Petitioner cites to facts alleged in claim 10, *ante*. He argues that had Holloway testified

truthfully at the preliminary hearing, a three assailant theory might have discredited Hernandez's testimony that only two assailants struck blows to the victims. However, the Court is not convinced that Dr. Holloway's erroneous testimony precluded a theory that more than one perpetrator and more than one weapon inflicted the scalp wounds on Mr. Bocanegra and Mrs. Bocanegra; Toton argued as much. (RT 187-191.)

Dr. Holloway testified at the preliminary hearing that Mr. Bocanegra's head wounds were entirely consistent with being inflicted by one person (CT 118-119, 134), similar to Mrs. Bocanegra's head wounds (CT 118, 155-156, 159), and were consistent with being inflicted by the same type of instrument (CT 118-119), though not necessarily the identical instrument. (CT 131-134.)

Dr. Holloway later testified at the penalty phase that he had erred, that Mr. Bocanegra's head wounds were not entirely consistent with Mrs. Bocanegra's (RT 2704-2706, 2720-2721, 2725), that is they were only partially consistent (RT 2721-2722, 2725), and that he could not conclude from the autopsy evidence how many assailants were involved in the attack on Mr. Bocanegra and Mrs. Bocanegra. (SPet. Ex. 120, p.3.)

Even so, the state court could reasonably have found that Holloway and prosecutor Ryals were not aware of the error at the preliminary hearing. (SResp. Ex. B.)

There is no sufficient showing Petitioner was prejudiced by pathologist Holloway's erroneous interpretation of scalp wounds of Mr. Bocanegra and Mrs. Bocanegra. The state court could reasonably have found that Holloway's erroneous testimony that Mr. Bocanegra's scalp wounds were "entirely" consistent with Mrs. Bocanegra's did not affect the outcome of Petitioner's trial. See Agurs, 427 U.S. at 103. Holloway's preliminary hearing opinion qualified that the scalp wounds were not necessarily caused by the "the identical instrument" (CT 132) and were consistent with being inflicted by one person (CT 134). Holloway's testimony did not reasonably preclude Toton from arguing use of more than one weapon by more than one perpetrator. (RT 189-191). Moreover, had Dr. Holloway's modified testimony been presented at the preliminary hearing the outcome would not likely have changed for reasons stated in

claims 1, 3, and 10.

Any attempt by defense counsel to argue Reyes rather than Petitioner struck blows to the victims is rebutted by the record (CT 77-78, 479-84, 487-89, 495, 500-505; RT 181; SPet. Exhs. 700-701) and Petitioner's expressed desire to plead guilty. (SPet. Ex. 520, p. 2; CT 891-92; RT [5/16/88] 7; RT- 108a-155a.) A mere inconsistency in testimony does not establish that a prosecutor knowingly permitted the admission of false testimony. Zuno-Arce, 44 F.3d at 1423. Holloway's erroneous preliminary hearing testimony was corrected at the penalty phase. (SPet. Ex. 120, p. 3.)

Respondent contends claim 31 is not cognizable because it creates and retroactively applies a "new rule" of constitutional law within Teague v. Lane, 489 U.S. 288. However, the Court finds the claim fails not because Petitioner seeks to apply a new rule of criminal procedure under Teague, but rather on grounds the claim lacks merit for the reasons stated.

For the reasons stated, a fair-minded jurist could have found that the state court rejection of the claim was neither contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme Court, nor an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. See 28 U.S.C. § 2254(d).

Claim 31 is denied.

f. Review of Claim 32

Petitioner claims here that prosecutor Ryals' falsely argued the two assailant theory when the evidence (i.e., the third set of footprints and a bloody palm print on the doorknob and information from Seeley) supported Reyes's presence in the Bocanegra home.

This claim was reached and summarily denied in Petitioner's state petition for habeas corpus (SPet. Claim Z). In re Sanchez, S049502 (DD). In such a case, "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, and this Court "must determine what arguments or theories supported or . . . *could have supported*, the state court's decision; and then it must ask whether it is possible fair-minded jurists could disagree that those arguments or theories are inconsistent

with the holding in a prior decision of this Court." Id. (emphasis added).

The California Supreme Court declined to reach the claim that Prosecutor Ryals committed such prejudicial misconduct in her guilt phase closing argument because the asserted evidence of misconduct, allegedly contrary statements by prosecutor Ryals to the court during subsequent, separate pretrial hearings in the prosecution of Reyes, were not within the appellate record or matters judicially noticed. This Court cannot consider evidence outside the state record. Pinholster, 131 S. Ct. at 1398. Even if it could, evidence proffered in the Reyes proceeding was not necessarily inconsistent with the prosecution's two assailant theory in this action. See People v. Robert Gabriel Reyes, Kern County Superior Court case number 34638, RT [10/3/91] 2-3, SResp. Ex. A.

The state court could reasonably have determined that Petitioner was not prejudiced by the prosecution's two assailant argument for reasons discussed in claims 1-4 and 28-31. The prosecution could rely upon inference from trial court evidence that supported the two person theory, i.e., that only Joey and Petitioner were in the Bocanegra home at the time of the murders. Notably, Petitioner did not challenge the evidence demonstrating that he struck Mr. Bocanegra (CT 481-82; RT 169, 184-185, 188, 196; RT 207) and that he grabbed Mrs. Bocanegra and told Joey to "shut her up" (CT 482-83, 504; RT 190-191). Evidence that, at some point, Reyes was present in the house does not necessarily establish his participation in the murders. (See CT 202-203.)

Additionally, no theory inconsistent with the two assailant theory was advanced in Reyes's separate criminal proceedings. Reyes pled guilty in his criminal proceeding on the theory he participated in the Bocanegra murders only by acting as a lookout during the murders and then assisting Joey and Petitioner after the murders. See People v. Robert Gabriel Reyes, Kern County Superior Court Case No. 34638, RT [10/3/91] 2-3; SResp. Ex. A. Even if there were inconsistencies in testimony regarding the Reyes involvement in the Bocanegra murders, inconsistencies alone are not sufficient to establish that the prosecutor knowingly permitted the admission of false testimony. Zuno-Arce, 44 F.3d at 1423.

The Court does not find that Petitioner's trial was fundamentally unfair. The two assailant theory was consistent with the evidence at the guilt and special circumstance phase and inference therefrom and was not objected to by Toton. (RT 147-149, 191, 211-12; claims 1, 3, 10.) See Donnelly, 416 U.S. at 647-48 (1974) (improper jury argument by the state does not present a claim of constitutional magnitude unless it is so prejudicial that the petitioner's trial was fundamentally unfair . . . [t]o establish prejudice, the petitioner must demonstrate either persistent and pronounced misconduct or that the evidence was so insubstantial that, in all probability, but for the remarks, no conviction would have occurred); see also Darden, 477 U.S. at 182 (claim of prosecutorial misconduct rejected where the prosecutor's comments "did not manipulate or misstate the evidence, nor . . . implicate other specific rights of the accused, such as the right to counsel or to remain silent."). For the reasons stated in claims 1-4, the weight of evidence against Petitioner was not insubstantial.

Respondent also contends claim 32 is not cognizable because it creates and retroactively applies a "new rule" of constitutional law within Teague v. Lane, 489 U.S. 288. However, the Court finds the claim fails not because Petitioner seeks to apply a new rule of criminal procedure under Teague, but rather on grounds the claim lacks merit for the reasons stated.

Accordingly, a fair-minded jurist could have found that the state court rejection of the claim was neither contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme Court, nor an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. See 28 U.S.C. § 2254(d).

g. Review of Claim 33

In this next claim, Petitioner alleges cumulative error from prosecutorial misconduct.

This claim was reached and summarily denied in Petitioner's state petition for habeas corpus (SPet. Claim AA). In re Sanchez, S049502 (DD). In such a case, "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, and this Court "must determine what arguments or theories supported or . . . *could have supported*, the state court's decision; and then it must ask whether it

is possible fair-minded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." Id. (emphasis added).

Petitioner cites to facts alleged in claims 28-32, *ante*, in support of this claim. However, the Court finds Petitioner has not made a sufficient showing of prejudiced by cumulative error from prosecutorial misconduct. The state court could reasonably have found that Petitioner failed to established prosecutorial misconduct causing him prejudice for the reasons discussed above in claims 28-32. These claims are insubstantial when considered cumulatively. See Karterman, 60 F.3d at 580; see also Rupe, 93 F.3d at 1445. Petitioner has not then established a reasonable probability that the evidence of alleged prosecutorial error, considered cumulatively, would have produced a different result at trial.

Respondent contends claim 33 is not cognizable because it creates and retroactively applies a "new rule" of constitutional law within Teague v. Lane, 489 U.S. 288. However, the Court finds the claim fails not because Petitioner seeks to apply a new rule of criminal procedure under Teague, but rather on grounds the claim lacks merit for the reasons stated.

Accordingly, for the reasons stated, a fair-minded jurist could have found that the state court rejection of the claim was neither contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme Court, nor an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. See 28 U.S.C. § 2254(d).

Claim 33 is denied.

7. Cumulative Error in Guilt and Special Circumstance Phase – Claim 34

a. Clearly Established Law

The applicable legal standard is set forth above, in the Court's analysis of claim 18.

b. Review of Claim 34

In this next claim, Petitioner alleges that constitutional violations during the guilt and special circumstance phase, claims 1 through 33, *ante*, when considered together and taken as a whole, prejudicially caused an unfair guilt trial, in violation of the Fifth, Sixth, Eighth and

Fourteenth Amendments.

The California Supreme Court summarily denied claim 34 (SPet. Claim BB) raised in Petitioner's state petition for habeas corpus. In re Sanchez, S049502 (DD).

The state supreme court also considered this claim on appeal and rejected it noting:

> Defendant contends his conviction should be reversed because of the cumulative effect of the alleged guilt phase errors. He relies on the California Constitution, article I, section 15, and the Sixth and Fourteenth Amendments to the United States Constitution.
>
> Contrary to defendant's contention, however, he has not sustained any of his claims of error. Accordingly, we find no cumulative deficiency in the guilt phase proceedings to support reversal. [Citation]

Sanchez, 12 Cal.4th, at 60.

Where none of the alleged claims state a violation of constitutional law, there is no reason to grant habeas relief based on cumulative error. Rupe, 93 F.3d at 1445. For the reasons stated in claims 1-33 above, this Court finds claim 34 fails substantively for reasons discussed in claims 1-33.

Respondent also contends claim 34 is not cognizable because it creates and retroactively applies a "new rule" of constitutional law within Teague v. Lane, 489 U.S. 288. However, the Court finds the claim fails not because Petitioner seeks to apply a new rule of criminal procedure under Teague, but rather on grounds the claim lacks merit for the reasons stated.

Accordingly, the state court rejection of claim 34 was not contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme Court. Nor was the state court's ruling based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. See 28 U.S.C. § 2254(d).

Claim 34 is denied.

8. State Appellate Review of Guilt and Special Circumstance Phase – Claim 35

a. Clearly Established Law

A habeas petition must allege that the petitioner's detention violates the Constitution, a federal statute, or a treaty. 28 U.S.C. § 2241(c)(3); Rose v. Hodges, 423 U.S. 19, 21 (1975). No

constitutional provision or federal law entitles Petitioner to any state collateral review. Pennsylvania v. Finley, 481 U.S. 551, 557 (1987). As the Ninth Circuit and nearly all other circuit courts have found, "federal habeas relief is not available to redress alleged procedural errors in state post-conviction proceedings." Ortiz v. Stewart, 149 F.3d 923, 939 (9th Cir. 1998); Franzen v. Brinkman, 877 F.2d 26 (9th Cir. 1989) ("a petition alleging errors in the state post-conviction review process is not addressable through habeas corpus proceedings"); Williams v. State of Mo., 640 F.2d 140, 143 (8th Cir. 1981) (infirmities in the state's post-conviction remedy procedure cannot serve as a basis for setting aside a valid original conviction); Hassine v. Zimmerman, 160 F.3d 941, 954 (3d Cir. 1998) ("[T]he federal role in reviewing an application for habeas corpus is limited to evaluating what occurred in the state or federal proceedings that actually led to the petitioner's conviction; what occurred in the petitioner's collateral proceeding does not enter into a habeas calculation."); Morris v. Cain, 186 F.3d 581, 585 n.6 (5th Cir. 1999) (finding that "errors in state post-conviction proceedings will not, in and of themselves, entitle a petitioner to federal habeas relief"); Bryant v. Maryland, 848 F.2d 492, 493 (4th Cir. 1988) ("claims of error occurring in a state post-conviction proceeding cannot serve as a basis for federal habeas corpus relief"); Millard v. Lynaugh, 810 F.2d 1403, 1410 (5th Cir. 1987); Kirby v. Dutton, 794 F.2d 245, 247-48 (6th Cir. 1986); Spradley v. Dugger, 825 F.2d 1566, 1568 (11th Cir. 1987).

The Supreme Court has stated that "when a State chooses to offer help to those seeking relief from convictions," due process does not "dictat[e] the exact form such assistance must assume." Finley, 481 U.S. at 559. Since the petitioner has already been found guilty at a fair trial, he has only a limited due process interest in post-conviction relief. Dist. Attorney's Office for Third Judicial Dist. v. Osborne, 557 U.S. 52, 69 (2009). "[T]he question is whether consideration of [defendant's] claim within the framework of the State's procedures for post-conviction relief "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental," or "transgresses any recognized principle of fundamental fairness in operation." Id. (quoting Medina v. California, 505 U.S. 437, 446, 448

(1992). "Federal courts may upset a State's post-conviction relief procedures only if they are fundamentally inadequate to vindicate the substantive rights provided." Id.

Accordingly, a claim challenging the adequacy of state appellate review is not cognizable on federal habeas. Under well-established principles of law and comity, a federal court has no jurisdiction over state courts to assess the adequacy or competence of their review since appellate review is not constitutionally required. Evitts v. Lucey, 469 U.S. 387, 393 (1985) (citing McKane v. Durston, 153 U.S. 684 (1894)); see also Franzen v. Brinkman, 877 F.2d 26 (9th Cir. 1989) (federal habeas court may not review a petition alleging errors in the state post-conviction review process). The federal constitution only requires that an appellate forum be accessible and available to all, regardless of economic status, once a state establishes a right to appeal. Lucey, 469 U.S. at 393-94.

b. Review of Claim 35

Petitioner alleges in this claim that the California Supreme Court affirmed his conviction and sentence on the basis of material misstatements and omissions of issues and facts, and then denied rehearing, violating his Fifth, Sixth, Eighth and Fourteenth Amendment rights.

The state supreme court considered this claim in the petition for rehearing. That court issued a modification opinion upon denial of rehearing (see 12 Cal. 4th 825b), corrected errors and withdrew the "Alleged Prosecutorial Misconduct" section of its opinion.

Petitioner alleges that the state supreme court erred by not re-assessing or re-analyzing legal issues in light of the modification.

Appellate review of California's capital cases is authorized by California Penal Code sections 190.4(e) and 1239(b). At the time of Petitioner's trial, section 1239(b) provided, "[w]hen upon any plea a judgment of death is rendered, an appeal is automatically taken by the defendant without any action by him or his counsel." Even where defendant's counsel takes no action, California's high court has a duty to examine the complete trial record to "ascertain[] whether defendant was given a fair trial." People v. Perry, 14 Cal. 2d 387, 392 (1939).

Section 190.4 provides an automatic application for modification of a verdict imposing

the death penalty, by which the trial judge reviews the evidence and reweighs the section 190.3 aggravating and mitigating circumstances before imposing sentence based on the jury's verdict. Denial of modification of a verdict of death is reviewed on the automatic appeal pursuant to section 1293(b). Such review includes the "evidence relied on by the [trial] judge." Pulley, 465 U.S. at 53 (quoting People v. Frierson, 25 Cal. 3d 142, 179 (1979)) ("the statutory requirements that the jury specify the special circumstances which permit imposition of the death penalty, and that the trial judge specify the reasons for denying the modification of the death penalty, serve to assure thoughtful and effective appellate review, focusing upon the circumstances present in each particular case.").

Aside from the state statutory duty to examine the complete trial record for fairness and the federal constitutional requirement that an appeal be available to indigent appellants, there are no obligations placed on the California Supreme Court that could cause a violation of an appellant's federal constitutional rights. Sections 190.4(e) and 1239(b), and the cases construing them, provide the mechanism for meaningful appellate review.

Petitioner alleges misstatements regarding the Bocanegra murders; misstatements and omissions regarding disciplinary proceedings against Toton; misstatements and omissions regarding reporter immunity under California Shield Law; misstatements regarding alleged prosecutorial misconduct; and other misstatements and omissions. Nonetheless, the state supreme court's affirmance was based on its modified opinion. Reasonably implicit in the modified opinion is that court's re-examination of the issues underlying its issuance of the modified opinion.

Additionally, Petitioner has not made a showing on the evidentiary record that the modified opinion contained any misstatements or omission. In that no material misstatements or omissions are identified in the modified opinion, and given that court's adjudication of all Plaintiff's claims on the merits, this Court cannot find the state supreme court's determination of facts to be unreasonable or unfair on the record before it.

Respondent contends claim 35 is not cognizable because it creates and retroactively

applies a "new rule" of constitutional law within Teague v. Lane, 489 U.S. 288. However, the Court finds the claim fails not because Petitioner seeks to apply a new rule of criminal procedure under Teague, but rather on grounds the claim lacks merit for the reasons stated.

Accordingly, the state court rejection of claim 35 was not contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme Court. Nor was the state court's ruling based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. See 28 U.S.C. § 2254(d).

Claim 35 is denied.

9. Constitutionality of California Death Penalty – Claim 36

a. Clearly Established Law

Supreme Court cases have established that a state capital sentencing system must: "(1) rationally narrow the class of death-eligible defendants; and (2) permit a jury to render a reasoned, individualized sentencing determination based on a death-eligible defendant's record, personal characteristics, and the circumstances of his crime." Kansas v. Marsh, 548 U.S. 163, 173-74 (2006). If the "state system satisfies these requirements," then the "State enjoys a range of discretion in imposing the death penalty, including the manner in which aggravating and mitigating circumstances are to be weighed." Id. (citing Franklin v. Lynaugh, 487 U.S. 164, 179 (1988) and Zant v. Stephens, 462 U.S. 862, 875–876, n.13 (1983)).

A state may narrow the class of murderers eligible for the death penalty by defining degrees of murder. Sawyer v. Whitley, 505 U.S. 333, 342 (1992). A state may further narrow the class of murderers by finding "beyond a reasonable doubt at least one of a list of statutory aggravating factors." Id.; see also Gregg, 428 U.S. at 196-97.

b. Review of Claim 36

In this claim Petitioner alleges that California's death penalty scheme in effect in 1987 was unconstitutional because it was arbitrary and unpredictable, failing to genuinely narrow class of murders eligible for the death penalty, violating his Eighth and Fourteenth Amendment rights.

The California Supreme Court summarily denied claim 34 (SPet. Claim YY) raised in

Petitioner's state petition for habeas corpus. In re Sanchez, S049502 (DD).

The state supreme court also considered this claim on appeal, as follows:

> Defendant contends that the 1978 death penalty law is unconstitutional under the United States and California Constitutions because it fails to narrow the class of death-eligible murderers and thus renders "the overwhelming majority of intentional first degree murderers" death eligible. Defendant cites statistics of all first degree murder convictions in which a defendant was found death eligible, and concludes: "The vice of the California scheme is not that any one of the special circumstances taken alone is unconstitutional-each arguably identifies a subclass of all first degree murders more deserving of the death penalty than other members of the class. The vice is that, taken together, the special circumstances cover virtually all first degree murders (and a substantial majority of all murders), and, thus, they perform no narrowing function at all." Principally, defendant relies on Justice Blackman's dissent in Tuilaepa v. California, (1994) 512 U.S. ---, --- [129 L.Ed.2d 750, 767-774, 114 S. Ct. 2630], in which he stated: "By creating nearly 20 such special circumstances, California creates an extraordinarily large death pool." Id.
>
> We have repeatedly considered and rejected this identical claim beginning with our decision in People v. Rodriguez (1986) 42 Cal.3d 730, 770-779. [Citation] Moreover, in Tuilaepa, supra, and in a number of previous cases, the high court has recognized that "the proper degree of definition" of death-eligibility factors "is not susceptible of mathematical precision"; the court has confirmed that our death penalty law avoids constitutional impediments because it is not unnecessarily vague, it suitably narrows the class of death-eligible persons, and provides for an individualized penalty determination. [Citation] Defendant's argument fails to convince us to revisit the issue. [Citation]

Sanchez, 12 Cal.4th at 60-61. In addition, the state supreme court has further held that:

> California's scheme for death eligibility satisfies the constitutional requirement that it "not apply to every defendant convicted of a murder[, but only] to a subclass of defendants convicted of murder. [Citation.]" Even after 1990 additions by virtue of Propositions 114 and 115, the special circumstances set forth in the statute are not over inclusive by their number or terms. [Citation] Nor have the statutory categories been construed in an unduly expansive manner. [Citation] Having been found guilty of an intentional murder in the course of a robbery, defendant falls within the "subclass" of murderers who are eligible for the death penalty. [Citation]

People v. Arias, 13 Cal.4th 92, 186-87 (1996) (citing Harris, 465 U.S. at 53) (upholding 1977 death penalty law).

Petitioner claims most of those who could be convicted of first degree murder are statutorily eligible for the death penalty, yet only a small portion of murderers who are statutorily

eligible for the death penalty are actually sentenced to death.

However, in California, a defendant may be sentenced to death for first-degree murder if the trier of fact finds the defendant guilty and also finds true one or more of [then] 19 special circumstances listed in Cal. Penal Code § 190.2. As relevant here, one of the circumstances is: "[t]he defendant, in this proceeding, has been convicted of more than one offense of murder in the first or second degree." Cal. Penal Code § 190.2(a)(3). There is no question that this sentencing scheme satisfies clearly established constitutional requirements. First, the subclass of defendants eligible for the death penalty is rationally narrowed to those who have committed multiple murders. Tuilaepa, 512 U.S. at 969-73. The multiple murder special circumstance sufficiently guides the sentencer and is not unconstitutionally vague. See Godfrey v. Georgia, 446 U.S. 420, 428 (1980) (the sentencer's discretion must be guided by "clear and objective standards.").

In California v. Ramos, 463 U.S. 992 (1983), the United States Supreme Court stated that "[o]nce the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty" the jury's consideration of a myriad of factors and exercise of "unbridled discretion" in determining whether death is the appropriate punishment is not arbitrary and capricious. Id. at 1008-09. At the selection stage, an individualized determination includes consideration of the character and record of the defendant, the circumstances of the crime, and an assessment of the defendant's culpability. Tuilaepa, 512 U.S. at 972-73. However, the jury "need not be instructed how to weigh any particular fact in the capital sentencing decision." Id. at 979.

This Court finds that state supreme court could reasonably have determined that California's death penalty scheme in effect in 1987 did not fail to genuinely narrow the class of murderers eligible for the death penalty. California's scheme, which narrows the class of death eligible offenders to less than the definition of first degree murder and permits consideration of all mitigating evidence, has been approved by the United States Supreme Court, Tuilaepa, 512 U.S. at 972-79; Harris, 465 U.S. at 38, and this Court, see Ben-Sholom v. Woodford, Case No.

CV-F-93-5531 (E.D. Cal. October 5, 2001).

The state court rejection of this claim was not contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme Court. Nor was the state court's ruling was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding, viewed most favoring the prosecution, Jackson, 443 U.S. at 319. See 28 U.S.C. § 2254(d).

Claim 36 is denied.

10. Prosecutorial Misconduct In The Penalty Phase – Claims 37 through 42

a. Clearly Established Law

The legal standard is set out in the preface to claims 28-32.

b. Review of Claim 37

Petitioner next claims prosecutorial misconduct in using, failing to correct and arguing false evidence by Bakersfield Police Detective Boggs.

The California Supreme Court summarily denied claim 37 (SPet. Claim CC) raised in Petitioner's state petition for habeas corpus. In re Sanchez, S049502 (DD).

The California Supreme Court also considered and rejected this claim on appeal, finding that the defense had waived the issue on appeal, Sanchez, 12 Cal.4th 65-66, and that the record did not support the claim because it was "simply a disagreement as to the interpretation of the evidence, and in no way indicates that Ryals encouraged or elicited false testimony from Boggs." Sanchez, 12 Cal.4th at 71.

As discussed above, the knowing use of false or perjured testimony against a defendant to obtain a conviction is unconstitutional. Napue v. Illinois, 360 U.S. 264 (1959). In Napue, the Supreme Court held that the knowing use of false testimony to obtain a conviction violates due process regardless of whether the prosecutor solicited the false testimony or merely allowed it to go uncorrected when it appeared. Id. at 269. The high court explained that the principle that a State may not knowingly use false testimony to obtain a conviction - even false testimony that goes only to the credibility of the witness - is "implicit in any concept of ordered liberty." Id. A

conviction obtained by the knowing use of perjured testimony "must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." Bagley, 473 U.S. at 678. Nevertheless, simple inconsistencies in testimony are insufficient to establish that a prosecutor knowingly permitted the admission of false testimony. Zuno-Arce, 44 F.3d at 1423. "Discrepancies in . . . testimony . . . could as easily flow from errors in recollection as from lies." Id. To warrant habeas relief, Petitioner must establish that: 1) the testimony was actually false; 2) the prosecution knew or should have known it to be false; and 3) there is a reasonable likelihood that the false testimony could have affected the jury's verdict. Tayborn, 251 F.3d at 1130.

In this claim, Petitioner alleges that Boggs, testifying at the penalty phase, falsely attributed to Petitioner a statement actually made by Reyes, that after the Tatman murder he "kicked back, drank some whiskey, smoked some dope, ate some food, and mostly relaxed for the rest of the evening." (RT 2663-2664.) Though Boggs correctly attributed the statement to Reyes at the preliminary hearing (CT 308), Petitioner contends that prosecutor Ryals did not correct the false testimony at the penalty phase, instead using it to highlight Petitioner's lack of remorse. (RT 2619, 3036.)

The evidence before the state court did not reasonably suggest Boggs knowingly testified falsely, or that Prosecutor Ryals was aware of the errant testimony. (SResp. Ex. B.) Boggs states in his June 29, 1995 declaration that he mistakenly testified at the penalty phase that Petitioner, rather than Robert Reyes, stated that:

> They returned to their own room and just, again in his own words, kicked back, drank some whiskey, smoked some dope, ate some food, and just relaxed for the rest of the evening.

SPet. Ex. 100. The state court could reasonably have determined that Prosecutor Ryals did not know that Boggs's testimony was erroneous and did not knowingly rely on erroneous testimony. (SResp. Ex. B.) Petitioner has not pointed to evidence before the state court demonstrating either Ryals or Boggs was aware of the error in Boggs's testimony. Defense counsel Toton and Frank,

who both were present at the preliminary hearing, were themselves unaware of the erroneous testimony. (SPet. Exhs. 137, p. 12; 113, p. 10.)

Nor does there appear to be a reasonable likelihood the error affected imposition of the death penalty, see Agurs, 427 U.S. at 103, or made trial so fundamentally unfair as to deny due process. Donnelly, 416 U.S. at 645. The Court concurs in Respondent's argument that it is unlikely the erroneous testimony undercut juror sympathy for Petitioner given Petitioner's confession to Boggs of the circumstances of the Tatman murder, that Petitioner decided to "hit the old man" and take his food and refrigerator, that he and Reyes entered Mr. Tatman's room, that Reyes made stabbing motions at Tatman with a screwdriver, and that Petitioner stole Mr. Tatman's possessions after witnessing his murder. (RT 2658-2666; SPet. Ex. 129, pp. 1-2.)

For these reasons, the state court rejection of the claim was not contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme Court, or based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding viewed most favoring the prosecution, Jackson, 443 U.S. at 319. See 28 U.S.C. § 2254(d).

Claim 37 is denied.

c. Review of Claim 38

Petitioner next claims prosecutorial misconduct in using false evidence at penalty phase by Criminalist Laskowski. He alleges that Laskowski falsely testified at the penalty phase, as he did in the guilt and special circumstance phase, that there were only two sets of footprints at the Bocanegra home after the murders, only later discovering a third set of footprints. Petitioner further argues that, as at the guilt and special circumstance phase, prosecutor Ryals used a two-person theory to linking Petitioner to the murders.

The California Supreme Court summarily denied claim 38 (SPet. Claim DD) raised in Petitioner's state petition for habeas corpus. In re Sanchez, S049502 (DD). In such a case, "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, and this Court "must determine what

arguments or theories supported or . . . *could have supported*, the state court's decision; and then it must ask whether it is possible fair-minded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." Id. (emphasis added).

Napue established that the knowing use of false or perjured testimony against a defendant to obtain a conviction is unconstitutional. A conviction obtained by the knowing use of perjured testimony "must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." Bagley, 473 U.S. at 678. Nevertheless, simple inconsistencies in testimony are insufficient to establish that a prosecutor knowingly permitted the admission of false testimony. Zuno-Arce, 44 F.3d at 1423. "Discrepancies in . . . testimony . . . could as easily flow from errors in recollection as from lies." Id. To warrant habeas relief, Petitioner must establish that: 1) the testimony was actually false; 2) the prosecution knew or should have known it to be false; and 3) there is a reasonable likelihood that the false testimony could have affected the jury's verdict. Tayborn, 251 F.3d 1125 at1130.

Petitioner cites to facts alleged in claims 30 and 32 in support of this claim. However, the state court could reasonably have found that the claim lacks merit. At the preliminary hearing (CT 376) and at the penalty phase of Petitioner's trial (RT 2813), Laskowski testified he was able to determine from crime scene photographs that there were two types of shoes in the kitchen. The following year he re-examined the photographs and determined that there were three types of shoe patterns in the kitchen and outside the Bocanegra home. (SPet. Ex. 121, p. 2; Ex. 417, pp. 1-2; SHCP Ex. 137, Ex. A.)

However, Petitioner does not make an evidentiary showing that either Laskowski or Ryals knew of the error at the time of the penalty phase. The Court finds that the Claim fails substantively for reasons stated in Claims 30 and 32, *ante*. The state court could reasonably conclude that neither Laskowski nor Ryals knew the former's interpretation was erroneous.

Nor is there a reasonable likelihood the erroneous testimony affected the jury's imposition of the death penalty, see Agurs, 427 U.S. at 103, or made trial so fundamentally

unfair as to deny due process. Donnelly, 416 U.S. at 645. The evidence against Petitioner was substantial as discussed in claims 30 and 32.

A fair-minded jurist could conclude from the evidence and statements Petitioner made to Hernandez and Trihey, that Petitioner assisted Joey in murdering Mr. Bocanegra and Mrs. Bocanegra (RT 2843-45, 2851-54, 2856-59) and that he desired to enter a guilty plea. (SPet. Ex. 520, p. 2; see CT 891-92; RT [5/16/88] 7; RT-108a-155a.) Evidence suggesting the presence of a third non-victim in the Bocanegra Home does not does demonstrate or suggest a third person was present during the murders. (See claim 30, 32, *ante*.)

The Court finds the state court rejection of the claim was not contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme Court. Nor was the state court's ruling was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding, viewed most favoring the prosecution, Jackson, 443 U.S. at 319. See 28 U.S.C. § 2254(d).

Claim 38 is denied.

d. Review of Claim 39

Petitioner next alleges prosecutorial misconduct through use of false evidence at the penalty phase by Pathologist Holloway. He alleges that Holloway falsely testified at the penalty phase that Mr. Bocanegra's head wounds were a "contributory cause" of death, contradicting his guilt phase testimony and prosecutor Ryals argument based thereon that head wounds neither caused nor contributed to Mr. Bocanegra's death. Petitioner claims Ryals knew or should have known this testimony was false.

The California Supreme Court summarily denied claim 39 (SPet. Claim EE) raised in Petitioner's state petition for habeas corpus. In re Sanchez, S049502 (DD).

The State Supreme Court also considered this claim on appeal and found that:

> [T]the prosecutor did not commit misconduct in failing to correct Dr. Holloway's characterization of the nonfatal scalp wounds to Juan Bocanegra as a "contributory cause" rather than an "other condition" of death. The characterization of the scalp wounds as contributing to Juan's death was minimally significant to the jury's assessment of defendant's culpability in the murders. The facts showed that defendant struck disabling blows to the victim's

> head while Joey was stabbing him. Moreover, any misperceptions of the cause of Juan's death were corrected by the prosecutor's opening statement that the wounds inflicted by defendant with a metal bar, "were not the actual blows that killed the man. They were only a part of what killed the man. The actual blow to the man was the stab wound inflicted by his son while defendant was beating him in the head with an iron pipe."

Sanchez, 12 Cal.4th at 71.

Under Napue the knowing use of false or perjured testimony against a defendant to obtain a conviction is unconstitutional. A conviction obtained by the knowing use of perjured testimony "must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." Bagley, 473 U.S. at 678. Nevertheless, simple inconsistencies in testimony are insufficient to establish that a prosecutor knowingly permitted the admission of false testimony. Zuno-Arce, 44 F.3d at 1423. "Discrepancies in . . . testimony . . . could as easily flow from errors in recollection as from lies." Id. To warrant habeas relief, Petitioner must establish that: 1) the testimony was actually false; 2) the prosecution knew or should have known it to be false; and 3) there is a reasonable likelihood that the false testimony could have affected the jury's verdict. Scott, 251 F.3d at 1130.

Here, Dr. Holloway's testimony was consistent from preliminary hearing through penalty phase that Mr. Bocanegra died from three fatal stab wounds to the torso. (RT 2697, 2699-2700.) Prosecutor Ryals argued as much in her opening statement. (RT 2620.) Holloway's preliminary hearing characterization of scalp wounds as an "other condition" attendant to fatal stab wounds, (CT 112-119, 158-59), and Holloway's penalty phase characterization of the same scalp wounds as a "contributory cause" attendant to fatal stab wounds, (RT 2706), was not erroneous because Holloway used the terms interchangeably to characterize non-fatal wounds. (SPet. Ex. 120, pp. 1-4.) The same applies to Mrs. Bocanegra, who also suffered scalp wounds but died from stab wounds. (CT 115-117, 153-154.)

For the reasons stated and those discussed in Claims 31 and 32, it is not reasonably likely Holloway's characterization of Mr. Bocanegra's head wounds as either "other conditions" or a "contributory cause" misled the jury in its assessment of Petitioner's culpability. The state

court was not unreasonable in concluding that:

> "The characterization of the scalp wounds as contributing to Juan's death was minimally significant to the jury's assessment of defendant's culpability in the murders. The facts showed that defendant struck disabling blows to the victim's head while Joey was stabbing him. Moreover, any misperceptions of the cause of Juan's death were corrected by the prosecutor's opening statement that the wounds inflicted by defendant with a metal bar, were not the actual blows that killed the man. They were only a part of what killed the man. The actual blow to the man was the stab wound inflicted by his son while defendant was beating him in the head with an iron pipe."

Sanchez, 12 Cal.4th at 71.

A fair-minded jurist could conclude from the evidence and statements Petitioner made to Hernandez and Trihey, that Petitioner assisted Joey in murdering Mr. Bocanegra and Mrs. Bocanegra (RT 2843-45, 2851-54, 2856-59) and that he desired to enter a guilty plea. (SPet. Ex. 520, p. 2; see CT 891-92; RT [5/16/88] 7; RT-108a-155a.)

Respondent contends claim 39 is not cognizable because it creates and retroactively applies a "new rule" of constitutional law within Teague v. Lane, 489 U.S. 288. However, the Court finds the claim fails not because Petitioner seeks to apply a new rule of criminal procedure under Teague, but rather on grounds the claim lacks merit for the reasons stated.

This Court does not find that the state court rejection of the claim was contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme Court, or that the state court's ruling was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding, viewed most favoring the prosecution, Jackson, 443 U.S. at 319. See 28 U.S.C. § 2254(d).

Claim 39 is denied.

e. Review of Claim 40

In his next claim, Petitioner alleges prosecutorial misconduct by failure to disclose exculpatory evidence and using false evidence by Hernandez at the penalty phase.

The California Supreme Court summarily denied claim 40 (SPet. Claims FF) raised in Petitioner's state petition for habeas corpus. In re Sanchez, S049502 (DD). In such a case, "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, and this Court "must determine what arguments or theories supported or . . . *could have supported*, the state court's decision; and then it must ask whether it is possible fair-minded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." Id. (emphasis added).

As noted, there are three components of a Brady violation: (1) the evidence at issue must be favorable to the accused either because it is exculpatory or because it is impeaching; (2) the evidence must have been suppressed by the State either willfully or inadvertently; and (3) prejudice must have ensued. Banks, 540 U.S. at 691; Strickler, 527 U.S. at 281–82. "Such evidence is material if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Strickler, 527 U.S. at 280, (quoting Bagley, 473 U.S. 667, 682 (1985)). "[T]here is never a real Brady violation unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict." Strickler, 527 U.S. at 281.

Additionally, under Napue the knowing use of false or perjured testimony against a defendant to obtain a conviction is unconstitutional. A conviction obtained by the knowing use of perjured testimony "must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." Bagley, 473 U.S. at 678. Nevertheless, simple inconsistencies in testimony are insufficient to establish that a prosecutor knowingly permitted the admission of false testimony. Zuno-Arce, 44 F.3d at 1423. "Discrepancies in . . . testimony . . . could as easily flow from errors in recollection as from lies." Id. To warrant habeas relief, Petitioner must establish that: 1) the testimony was actually false; 2) the prosecution knew or should have known it to be false; and 3) there is a reasonable likelihood that the false testimony could have affected the jury's verdict. Tayborn, 251 F.3d at 1130).

Petitioner cites to claims 2, 7 and 28 in support of this claim. He alleges Hernandez testified falsely regarding his deal with the prosecution - that the prosecution had only promised

to tell the sentencing judge of Hernandez's testimony, when the circumstantial evidence, (SHCP Exhs. 510, 511), suggested that he had a promise of probation in exchange for his testimony; and that Hernandez concealed that he was in custody on a heroin charge; and falsely stated he contacted the police when detective Stratton initiated the contact.

Petitioner's claim is unpersuasive. He has not made an evidentiary showing that there was an undisclosed sentence concession or that Hernandez testified falsely. (See claims 1-4 and 28, *ante.*) The record that was before the state court does not reasonably support any undisclosed sentence concession(s). (See SResp. Ex. B.) Hernandez's testimony that he contacted police, through a request made to a jail deputy (CT 477; see RT 2840) is not materially false and could not reasonably have affected the jury's imposition of the death sentence given the noted substantial evidence against Petitioner. Petitioner claims, but makes no evidentiary showing that Hernandez was a heroin addict.

For the reasons stated, a fair-minded jurist could have found that the state court rejection of claims by the modified opinion was neither contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme Court, nor an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. See 28 U.S.C. § 2254(d).

Claim 40 is denied

f. Review of Claim 41

Petitioner next claims prosecutorial misconduct in Losing/Destroying Exculpatory Evidence at Penalty phase. He claims the police or prosecution lost or destroyed Hernandez's contemporaneous notes of conversations with Petitioner; notes which could have been used to impeach Hernandez.

The California Supreme Court summarily denied claim 41 (SPet. Claims GG) raised in Petitioner's state petition for habeas corpus. In re Sanchez, S049502 (DD). "[T]he 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, and this Court "must determine what arguments or

theories supported or . . . *could have supported*, the state court's decision; and then it must ask whether it is possible fair-minded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." Id. (emphasis added).

Where the government fails to preserve evidence that is only potentially exculpatory, the right to due process is violated only if [the evidence] possesses "an exculpatory value that was apparent before the evidence was destroyed, and [is] of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." Trombetta, 467 U.S. at 489.

For the same reasons state in claim 29, *ante*, Plaintiff has not made a sufficient evidentiary showing that Hernandez acted for the police, or that the police and prosecution were required to preserve alleged notes of conversations Hernandez had with Petitioner, or that the notes had material exculpatory value.

Respondent contends claim 41 is not cognizable because it creates and retroactively applies a "new rule" of constitutional law within Teague v. Lane, 489 U.S. 288. However, the Court finds the claim fails not because Petitioner seeks to apply a new rule of criminal procedure under Teague, but rather on grounds the claim lacks merit for the reasons stated.

A fair-minded jurist could have found that Petitioner failed to establish that the state court rejection of the claim was contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme Court. Nor was the state court's ruling based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding, viewed most favoring the prosecution. Jackson, 443 U.S. at 319. See 28 U.S.C. § 2254(d).

Claim 41 is denied.

g. Review of Claim 42

Petitioner next claims prosecutorial misconduct during penalty phase closing argument.

The California Supreme Court summarily denied claim 42 (SPet. Claims JJ) raised in Petitioner's state petition for habeas corpus. In re Sanchez, S049502 (DD).

The California Supreme Court also considered this claim on appeal and found that the defense had not objected on this ground or sought a curative admonition at trial and thus waived the issue on appeal, Sanchez, 12 Cal.4th at 65-66. Additionally, the state supreme court found as follows:

> [A]ny error that did occur was harmless. As we explain in detail below, although the prosecutor may have, at times, pushed the limits of proper advocacy, any misconduct that did occur could not have contributed to the verdict and was thus rendered harmless.
>
> Defendant contends Ryals improperly told the jury that he was Tatman's actual killer, and that Tatman was killed with a screwdriver seized from him. Defendant also asserts that Ryals improperly treated defendant's conviction under section 187 (without special circumstances) as a capital crime. Her argument, claims defendant, violated the doctrines of collateral estoppel and double jeopardy, and denied him his constitutional rights under both the state and federal Constitutions.
>
> Defendant's first claim, that the prosecutor improperly argued to the jury that he was Tatman's actual killer, was based on the following comments made during the prosecutor's closing argument:
>
> "First, Mr. Tatman, an old, sick man, wheelchair bound, living from payday to payday in the Bakersfield Inn, hardly a match for the defendant alone much less for the defendant and his friend, Robert Reyes.
>
> "Think of the old man lying in his bed, fearful because there were burglars in his little room at the Bakersfield Inn. Think of how that fear turned to horror as he realized that they weren't just burglars but that they intended to take his life. Imagine how he must have felt when they approached him.
>
> "Of course, the defendant told the police that he had no actual part in the murder, that he watched his buddy do it. But then, when you think of that, think that the defendant learned to lie to authorities at an early age, I believe Dr. Wright said the third grade. Remember that he denied to the police also anything or any facts concerning the Bocanegra murders, but then remember what he told Rufus Hernandez.
>
> "He told Rufus Hernandez what happened, how the two of them killed Mr. Tatman, not how Robert [Reyes] killed Mr. Tatman or how he killed Mr. Tatman but how they killed Mr. Tatman. Think of that when you are considering what the penalty in this case should be.
>
> "The two men could have taken the food. They could have taken the refrigerator. They could have taken everything that was in that room and not touched that old man who weighed less than one hundred pounds. They could have gone into that room, completely cleared it out, even stripped the bed clothes out from under him and never harmed him, never hurt him at all. But they didn't do that. The defendant didn't do that. They chose, for some useless, senseless reason, to commit an act of violence, the ultimate, ultimate act of violence, murder."

In her rebuttal, the prosecutor told the jury that it should not attempt to relitigate the guilt phase facts, but then asked the jury to deliberate over what she had told it: "You do not know what evidence was presented in the previous hearing. You are not to re-litigate that at this time. You hear[d] the circumstances of the Tatman murder. You know what the defendant told the police because you heard that. But you also know what the defendant told Rufus Hernandez because you heard that. It is up to you to weigh this and to deliberate on that and to determine who exactly struck the fatal blow."

Defendant asserts that the effect of the above argument was to ask "the jury to disregard completely the trial court's not true verdict on the robbery murder special circumstance under Count I which implicitly and necessarily rejected the charges that [defendant] was the actual killer in the Tatman homicide and that he harbored an intent to kill in committing the crime." Defendant claims Ryals's argument sought to elevate a noncapital murder to which defendant was an accomplice into a capital murder in violation of the guarantee against double jeopardy following acquittal under the Fifth Amendment to the United States Constitution and article I, section 15 of the California Constitution, and the related doctrine of collateral estoppel. [Citation]

In making his argument, defendant points to the court's guilt phase verdict, in which the court found defendant acted as an accomplice (and not the actual killer) in the Tatman murder:

"As to the first count [the Tatman murder], the Court finds defendant guilty of murder and fixes that murder as murder in the first degree based on the felony murder rule.

"The Court finds that it is not true that the murder of Woodrow Wilson Tatman was committed while the defendant was engaged in the commission or attempted commission of a felony, to wit: The crime of robbery, within the meaning of the special circumstance section. That does not mean, I hasten to add, that I do not think there was a robbery in progress; that simply means that I find that the defendant was an aider and abettor of the robbery but that the homicide occurred in the commission of that, and therefore it's a first degree felony murder."

The People observe that this verdict appears inconsistent. The confusion over the verdict is highlighted by the fact that early in the guilt phase arguments, the prosecutor appeared to concede (and the court appeared to agree) that defendant could be found guilty only of second degree felony murder in connection with the Tatman killing. Of course, any inconsistency in the verdict was harmless in light of our law recognizing that accomplice status is sufficient to elevate a defendant's complicity in the crime to the robbery-murder special circumstance as long as defendant acted with "intent to kill." [Citation]

What is clear from the verdict is the court's finding that defendant aided and abetted the robbery, and that the murder verdict was based on the felony-murder rule. It is less clear, however, whether the court found defendant was or was not the actual killer. If we assume the court found the special circumstance untrue because the prosecution had proved neither that defendant was the actual killer, nor that he had the intent to kill, prosecutorial argument attempting to re-litigate the guilt phase as to actual killer status was improper. [Citation] To the extent Ryals crossed the line of proper argument, however, any misconduct was not prejudicial to defendant because it is not reasonably possible a result more favorable to the defendant would have occurred. Defendant was convicted of the

multiple murders of Juan and Juanita Bocanegra (§ 190.2, subd. (a)(3)), and the jury was aware of defendant's prior violent criminal activity (§ 190.3, factors (b) & (c)). Thus, Ryals's references to defendant's role in the Tatman murder could not have affected the outcome of the penalty phase. [Citation]

Defendant next claims that the prosecutor deliberately misled the jury by her opening statement comment that Tatman was actually murdered by Reyes with a screwdriver that had been stolen from the Bocanegra residence and later found on defendant's person. [Citation] Defendant asserts the prosecutor's comment contradicted guilt phase evidence indicating that Tatman was mortally wounded by a "massive blunt force injury to the left chest," consistent with a heel stomp or blow by a similar object (with a dimension of two to three inches). According to the autopsy report, the screwdriver wounds were superficial stab wounds that did not actually contribute to Tatman's death. Accordingly, defendant contends, the prosecutor's misstatement of the evidence rendered the penalty phase fundamentally unfair. [Citation]

Any inaccurate reference to the screwdriver as the actual murder weapon (or comment that the weapon was found on defendant) could not properly be characterized as prejudicial or so egregious as to deny defendant a fair trial. [Citation] When, as here, the point focuses on the prosecutor's comments to the jury, the question is whether there is a reasonable possibility that the jury construed or applied any of the complained-of remarks in an objectionable manner. [Citation]

Here, the jury was told that only nonfatal stab wounds were inflicted upon Tatman. Forensic pathologist Holloway testified that the cause of Tatman's death was massive blunt force injury to his chest. Holloway also stated that some of the injuries sustained by Tatman were multiple superficial stab wounds to the chest "none of which would be construed as capable of a cause of death in themselves," and a superficial stab wound to the abdomen which "would not itself have been a fatal wound."

In addition, Bakersfield Police Detective Boggs testified that, on March 23, 1987, defendant told him that after he and Reyes had entered Tatman's hotel room, he saw Reyes standing over Tatman in a threatening manner with a screwdriver in his hand, that Reyes "freaked out" and stabbed Tatman with a screwdriver although defendant never saw the screwdriver enter Tatman's body, and that Reyes "possessed the screwdriver at all times."

Moreover, the jury was consistently admonished by the court that it was to consider only the evidence presented, and that the opening statements of the lawyers were not to be considered evidence. The court admonished the jury that: "The important thing to remember is that what lawyers say in a trial, what they say in their argument, what they say in their opening statements, those simply are not evidence. They are just telling you what they expect to prove. You have to decide this case, however, based on what you hear under oath from the witness stand or based on some documents or pictures that I admit for your consideration. What a lawyer says . . . is not evidence." [Citation] The court repeated its admonition following closing arguments.

Taken in context as an attempt to counter defense counsel's argument that defendant did not participate in the Tatman killing, it is not reasonably possible the prosecutor's alleged inaccurate remarks about the Tatman murder misled the jury. [Citation] Moreover, the court's instruction that the lawyers' opening and

> closing statements were not to be considered evidence by the jury vitiated the misleading effect of any inaccurate remarks. The court's instructions are determinative in their statement of law, and we presume the jury treated the court's instructions as statements of law, and the prosecutor's comments as words spoken by an advocate in an attempt to persuade. [Citation] We cannot conclude on this record that the prosecutor's isolated mischaracterization of the evidence in her opening statement misled the jury.
>
> Defendant also asserts that by discussing the circumstances of the Tatman killing during the penalty phase, the prosecutor improperly misled the jury into believing it could sentence defendant to death for the murder of Tatman alone, when the penalty should have been considered only for the Bocanegra crimes, in which the multiple-murder special circumstance was found true.
>
> Defendant's argument is misplaced. The circumstances of the Tatman crime were properly argued as an aggravating factor under section 190.3, factor (a) (circumstances of the crime and the existence of any special circumstances found to be true pursuant to section 190.1). [Citation] Moreover, defense counsel reminded the jury of defendant's aider and abettor status in the Tatman murder when he stated: "Ted Sanchez did not kill Mr. Tatman nor did he share in Robert Reyes's intent to kill Mr. Tatman. Ted's role in that tragic incident was limited to removing some of Mr. Tatman's property." Hence, we find no prosecutorial error occurred in Ryals's discussion of the circumstances of the Tatman murder at the penalty phase.
>
> Defendant's other claims of prosecutorial misconduct to which there was no defense objection are not supported by the record. For example, defendant's contention that the prosecutor allowed Detective Boggs to testify falsely as to who told him-Reyes or defendant-that both men had "kicked back" and "relaxed" after the Tatman murder, is simply a disagreement as to the interpretation of the evidence, and in no way indicates that Ryals encouraged or elicited false testimony from Boggs. In addition, the prosecutor did not commit misconduct in failing to correct Dr. Holloway's characterization of the nonfatal scalp wounds to Juan Bocanegra as a "contributory cause" rather than an "other condition" of death. The characterization of the scalp wounds as contributing to Juan's death was minimally significant to the jury's assessment of defendant's culpability in the murders. The facts showed that defendant struck disabling blows to the victim's head while Joey was stabbing him. Moreover, any misperceptions of the cause of Juan's death were corrected by the prosecutor's opening statement that the wounds inflicted by defendant with a metal bar, "were not the actual blows that killed the man. They were only a part of what killed the man. The actual blow to the man was the stab wound inflicted by his son while defendant was beating him in the head with an iron pipe."
>
> Finally, defendant's claim that the prosecutor committed misconduct by asserting that the Bocanegras would not have been killed without defendant's assistance is without merit. The evidence supported the view that defendant restrained both victims while Joey Bocanegra stabbed them. "The argument came well within the broad discretion of the parties to state their views as to what the evidence shows and what inferences may be drawn therefrom." [Citation]

Sanchez, 12 Cal.4th at 66-72.

Petitioner alleges that prosecutor Ryals improperly argued and misstated evidence, that the Bocanegra and Tatman murders would not have occurred but for Petitioner's participation, that the jury was sentencing Petitioner for the Tatman murder, and that Petitioner stabbed Mr. Tatman to death, (See SHCP Ex. 124, ¶ 16), with a screwdriver (RT 2619.) Petitioner contends that the correct facts are that Petitioner was only vicariously liable in the murders, that Mr. Tatman was killed by blunt force rather than stab wounds (CT 109; RT 2695), and Petitioner was sentenced by the trial court to 25 years to life for the Tatman conviction.

The Court finds that the state court could reasonably have concluded this claim lacks merit. Petitioner contends the prosecution misled the jury into thinking it was sentencing Petitioner for the Tatman murder (RT 3047-3048), i.e., as a triple murderer (RT 3080), when in fact the trial court was responsible for sentencing Petitioner for the Tatman murder, which was a non-capital murder. (CT 1103; RT October 31, 1988 at p. 13.) Even if the prosecution argued that Petitioner played a principal role in the Tatman murder, the state court could reasonably have determined no prejudice resulted. The Tatman conviction was presented to the jury as evidence in aggravation. The jury was appropriately admonished and instructed in this regard. (RT 2615-2616; CT 979-1021; RT 3082-3097.) The record included testimony of pathologist, Dr. Holloway that Mr. Tatman died of blunt force injury to his chest. (RT 2695.) Nothing in the evidentiary record suggests the trial court's admonishment and jury instructions were not understood and followed. Moreover, the penalty phase evidence in aggravation was substantial as discussed in claims 1 through 4, *ante*.

The record suggests that, as to Mr. Tatman, it was Petitioner's decision to "hit the old man" and take his food and refrigerator, that Petitioner and Reyes entered Mr. Tatman's room, that Reyes made stabbing motions at Mr. Tatman with a screwdriver, and that Petitioner stole Mr. Tatman's possessions after witnessing his murder. (RT 2658-2666; SPet. Ex. 129, pp. 1-2.) Hernandez testified he told detective Stratton (RT 2848-2849; 2855-2856), that Petitioner told him that "[Petitioner] and two other men entered an old man's room at the Bakersfield Inn, that the old man was in a wheelchair, that they beat the old man, that he and the other men stabbed

the old man with a screwdriver, and that they took the old man's money." (RT 2842, 2846-2848.) Detective Stratton testified to that effect. (RT 2858-2861.)

The jury was made well aware that Mr. Tatman's stabbing wounds were non-fatal injuries and that Petitioner's conviction for Mr. Tatman's murder was based on his aiding and abetting Reyes. (Id.; RT 235, 2693-2695.) Defense counsel made its argument to the jury that Petitioner did not intend to kill Mr. Tatman.

Ryals' argument that Petitioner had a principal role in the Bocanegra homicides, and that the Bocanegras would not have been killed without his assistance, did not in all reasonable likelihood mislead the jury or affect the death sentence imposed. The evidence weighed heavily against Petitioner as an aider and abettor of the homicides. Petitioner grabbed and held Mr. Bocanegra while Joey got a knife. (RT 2843, 2853-54.) Petitioner beat Mr. Bocanegra while Joey stabbed him. (RT 2696-2706, 2719-21, 2725, 2843-44, 2854, 2858.) Petitioner rushed Mrs. Bocanegra and told Joey to "shut her up." (RT 2844, 2858.) Petitioner pushed Mrs. Bocanegra into a back room and hit her on the head with a bar while Joey stabbed her. (RT 2710-14, 2720-21, 2725, 2752, 2844.) This occurred Mrs. Bocanegra's hands were bound and she was likely gagged. (RT 2708, 2723, 2749-51, 2754-55, 2774-2775.)

Petitioner's proffer of statements by jurors Bobbie Crowder (SHCP Ex. 124, ¶ 16) and John Rodriguez (SHCP Ex. 109, App. A, ¶ 3) suggesting they believed Petitioner to be equally culpable with Joey in the Bocanegra murders, even if such statements were competent evidence, does not reasonably demonstrate prosecutorial misconduct sufficiently significant to deny a fair trial or lack confidence in the verdict, given the above noted evidence in aggravation.

Given the unrebutted evidence presented at the penalty phase, the admonitions of the trial judge that argument is not evidence, the potential aggravating and mitigating effects of circumstances surrounding the Bocanegra murders, the state court could reasonably have found that the prosecution arguments above were not so prejudicial as to make trial fundamentally unfair. The multiple murder special circumstance in the Bocanegra murders and the substantial evidence in aggravation presented during the penalty phase show that the state court could

reasonably determine the outcome would not likely have been different absent the alleged prosecutorial misconduct. See Donnelly, 416 U.S. at 643 (improper jury argument by the state does not present a claim of constitutional magnitude unless it is so prejudicial that the petitioner's trial was fundamentally unfair . . . [t]o establish prejudice, the petitioner must demonstrate either persistent and pronounced misconduct or that the evidence was so insubstantial that, in all probability, but for the remarks, no conviction would have occurred); see also Darden, 477 U.S. at 182 (claim of prosecutorial misconduct rejected where the prosecutor's comments "did not manipulate or misstate the evidence, nor . . . implicate other specific rights of the accused, such as the right to counsel or to remain silent."); Furman v. Wood, 190 F.3d 1002, 1006 (9th Cir. 1999) (rejecting habeas claim where, although some of prosecutor's arguments were improper, jury was told comments were not evidence, and evidence against defendant was substantial).

Generally, counsel are "given latitude in the presentation of their closing arguments, and courts must allow the prosecution to strike hard blows based on the evidence presented and all reasonable inferences therefrom." Ceja v. Stewart, 97 F.3d 1246, 1253–1254 (9th Cir. 1996) (quoting United States v. Baker, 10 F.3d 1374, 1415 (9th Cir. 1993)); see also United States v. Molina, 934 F.2d 1440, 1445 (9th Cir. 1991) (prosecutor has wide latitude during closing argument to make reasonable inferences based on the evidence).

Accordingly, the state court rejection of the claim was not contrary to, or an unreasonable application of, clearly established federal law, and the state court's ruling was not based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding, viewed most favoring the prosecution, Jackson, 443 U.S. 307, 319 (1979). See 28 U.S.C. § 2254(d).

Claim 42 is denied on the merits.

11. Ineffective Assistance Of Counsel In Penalty Phase - Claims 43 through 61

a. Clearly Established Law

The applicable legal standard is set forth above, in the preface to the Court's analysis of

claims 6-18. The basic requirements of Strickland apply with equal force in the penalty phase. Thus, Petitioner must show that counsel's actions fell below an objective standard of reasonableness, and that the alleged errors resulted in prejudice. Strickland, 466 U.S. at 687-88.

In the context of the penalty phase, just as in the guilt phase, the Supreme Court has "declined to articulate specific guidelines for appropriate attorney conduct and instead [has] emphasized that '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" Wiggins, 539 U.S. at 521 (quoting Strickland, 466 U.S. at 688). In the penalty phase, defense counsel has an "obligation to conduct a thorough investigation of the defendant's background," Williams, 529 U.S. at 396, and defense counsel has a duty to investigate, develop, and present mitigation evidence during penalty phase proceedings, Wiggins, 539 U.S. at 521-23. Counsel has a duty to make a "diligent investigation into his client's troubling background and unique personal circumstances." Williams, 529 U.S. at 415 (O'Connor, J., concurring).

However, the Supreme Court has recognized that the duty to investigate does not require defense counsel "to scour the globe on the off chance something will turn up; reasonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste." Rompilla v. Beard, 545 U.S. 374, 382-83 (2005) (citing Wiggins, 539 U.S. at 525 (further investigation excusable where counsel has evidence suggesting it would be fruitless)); Strickland, 466 U.S. at 699 (counsel could "reasonably surmise . . . that character and psychological evidence would be of little help"); Burger, 483 U.S. at 794 (limited investigation reasonable because all witnesses brought to counsel's attention provided predominantly harmful information). The Strickland court stated:

> [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

Strickland, 466 U.S. at 690-691.

"In assessing counsel's investigation, the Court must conduct an objective review of their performance, measured for reasonableness under prevailing professional norms," Strickland, 466 U.S. at 688, which includes a context-dependent consideration of the challenged conduct as seen "from counsel's perspective at the time," id., at 689 ("[e]very effort [must] be made to eliminate the distorting effects of hindsight")." Wiggins, 539 U.S. at 523. Further, the reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information. Strickland, 466 U.S. at 691.

In order to demonstrate prejudice, Petitioner must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 693-94. To assess that probability, the reviewing court must consider the totality of the available mitigation evidence and reweigh it against the evidence in aggravation. Porter v. McCollum, 558 U.S. 30, 41 (2009) (citing Williams, 529 U.S. at 397-398). The court must consider whether the likelihood of a different result if the evidence had gone in is "sufficient to undermine confidence in the outcome" actually reached at sentencing. Rompilla, 545 U.S. at 393 (quoting Strickland, 466 U.S. at 694).

b. Review of Claim 43

In this claim, Petitioner alleges ineffective assistance of counsel by failure to seek sufficient continuance to prepare for penalty phase and avoid adverse publicity from defense counsel Toton's impending disbarment.

The California Supreme Court summarily denied claim 43 (SPet. Claim LL) raised in Petitioner's state petition for habeas corpus. In re Sanchez, S049502 (DD). In this case, "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, and this Court "must determine what arguments or theories supported or . . . *could have supported*, the state court's decision; and then it must ask whether it is possible fair-minded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." Id. (emphasis added).

Petitioner states that defense counsel Frank was aware that proper penalty phase preparation had not been completed when the penalty trial started. Petitioner faults Frank for failing to fully investigate neurological, psychiatric, drug use and social history defenses. Petitioner points to retained social historian Dr. Wright, who found the penalty preparations disorganized. (SHCP Ex. 131, Att. B, ¶ 6.) This disorganization, according to Dr. Wright, was exacerbated by the accelerated penalty phase time line following trial waiver at the guilt and special circumstances phase, (SHCP Ex. 137, ¶ 16), and by defense counsel's delay in paying defense service providers. (SHCP Ex. 137, Att. B, ¶ 16.) Dr. Wright also suggested aspects of the penalty defense were not completed by the time of the penalty trial (SHCP Ex. 137, App. B, ¶¶ 11-14), such that defense counsel should have requested a continuance. (SHCP Ex. 137, ¶¶ 10-21.)

However, the state court could reasonably find here, as it did in claim 13, *ante*, that additional preparation time was unnecessary. Defense counsel consulted with a serologist and retained defense psychologist Donaldson in 1987. (RT [5/16/88] 3-4.) Defense counsel Frank, who was responsible for the penalty phase, had almost completed his preparation when, on July 14, 1988, Petitioner waived jury trial on guilt and special circumstances. (CT 892; RT-115a; SPet. Ex. 113, pp. 5-6.) By Frank's own estimate, his preparations were to be complete by July 25, 1988. (RT [5/16/88] 6.) This was reasonably sufficient time given that the penalty phase did not begin until September 21, 1988. (CT 949.) Defense counsel Frank was able to complete his defense investigation prior to the penalty phase. (RT [5/16/88] 3-6.) During this time, Frank retained Dr. Wright to prepare the social history (SHCP Ex. 137, Att. B, ¶ 3), and hired defense investigators Peninger and McGregor. (SHCP Ex. 124, ¶¶ 1-2.) Given the foregoing, the state

court could reasonably have found Dr. Wright allegations relating to inadequate trial preparation, if considered evidence, to be unpersuasive.

Defense counsel, having already been granted a partially opposed three week continuance on the eve of trial, could reasonably have concluded that a further continuance was unlikely. (RT [5/16/88] 5-6; CT 713-714.) Moreover, a further continuance was contrary to Petitioner's stated desire to plead guilty to the Bocanegra murders. (SPet. Ex. 520, p. 2; SPet. Ex. 700.) Petitioner waived jury trial (RT [5/16/88] 7-8) and submitted guilt and special circumstances phase on the preliminary hearing transcript and the testimony of additional prosecution witnesses. See Sanchez, 12 Cal.4th at 23-30. Dr. Wright's suggestion a continuance would have been granted could have been viewed as speculative.

Petitioner also alleges his defense was affected by publicity of the pending disbarment proceedings against defense counsel Toton. Petitioner asserts that defense Counsel Toton received substantial adverse publicity in the Bakersfield Californian from his impending debarment some two weeks before jury selection. However, the record does not demonstrate that jurors had knowledge of the debarment proceedings or that the jury was unfair or biased as to Toton's disciplinary matter. As discussed in claims 49 and 55, *post*, the California Supreme Court reasonably have determined that there was "no showing the jury was unfair or biased." Sanchez, 12 Cal. 4th at 62, n.6. That court noted that, during voir dire, only two of the jurors selected, Razo and Rodriguez, had heard of the case. (RT 1814-1815; 2458-2460, 2471.) Neither of those two jurors mentioned having hearing of Toton. Both of those jurors indicated they could put what they had heard out of mind while deliberating. Id. Petitioner proffers no evidence these statements were untrue.

It is well-established that "juror impartiality . . . does not require ignorance." Skilling v. United States, 561 U.S. 358, 360 (2010) 81 (citing Irvin v. Dowd, 366 U.S. 717, 722 (1961)) (jurors are not required to be "totally ignorant of the facts and issues involved, scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case."); Reynolds v. U.S., 98 U.S. 145, 155–156 (1878) ("[E]very case of public

interest is almost, as a matter of necessity, brought to the attention of all the intelligent people in the vicinity, and scarcely any one can be found among those best fitted for jurors who has not read or heard of it, and who has not some impression or some opinion in respect to its merits.").

When pretrial publicity is at issue, "primary reliance on the judgment of the trial court makes [especially] good sense" because the judge "sits in the locale where the publicity is said to have had its effect" and may base her evaluation on her "own perception of the depth and extent of news stories that might influence a juror." Mu'Min v. Virginia, 500 U.S. 415, 427 (1991).

Here, for the reasons stated, the California Supreme Court could reasonably have concluded that there was no reasonable likelihood that Petitioner did not receive a fair trial despite limited pretrial publicity. Sanchez, 12 Cal.4th at 61. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight . . . and to evaluate the conduct from counsel's perspective at the time." Strickland, 466 U.S. at 689. Bearing that in mind, and as discussed in the claims above, the penalty phase evidence against Petitioner was substantial. Nothing suggests a reasonable likelihood of a more favorable outcome had there been a further continuance.

Accordingly, the state court could have reasonably determined that there was no competent evidence of juror bias arising from Toton's state bar difficulties and related publicity. Petitioner has not established that defense counsel's failure to seek a further continuance to prepare for the penalty trial and to avoid adverse publicity fell below an objective standard of reasonableness and that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland, 466 U.S., at 687-694.

A fair-minded jurist could have found that the state court rejection of the claim was neither contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme Court, nor an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. See 28 U.S.C. § 2254(d).

Claim 43 is denied.

c. Review of Claim 44

Petitioner next claims ineffective assistance of counsel by the individual and cumulative failure to conduct additional investigation and present mitigating evidence in the Bocanegra homicides.

The California Supreme Court summarily denied claim 44 (SPet. Claim MM) raised in Petitioner's state petition for habeas corpus. In re Sanchez, S049502 (DD). In this case, "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, and this Court "must determine what arguments or theories supported or . . . *could have supported*, the state court's decision; and then it must ask whether it is possible fair-minded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." Id. (emphasis added).

The Court finds that Petitioner has not made a sufficient showing that he was prejudiced by defense counsel's failure to further investigate and present mitigating evidence of the Bocanegra homicides, for the reasons discussed below.

i. Jailhouse Informant Hernandez

The Court finds that, for reasons discussed in claims 2 and 7, the decision of defense counsel not to further investigate and impeach jailhouse informant Hernandez regarding substance abuse and heroin addiction (SCHP Exhs. 112, ¶ 10; 137, ¶ 37; 113, ¶ 34), and his changing testimony to inculpate Petitioner as an equal participant in all three homicides (CT 488; RT 2842-44), could reasonably reflect counsel's lack of knowledge of sufficient supporting facts. (SHCP Exhs. 137, ¶ 37; 113, ¶ 34; 112, ¶ 4.)

Additionally, it appears unlikely such impeachment would have been effective. See claims 2, 7, *ante*; see also Burger, 483 U.S. at 795 (failure to pursue fruitless or harmful investigation not unreasonable). The evidentiary record did not demonstrate that Hernandez, by virtue of his alleged substance addition, his plea deal, or otherwise, was motivated to and did testify falsely or inaccurately. (SPet. Ex. 900, pp. 4, 11; SResp. Ex. B.) Defense counsel Toton cross-examined Hernandez at the preliminary hearing and asked Hernandez about any

undisclosed plea deal during cross-examination in the guilt and special circumstances phase. (CT 576-577.) Hernandez's testimony was consistent with Petitioner's statements and the physical evidence. (CT 355, 378-380; 576-77.) Hernandez was not offered any disposition of pending criminal matters prior to agreeing to testify at the Petitioner's proceeding. (Id.; See SResp. Ex. B.) Toton later cross-examined Hernandez during the penalty phase. Hernandez admitted a deal on a then pending charge in exchange for his testimony. (RT 2850-2857.) As discussed in claim 7, *ante,* Hernandez's testimony was not false or misleading.

Accordingly, the state court could reasonably have found that defense counsel were not deficient in the decision not to conduct additional investigation of Hernandez to impeach him.

ii. *Jailhouse Informant Seeley*

The Court finds that for reasons discussed in claims 2 and 8, the decision of defense counsel not to further investigate alleged statements of jailhouse informant Charles Seeley regarding Reyes's involvement in the Bocanegra homicides, could have been a reasonable trial tactic given the evidentiary record. Toton had dealt with Seeley in a separate matter and based thereon doubted Seeley's credibility and whether the prosecution would call him. (SPet. Ex. 137, p. 4.) Seeley's version of events seemed contrary to the physical evidence at the Bocanegra crime scene. (SPet. Ex. 419, pp. 5-6, 17; CT 355-382.) See e.g., Denham, 954 F.2d at 1505-06 (9th Cir. 1992) (defense counsel not ineffective where decision not to call witness based on inconsistencies in witness's testimony).

Also, Seeley's testimony could reasonably have been viewed as more inculpating of Petitioner than was Hernandez's testimony. (SPet. Ex. 419, pp. 6-8, 18-19.) Seeley's testimony would have been subject to rebuttal by the substantial contrary evidence from Hernandez, Stratton, Trihey, as well as by the crime scene physical evidence.

Defendant counsel Frank, for his part, had a tactical reason for not interviewing Seeley to the extent any evidence provided by Seeley related only to the guilt and special circumstances phase that were handled by Toton. (See SPet. Ex. 113, p. 4.)

Accordingly, the state court could reasonably have found that defense counsel was not

deficient in the decision not to conduct further investigation of Seeley and present him as a defense witness.

iii. *Joey Bocanegra*

The Court finds that, for reasons discussed in claims 2 and 9, the evidentiary record could reasonably support as trial tactics, the failure of defense counsel to further investigate and present evidence about Joey's role in the murders of his parents including Joey's history of violence, violent temper, PCP use around the time of the murders, and the sudden fight with Mr. Bocanegra that preceded the murder. There was substantial evidence that Petitioner aided and abetted the Bocanegra murders with premeditation and deliberation. (See claims 1-8.) So much so that defense counsel chose not to object to the prosecution's two assailant theory.

Petitioner has not made an evidentiary showing of prejudice regarding evidence about Joey. In the face of such substantial evidence of guilt, the state court could reasonably have determined that a showing of Joey's temper and prior assaultive conduct would not have raised a reasonable doubt that Petitioner aided and abetted the premeditated and deliberate murders of Mr. Bocanegra and Mrs. Bocanegra. Moreover, such a defense was contrary to Petitioner's stated desire to plead guilty to the Bocanegra murders (SPet. Ex. 520, p. 2) and "dying for his crimes but dying with a clear conscience." (SPet. Ex. 700.) Petitioner waived jury trial and submitted guilt and special circumstances phase on the preliminary hearing transcript and the testimony of additional prosecution witnesses. See Sanchez, 12 Cal.4th at 23-30.

The state court could reasonably have found that the record did not suggest that evidence about Joey would have changed the result, given Petitioner's incriminating statements to detective Stratton and reporter Trihey and the crime scene evidence corroborated by Hernandez's testimony, (see claims 1-4, *ante*), supporting Petitioner's intent to aid and abet the murders.

The state court could reasonably have found that defense counsel was not deficient in the decision not to conduct additional investigation of Joey Bocanegra regarding his role in the murders of his parents.

iv. *Physical Evidence*

The Court finds that, for the reasons discussed in claims 1, 3, 10, 38 and 39, the failure of defense counsel to further investigate crime scene evidence was not unreasonable.

Petitioner revisits his allegations relating to Laskowski's testimony in this proceeding that crime scene photographs showed two types of shoe prints in the Bocanegra kitchen, and Laskowski's subsequent re-examination of the photographs and identification of three types of shoe patterns in the kitchen and outside the Bocanegra home. (Pet. Ex. 121, p. 2; Ex. 417, pp. 1-2; SHCP 137, Ex. A.) Petitioner argues further investigation could have shown that Reyes, not Petitioner, caused the scalp wounds. However, Reyes admitted in subsequent proceedings that he served as lookout during the murders and entered the residence only afterwards to assist Petitioner and Joey. (SResp., Ex. A.) Evidence of Petitioner's shoeprint in the kitchen also undermines Seeley's testimony that Petitioner watched the assault on Mr. Bocanegra from the hallway. (SHCP, Ex. 419, pp. 6, 7, 22-23.) Evidence suggesting the presence of a third non-victim in the Bocanegra Home does not does demonstrate or suggest a third person was present during the murders. (See claim 30, 32, *ante*.) Significantly, defense counsel did not to object to the two assailant theory (SHCP Ex. 137, ¶ 22) and the state record suggests this decision was not unreasonable.

Petitioner also revisits testimony by Dr. Holloway that the scalp wounds were non-fatal. (CT 119, 158-159.) Petitioner argues that further investigation could have shown the blows to the head were not of such force as would show an intent to kill. However, as discussed in claims 1 and 3, there was substantial evidence of Petitioner's aider and abetter liability. The violent nature and extended duration of the struggles with Mr. Bocanegra and Mrs. Bocanegra, with Joey taking time to get a kitchen knife, and Petitioner attempting to subdue and restrain each of the victims during Joey's assault on them, along with the multiple stab and blunt force wounds inflicted during room to room struggle with the victims, reasonably suggest a plan to kill them. (CT112-120; 149-156; 159; 167; 181; 192-194; 357-383; 479-483; 488.) Each victim suffered multiple stab wounds (id.) and was left unassisted to hemorrhage to death. (CT 114-119.) There was evidence Mrs. Bocanegra's wrists had been tied together and that she had been gagged. (CT

113, 149-150, 153.) She suffered 26 stab wounds, three fatal, and six scalp wounds during the struggle. (CT 115-116, 153-154.) Mr. Bocanegra was stabbed at least eight times and had nine scalp wounds. (Id.) Defense counsel could reasonably have determined to focus limited resources elsewhere.

Additionally, there is no reasonable likelihood that the foregoing testimony of Laskowski and Holloway affected the jury's imposition of the death penalty, see Agurs, 427 U.S. at 103, or made trial so fundamentally unfair as to deny due process. Donnelly, 416 U.S. at 645. The evidence against Petitioner was substantial. A fair-minded jurist could conclude from the evidence and statements Petitioner made to Hernandez and Detective Stratton, that Petitioner assisted Joey in murdering Mr. Bocanegra and Mrs. Bocanegra (RT 2843-45, 2851-2854, 2856-59) and that he desired to enter a guilty plea. (SPet. Ex. 520, p. 2; see CT 891-92; RT [5/16/88] 7; RT- 108a-155a.)

Defense counsel's failure to further investigate and rebut the prosecution's physical evidence supporting the two assailant theory was not unreasonable given the evidentiary record.

v. Mental Defenses

The Court finds that, for the reasons discussed in claims 2 and 6, the failure of defense counsel to further investigate and present mitigating evidence of Petitioner's organic brain damage and psychiatric impairments could reasonably be justified by a lack of supporting evidence. (SHCP Exhs. 113, ¶ 31; 139, ¶ 11; 136, ¶ 10.) The evidentiary record suggests that Petitioner was not under the influence of phencyclidine (PCP), marijuana, or alcohol at the time of the Bocanegra and Tatman murders. The evidence proffered by Petitioner suggests a history of substance abuse (SPet. Exhs. 105, pp. 64-65, 74-75; 110, p. 1; 119, p. 8; 123, p.1; 128, pp. 1-2), continuing through the weeks prior to the murders. (SPet. Ex. 105, pp. 85-87.) However, Respondent correctly points to the absence of competent evidence that Petitioner ingested and/or was under the influence of phencyclidine, marijuana, or alcohol on the days the Bocanegra and Tatman murders occurred.

As discussed in claim 6, defense psychologist Donaldson did not recommended to

defense counsel that a neuropsychological evaluation be performed. Court appointed psychiatrist Matychowiak, following his November 1987 examination, found that Petitioner was not suicidal or delusional or suffering memory gaps (SPet. Ex. 520, p.5); that Petitioner planned to tell the judge he was guilty (Id. at 2); and that Petitioner understood the proceedings and could cooperate with counsel. (Id. at 6.) Petitioner told Matychowiak that he planned to tell the jury he was guilty and "get it over with." (SPet. Ex. 520, p. 2.) Dr. Matychowiak found Petitioner competent to stand trial. (SPet. Ex. 520, p. 2-6.)

The state court could reasonably have found that defense counsel were not deficient in the decision not to conduct additional investigation of mental state defenses.

Accordingly, all the foregoing allegations of failure to investigate and present mitigating evidence are insubstantial when considered cumulatively for the reasons stated. See Karterman, 60 F.3d at 580.

For the reasons stated, a fair-minded jurist could have found that the state court rejection of this claim was neither contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme Court, nor an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. See 28 U.S.C. § 2254(d).

Claim 44 is denied.

d. Review of Claim 45

In his next claim, Petitioner alleges ineffective assistance by counsel's failure to object to admission of prejudicial crime scene and autopsy photographs.

The California Supreme Court summarily denied claim 44 (SPet. Claim NN) raised in Petitioner's state petition for habeas corpus. In re Sanchez, S049502 (DD).

The state supreme court also considered and rejected this claim on appeal:

> The trial court admitted into evidence 44 photographs, including 2 photographs of the autopsies of Juan and Juanita Bocanegra depicting the extensive nature of their scalp wounds. (Exhibits Nos. 13 & 14.) The autopsy photographs had been excluded from the guilt phase following a successful motion in limine by defendant. The trial court overruled defendant's objection to the admission of the autopsy photographs, however, for the penalty phase. We first review his contention that the trial court erred in admitting the autopsy photographs because

they were cumulative, misleading and inflammatory, and their prejudicial effect substantially outweighed their probative value.

In overruling defendant's objection, the court stated: "These scalp wounds are absolutely very important that the jury see. And they are not the kind of autopsy pictures-they're bad, I'll say that, all autopsy pictures are bad, but they're not the blood and guts type of thing that you sometimes see in autopsy pictures. And I think the prejudicial effect is far, far, far, and I can't stress it enough, outweighed by the probative value of these scalp wounds."

Defendant contends the trial court committed prejudicial error in admitting Exhibits Nos. 13 and 14 in violation of his right to a fair trial and reliable penalty determination under the Eighth and Fourteenth Amendments of the federal Constitution. The thrust of his argument is that the photos were not relevant to the penalty determination, were cumulative to the testimony of Dr. Holloway (the forensic pathologist who performed the autopsies on the Bocanegras), and seriously misled the jury as to defendant's culpability in the Bocanegra murders. In sum, the sole purpose of allowing the photographs, defendant asserts, was to improperly shock and horrify the jury.

Defendant points to the prosecutor's explanation to the jury as to why she believed the autopsy photographs were important evidence and asserts her comment actually exploited the prejudicial effect of the evidence: "You will have the pictures available to you. Look at the scalp wounds. You make the decision. But whatever, [Mrs. Bocanegra] would not have been killed but for the help of Teddy Brian Sanchez, and he is just as guilty of the murder as Joey Bocanegra." Defendant claims that because the probative value of the photographs was clearly outweighed by their prejudicial effect, their admission violated his constitutional rights.

The decision whether to admit photographs is within the trial court's discretion and will not be disturbed unless their prejudicial effect substantially outweighs their probative value. [Citation] We have examined Exhibits Nos. 13 and 14 and have determined they are not so horrific or shocking that we can conclude the trial court abused its discretion in admitting them. [Citation] The jury was familiar with the facts of the crime, and the photographs had substantial probative value in demonstrating defendant's culpability as an aider and abettor, and as corroborative of Hernandez's testimony implicating defendant in the crimes. Moreover, the probative value of the photographs was not diminished simply because the scalp wounds alone were not fatal to the victims. The photographs corroborated the testimonial evidence and were relevant to a determination of the appropriateness of the death penalty. [Citation]

Defendant's claim that there was no dispute as to the circumstances of the murders is not supported by the facts. Defense counsel Frank argued at the penalty phase that defendant should be spared the death penalty if the jury had a "lingering doubt" about the extent of defendant's participation in the Bocanegra killings.

Nor is defendant assisted by People v. Love (1960) 53 Cal.2d 843, 856-857, in which we held that the trial court's admission of a photograph showing the victim's face as she was dying, and of a tape recording of her last words as she lay on a hospital table in extreme pain, was prejudicial because it "served primarily to inflame the passions of the jurors." [Citation] Here, by contrast, the autopsy photographs depicting the Bocanegras' scalp wounds were clearly probative of (i) the manner in which the victims were wounded, (ii) defendant's culpability as an

> aider and abettor, (iii) the malice and aggravation of the crime, and (iv) the appropriate ultimate penalty. [Citation]
>
> Because we find no error in admitting the autopsy photographs, we need not address defendant's claims that admission of other photographs during the penalty phase (Exhibits Nos. 9, 18, 19 & 25, depicting the wounds on the Bocanegras and Tatman) did not render harmless the prejudicial effect of the autopsy photos. Nor do we address defendant's related argument that, assuming we conclude the admission of these photographs "undercut the prejudice resulting from the admission" of the autopsy photographs, trial counsel was ineffective for failing to object to their admission. Neither argument is persuasive in light of our conclusion that the court did not err in admitting the autopsy photographs at the penalty phase.

Sanchez, 12 Cal.4th at 63-65.

A due process claim can be stated where graphic photos of victims make the trial fundamentally unfair. Jammal, 926 F.2d at 919. However, photos that are relevant to the crime charges and elements thereof are admissible. See Villafuerte v. Lewis, 75 F.3d 1330, 1343 (1996). Under California law, "photographs which disclose the manner in which the victim was wounded are relevant on the issues of malice and aggravation of the crime and the penalty." People v. Thompson, 50 Cal.3d 134, 182 (1990).

Petitioner, citing in support to claim 56, *post*, alleges the jury was allowed to view inflammatory and prejudicial autopsy, crime scene and victim photographs (RT 2891-2892), depicting graphic and gory injuries unrelated to actions attributed to Petitioner, which should have been excluded under California Evidence Code section 352, and that caused the penalty trial to be fundamentally unfair. He claims there was no tactical reason not to object to these photographs.

The state record shows that defense counsel Toton did move to exclude all photographs during the guilt phase (RT-30a-33a). At the penalty phase, two autopsy photos of Mr. Bocanegra and Juanita's scalp wounds (People's Exhs. 13, 14) were admitted, over the defense's objection, (RT 2876, 2880-2281, 2285, 2891-2892), and the victim photos were admitted without objection. (RT 2891).

However, the state court could reasonably find that Petitioner was not prejudiced by introduction of the photos or failure of defense counsel to object to them. The Court agrees with

the state court reasoning in finding the photographs relevant and probative of charges and elements including intent to kill, aggravation and penalty.

Nor does the failure to object necessarily demonstrate ineffective assistance. See Nefstad v. Baldwin, 66 F.3d 335 at *3 (9th Cir. 1995) (holding no violation of due process where prosecutor during closing argument shows photographs of victim before and after murder because relevant to intent).

Even without the photographs, it is not reasonably probable the jury would have returned a sentence less than death given the evidence in aggravation including the circumstances surrounding the murders of the Bocanegras and Mr. Tatman, and Petitioner's 1982 assaults on Ammarie and Pena. (RT 2863-2874.)

Accordingly, the state court could reasonable have found that Petitioner failed to make an evidentiary showing that defense counsel's performance fell below an objective standard of reasonableness and that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland, 466 U.S., at 687-694.

It follows that the state court rejection of the claim was neither contrary to, or an unreasonable application of, clearly established federal law, nor based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. See 28 U.S.C. § 2254(d).

Claim 45 is denied.

e. Review of Claim 46

Petitioner next claims ineffective assistance by failure to contest prosecution evidence of lack of remorse.

The California Supreme Court summarily denied claim 46 (SPet. Claim OO) raised in Petitioner's state petition for habeas corpus. In re Sanchez, S049502 (DD). In this case, "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, and this Court "must determine what arguments or theories supported or . . . could have supported, the state court's decision; and then

it must ask whether it is possible fair-minded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." Id. (emphasis added).

Petitioner alleges that he was prejudiced by Boggs's false testimony attributing to Petitioner the lack of remorse shown by Reyes following the Tatman murder, i.e., that Reyes and Petitioner "kicked back, drank some whiskey, smoked some dope, ate some food, and just relaxed for the rest of the evening." (RT 2663-64; SPet. Ex. 100.) An error that Ryals also made in her opening argument. (RT 2619.) Petitioner faults his counsel for failure to cross-examine Boggs, and failure to introduce evidence of Petitioner's remorse expressed to reporter Trihey and his friends Robin and Debbie Lozano.

The Court is not persuaded by this claim. Petitioner's contention regarding to Boggs's allegedly false testimony and defense counsel's failure to cross-examine Boggs on this issue fails substantively for reasons discussed in claim 37, i.e., the state court could reasonably have concluded that prosecutor Ryals did not know of and knowingly rely upon Boggs's erroneous testimony, (SPet. Exhs. 137, p. 12; 113, p.10; SResp. Ex. B), and there is no reasonable likelihood the error affected the result of trial or caused an unfair trial.

Petitioner also alleges prejudice from Ryals's opening argument in which she made reference to Boggs's errant testimony. Under California law, the absence or presence of remorse is a factor relevant to the jury's penalty determination. People v. Ghent, 43 Cal.3d 739, 771 (1987); see also Harris v. Pulley, 885 F.2d 1354, 1384 (9th Cir. 1988). The prosecutor's comment is impermissible only where it is "manifestly intended to call attention to the defendant's failure to testify or is of such a character that the jury would naturally and necessarily take it to be a comment on the failure to testify." Beardslee v. Woodford, 358 F.3d 560, 586 (9th Cir. 2003). Here the prosecution evidence of lack of remorse did not refer to Petitioner's failure to testify, but rather to statements that were already in evidence.

Additionally, there is not a reasonable probability that statements of remorse to Trihey and acquaintances, the Lozanos, even if taken as admissible evidence of remorse, could have

affected the jury's imposition of the death penalty. Statements of remorse to Trihey were themselves inculpating. (SPet. Ex. 113, p. 12.) Moreover, a lack of remorse is in any event suggested by Petitioner's statements describing Mr. Tatman's murder and robbery, his intention to rob Mr. Tatman, how Reyes stabbed Mr. Tatman, and how Petitioner and Reyes then took Mr. Tatman's things back to their room. (RT 2658-2666.) Tactical reasons for not presenting remorse evidence are reasonably suggested by hearsay issues relating to Petitioner's proffer (Pet. 719) and the defense strategy to not admit guilt but rather focus on "residual or lingering doubt." (SPet. Ex. 113, pp. 8-12.)

The state court could have reasonably believed that Petitioner's confession to Boggs of the circumstances surrounding Tatman's murder and Petitioner's involvement in it would have undercut any sympathy toward him by the jury. (See RT 2658-2666.) Moreover, defense counsel could reasonably have decided that a lingering doubt defense and mitigating social history might well have been weakened by evidence of remorse. (See RT 3053-3055, 3063-3064.)

The Court finds that Petitioner has not established that defense counsel's performance fell below an objective standard of reasonableness and that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland, 466 U.S., at 687-694.

For the reasons stated, a fair-minded jurist could have found that Petitioner failed to establish that the state court rejection of the claim was contrary to, or an unreasonable application of, clearly established federal law, or an or an unreasonable determination of the facts in light of the evidence presented in the state court proceeding, viewed most favoring the prosecution. Jackson, 443 U.S. at 319. See 28 U.S.C. § 2254(d).

Claim 46 is denied.

f. Review of Claim 47

Petitioner next claims ineffective assistance by counsel's failure to investigate and present mitigation evidence regarding the 1982 Ammarie and Pena Crimes.

The California Supreme Court summarily denied claim 47 (SPet. Claim PP) raised in

Petitioner's state petition for habeas corpus. In re Sanchez, S049502 (DD). In this case, "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, and this Court "must determine what arguments or theories supported or . . . could have supported, the state court's decision; and then it must ask whether it is possible fair-minded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." Id. (emphasis added).

The trial record reveals Mr. Ammarie, the store keeper victim in one incident, testified at the penalty phase that, on May 7, 1982, Petitioner assaulted him when Ammarie refused to "get [Petitioner] some bacon." Petitioner stabbed Ammarie in the left shoulder and neck, took money and ran away, leaving Ammarie in the hospital for two weeks. (RT 2862-2866; see Sanchez, 12 Cal.4th at 22.) The victim in the other incident, Mr. Pena, a friend of and Petitioner, testified at the penalty phase that Petitioner, without any provocation, stabbed him three times with a kitchen knife and demanded money, leaving Pena hospitalized for two days. (RT 2868-74.)

Petitioner contends that, as to the Ammarie and Pena crimes, defense counsel failed to investigate and present mitigating evidence of Petitioner's emotional and family turmoil, possible PCP psychosis, organic brain damage, and belief he acted in self-defense in these incidents. Petitioner claims there was no tactical reason for these omissions.

The Court finds this claim unavailing. Petitioner does not offer facts showing the nature and extent of the investigation conducted by defense counsel Frank, or what information if any, Petitioner provided to defense counsel Frank in preparation for the penalty phase, or what Petitioner did, if anything, to cooperate in developing mitigating penalty phase evidence. As the Supreme Court stated in Strickland, the information supplied by the defendant is "critical" in determining whether counsel's investigation decisions are reasonable. 466 U.S. at 691. Counsel is "strongly presumed" to make decisions in the exercise of professional judgment. Id. at 690.

Petitioner faults defense counsel Frank for failure to consult with counsel who assisted Petitioner in the 1982 criminal proceedings. Yet Petitioner does not state what credible,

probative mitigating information this consultation would have yielded over and above the police and court records relating to the 1982 convictions, which Petitioner concedes defense counsel undertook to obtain. (SHCP Exhs. 137, ¶ 35; 113, ¶ 30.)

Petitioner faults defense counsel's for a failure to investigate possible social and mental defenses contemporaneous to the 1982 crimes, including probable effects of alleged heavy PCP use. Petitioner offers in support the 1995 opinion of a clinical psychologist, Jeri Doane, as to the effect of losses and turmoil in his personal life (SPet. Ex. 105, pp. 75-78), as well as anecdotal assertions of Petitioner and others regarding potential mental and other defenses to his 1982 criminal conduct. (SPet. Exhs. 105, pp. 1-5, 79-82, 99- 100; 802; 506, pp.6-8; 128, p. 2.)

But even assuming this type of mitigating information could be competent evidence, it does not suggest Petitioner informed defense counsel in this proceeding of the existence of this mitigating information, or that defense counsel in this proceeding was otherwise aware of it or should have been aware of it. Moreover, defense counsel Frank could reasonably have believed such information, if developed, would have little if any mitigating value. Petitioner does not dispute that he was convicted of the 1982 crimes. *Post hac* assertion of defenses to convictions suffered years prior could reasonably be found to have little if any mitigating value. As to mental defenses, the lack of supporting evidence (see claim 6), and the fact that Petitioner was convicted for these 1982 offenses, could reasonably suggest further investigation was unwarranted. Based on the evidentiary record, defense counsel could reasonably presume viable defenses in the 1982 proceedings were raised therein.

These defenses would not advance defense counsel Frank's tactic of lingering doubt. "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." Richter, 131 S. Ct. at 789 (quoting Strickland, 466 U.S. at 689); see also Williams, 529 U.S. at 415 (O'Connor, J., concurring) (defense counsel conducted a reasonable investigation into Petitioner's troubling background and unique personal circumstances developed a coherent and organized strategy, proffered evidence, and presented a case for mitigation); Wiggins, 539 U.S. at 521 (citing Strickland, 466 U.S. at

688) ("the proper measure of attorney performance remains simply reasonableness under prevailing professional norms.").

Just as the Supreme Court found in Van Hook,

> This is not a case in which the defendant's attorney [] failed to act while potentially powerful mitigating evidence stared [him] in the face, cf. Wiggins, 539 U.S., at 525, 123 S. Ct. 2527, or would have been apparent from documents any reasonable attorney would have obtained, cf. Rompilla v. Beard, 545 U.S. 374, 389–393, 125 S. Ct. 2456, 162 L.Ed.2d 360 (2005). It is instead a case, like Strickland itself, in which defense counsel's "decision not to seek more" mitigating evidence from the defendant's background "than was already in hand" fell "well within the range of professionally reasonable judgments."

Bobby v. Van Hook, 558 U.S. 4, 11-12 (2009) (quoting Strickland, 466 U.S. at 699).

Additionally, even if defense counsel Frank's investigation and presentation relating to the 1982 crimes was deficient, there was no reasonable probability such mitigation evidence could have affected the jury's imposition of the death penalty given the noted substantial evidence against Petitioner. The state court could reasonably have concluded that defense counsel's investigation was adequate given the above noted facts underlying these prior criminal convictions, defense counsel Frank's theory of lingering doubt and the social and personal history mitigation evidence discussed in claims 6, 26, *ante*.

For these reasons, Petitioner has failed to overcome the strong presumption that counsel made decisions in the exercise of professional judgment. Strickland, 466 U.S. at 690. Even if defense counsel had discovered this evidence and still chose to proceed with his strategy as opposed to the strategy Petitioner now advocates, a fair-minded jurist could conclude that his decision was reasonable. "Counsel was entitled to formulate a strategy that was reasonable at the time and to balance limited resources in accord with effective trial tactics and strategies." Richter, 562 U.S. at 107. "[T]he Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." Yarborough, 540 U.S. at 8.

Petitioner fails to demonstrate that no reasonable jurist could have found that he failed to make a prima facie showing that defense counsel rendered ineffective assistance during the penalty phase of the trial relating to mitigating the 1982 criminal convictions.

For the reasons stated, a fair-minded jurist could have found that the state court rejection of this claim was neither contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme Court, nor an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. See 28 U.S.C. § 2254(d).

Claim 47 is denied.

g. Review of Claim 48

Petitioner next claims ineffective assistance by counsel's failure to fully and completely develop and present adequate and reliable evidence about Petitioner's character, background, and behavior.

The California Supreme Court summarily denied claim 48 (SPet. Claim QQ) raised in Petitioner's state petition for habeas corpus. In re Sanchez, S049502 (DD). In this case, "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, and this Court "must determine what arguments or theories supported or . . . could have supported, the state court's decision; and then it must ask whether it is possible fair-minded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." Id. (emphasis added).

Petitioner, citing to facts alleged in claim 6, contends that background and character testimony from four family members as well as social anthropologist Isabel Wright did not fully present evidence of his unstable family life, sporadic education, disabling physical violence, abuse, deprivation, and emotional suffering of his childhood and adolescence his caring for siblings and heavy drug use. He alleges that defense counsel Frank, consistent with Wright's requests, should have presented a full social history prepared by a social anthropologist, along with evidence of organic brain damage and psychiatric disorders prepared by a psychologist or psychiatrist, such as included with his state petition. (SHCP Exhs. 105, 111, 114.)

During the sentence selection stage, the Supreme Court has imposed a requirement that the jury make "an *individualized* determination on the basis of the character of the individual and

the circumstances of the crime." Tuilaepa, 512 U.S. at 972-73 (citing Zant, 462 U.S. at 879, and Woodson v. North Carolina, 428 U.S. 280, 303-304 (1976)). This "requirement is met when the jury can consider relevant mitigating evidence of the character and record of the defendant and the circumstances of the crime." Id. (citing Blystone v. Pennsylvania, 494 U.S. 299, 307 (1990)) ("requirement of individualized sentencing in capital cases is satisfied by allowing the jury to consider all relevant mitigating evidence"). The court may not "impede [] the sentencing jury's ability to carry out its task of considering all relevant facets of the character and record of the individual offender" by excluding "relevant mitigating evidence." Skipper v. South Carolina, 476 U.S. 1, 8 (1986). Nevertheless, the court retains "the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense." Lockett v. Ohio, 438 U.S. 586, 605 n.12 (1978).

The Court does not find that Petitioner was prejudiced by any failure of defense counsel to develop and present complete, adequate, and reliable evidence of Petitioner's character, background, and behavior at the time of the Bocanegra and Tatman homicides.

Defense counsel Frank, while arguing for life without the possibility of parole, (RT 2895-2896, 2910, 2923, 2928, 3021), did present the following significant mitigating background and character evidence from family members including Petitioner's wife and retained social anthropologist Dr. Wright. (RT 2897, 2912, 2928, 2930, 3007-3008, 3017.) Petitioner's mother became pregnant with him when she was fifteen. (RT 2897-2898, 2943-2945.) His mother turned to alcohol and drugs (2899-2900, 2902-2903) and embarked upon a succession of unstable and unsupportive marriages and relationships. Petitioner experienced an impoverished, nomadic, neglected and sometimes abusive upbringing with little positive parental or adult supervision. (RT 2902-2941, 2958-2964, 3003-3006.) He lived in a car and then cheap motels. (RT 2904, 2908, 2918-2919.) His parents drank and argued, (RT 2905, 2909), and sometimes physically abused Petitioner (RT 2907, 2985.) His siblings were removed from the home for adoption. (RT 2913-2914, 2941, 2970, 2978-83.) His lack of stability in school, changing schools often and infrequently attending class, resulted in poor academic performance such that

he did not progress beyond the eighth grade. (RT 2963-2969, 2941-2942, 2980, 2991-2994.) He began sniffing paint as a teen. (RT 2993, 2998.) His attempts at job training and employment (RT 2996-2997) were short-lived because of his lack of skills and education. (RT 3003-3004.)

Defense Counsel Frank presented evidence that Petitioner nonetheless showed concern and care for his siblings, sometimes stealing food for them. (RT 2920.) Petitioner's grandmother, to whom he was close, died in 1982 (RT 3000). Petitioner's mother died from alcohol related complications at age thirty-eight while he was in prison for the 1982 Ammarie and Pena stabbings. (RT 2897, 2912, 2916, 3001.) Petitioner's step-father also died from complication of alcohol. (RT 2919, 2961.) Petitioner lived a transient existence after his release from prison in 1986. (RT 3001-3002.) Petitioner was unable to find work and resorted to drugs. (Id.) Petitioner married Robin Alvarado shortly before his 1988 homicide trial, (RT 2925, 2928), and prior to that cared for her children. (RT 2927, 3000, 3018-3019.) Social anthropologist, Dr. Wright, testified that the major influences in Petitioner's life were his migratory lifestyle secondary to poverty and inconsistent family relationships. (RT 2939, 3003, 3006.)

The evidentiary record demonstrates defense counsel argued all the foregoing in urging the jury to return a life sentence without the possibility of parole for the then twenty-five year old Petitioner. (RT 2895-2896, 2910, 2923, 2928, 3021.) Moreover, prosecutor Ryals, in her argument to the jury, acknowledged there were mitigating factors in Petitioner's background and character that evoked sympathy for him. (RT 3043-3047, 3079.)

The Court finds that, given the substantial inculpating evidence against Petitioner, it is not reasonably probable that Petitioner would have received a more favorable sentence had further evidence of his background, character and behavior been presented. In particular, presentation of additional evidence regarding Petitioner's substance abuse would not have necessarily added weight to his case for mitigation. See Cullen, 131 S. Ct. at 1410 (noting that evidence of serious substance abuse is "by no means clearly mitigating"); id. at 1406–07 (noting that Strickland "rejected the notion that the same investigation will be required in every case" and requires the habeas court to strongly presume that counsel exercised reasonable judgment in

making all significant decisions).

The state court could reasonably find Petitioner's alleged neurological and psychiatric conditions and related mental defenses were not sufficiently supported by the record and failed for reasons discussed in claims 6 and 26, *ante*.

Petitioner has not established that defense counsel's performance fell below an objective standard of reasonableness and that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland, 466 U.S., at 687-694.

For the reasons stated, a fair-minded jurist could have found that Petitioner failed to establish that the state court rejection of the claim was contrary to, or an unreasonable application of, clearly established federal law, or an unreasonable determination of the facts in light of the evidence presented in the state court proceeding, viewed most favoring the prosecution. Jackson, 443 U.S. at 319. See 28 U.S.C. § 2254(d).

Claim 48 is denied.

h. Review of Claim 49

Petitioner alleges defense counsel was ineffective by failing to request that the trial court voir dire prospective jurors about adverse publicity from Bakersfield Californian articles relating to debarment proceedings against defense counsel Toton.

The California Supreme Court summarily denied claim 49 (SPet. Claim RR) raised in Petitioner's state petition for habeas corpus. In re Sanchez, S049502 (DD).

The state supreme court considered and rejected this claim on direct appeal:

> [I]t is evident from the record that defendant failed to preserve his claim of improper voir dire by objecting to the court's questioning during trial. [Citation] On the merits, our review of the record shows the trial court's voir dire adequately insured an impartial jury, without unnecessarily exposing the jury to the very information defendant found could prejudice his case . . . .
>
> The trial court assisted counsel and to ensure a fair and impartial jury by requiring the 201 prospective jurors to fill out a one-page questionnaire asking the panel members whether they had ever heard of the case, and if so, to name their source. [Citation] Of the jurors eventually selected to serve, eight told the court they had never heard of defendant's case, were not familiar with counsel, and either did not subscribe to or did not read on a consistent basis the Bakersfield Californian. In addition, pursuant to further questioning by the court, four of these jurors

> indicated they did not believe everything they read in the newspaper.
>
> Two other jurors who acknowledged they read the Bakersfield Californian observed that they had never heard of defendant's case.
>
> Two of the twelve jurors selected had prior knowledge of defendant's case, but their voir dire responses clearly indicated that their exposure to the newspaper articles about defendant's case was limited to an awareness of the general facts and circumstances of the Bocanegra and Tatman murders. Their knowledge of the case did not include any specific information regarding Toton's pending disbarment. Thus, it appears that the trial court acted well within its discretion in proposing the general question of the jurors' knowledge of Toton's pending disbarment without unnecessarily educating the jury about that matter. The trial court's strategy thus avoided informing the jury of Toton's troubles, while assuring defendant a fair and impartial jury. [Citation] Under these facts, we find the trial court did not err in limiting voir dire to general questions concerning pretrial publicity. [Citation]

Sanchez, 12 Cal.4th at 61-63. The record demonstrates that defense counsel Toton agreed, reasoning that questioning jurors about the publicity was likely to be more prejudicial than that publicity itself. (SHCP Ex. 137, ¶ 29). This Court finds the tactic not unreasonable.

The Sixth Amendment secures to criminal defendants the right to trial by an impartial jury. Skilling, 561 U.S. at 377-78; Irvin, 366 U.S. at 722. Nevertheless, "juror impartiality, we have reiterated, does not require ignorance." Skilling, 561 U.S. at 381 (citing Irvin, 366 U.S. at 722) (jurors are not required to be "totally ignorant of the facts and issues involved."). To merit relief for violation of his due process rights due to pretrial publicity, Petitioner must demonstrate that the case is one in which prejudice is presumed, or he must demonstrate actual prejudice. Skilling, 561 U.S. at 379, 385.

"A presumption of prejudice . . . attends only the extreme case." Id. at 381. The Supreme Court has determined that pretrial publicity so manifestly tainted a criminal prosecution that prejudice must be presumed in only three cases: Rideau v. Louisiana, 373 U.S. 723, 726-27 (1963) (televised confession); Estes v. Texas, 381 U.S. 532, 536 (1965) (massive pretrial media interference); and Sheppard v. Maxwell, 384 U.S. 333, 355-356 (1966) (months of virulent pretrial publicity).

"To establish actual prejudice, the defendant must demonstrate that the jurors exhibited actual partiality or hostility that could not be laid aside." United States v. Sherwood, 98 F.3d

402, 410 (9th Cir. 1996). When pretrial publicity is at issue, "primary reliance on the judgment of the trial court makes [especially] good sense" because the judge "sits in the locale where the publicity is said to have had its effect" and may base her evaluation on her "own perception of the depth and extent of news stories that might influence a juror." Mu'Min, 500 U.S., at 427. Appellate courts making after-the-fact assessments of the media's impact on jurors should be mindful that their judgments lack the on-the-spot comprehension of the situation possessed by trial judges. Skilling, 561 U.S. at 386.

Petitioner contends that neither the trial court nor defense counsel asked prospective jurors about newspaper the articles appearing in the Bakersfield Californian two weeks before jury selection that discussed the impending debarment of lead defense counsel Toton. He maintains there was no tactical reason for not questioning jurors about these newspaper articles and that jurors prejudiced thereby may have been empaneled.

Petitioner's case is immediately distinguishable from Estes and Sheppard. He does not allege, nor is there any evidence, that media coverage of attorney disciplinary proceedings interfered with his right to a fair trial. See Skilling, 561 U.S. at 382 n.14 ("Skilling's reliance on Estes and Sheppard is particularly misplaced; those cases involved media interference with courtroom proceedings during trial. [Citation] Skilling does not assert that news coverage reached and influenced his jury after it was empaneled."). Rideau is the only case in which the Supreme Court overturned a conviction based on pretrial publicity.

Petitioner's case also is readily distinguished from Rideau. See Sanchez, 12 Cal.4th at 61-63. Here, during voir dire, the following eight jurors indicated they had never heard of the case, did not know counsel, and did not subscribe to and did not usually read the Bakersfield Californian: juror Jones (CT 258; RT 594, 596-597, 606); juror Mooney (CT 256, RT 647, 664); juror Roberts (CT 237, RT 1170); juror Stell (CT 184, RT 1882); juror G. Clark (CT 229, RT 2120); juror P. Clark (CT 228; RT 2140-2141); juror O'Toole (CT 220, RT 2401-2402, 2406); and juror Raymond (CT 217, RT 2438-2439).

Two jurors, Crowder and Zamora, regularly read the Bakersfield Californian but were

unaware of the case and of counsel. (CT 207; RT 1342-1343 regarding juror Crowder; CT 213; RT 2554, 2563 regarding juror Zamora.)

Only two of the jurors selected, Razo and Rodriguez, stated they had heard of the case. (RT 1814-1815; 2458-2460, 2471-2472.) Neither of these jurors mentioned having hearing of Toton; both indicated they did not believe everything they read in newspapers and could put what they had heard out of mind while deliberating. Id. Petitioner has not made an evidentiary showing that these juror statements were untrue.

"[P]retrial publicity—even pervasive, adverse publicity—does not inevitably lead to an unfair trial." Nebraska Press Assn. v. Stuart, 427 U.S. 539, 554 (1976). In the rare case that prejudice is presumed, there will have been a "'barrage of inflammatory publicity immediately prior to trial,' [Citation], amounting to a 'huge . . . wave of public passion.'" Patton v. Yount, 467 U.S. 1025, 1033 (1984) (quoting Murphy v. Florida, 421 U.S. 794, 798 (1975) and Irvin, 366 U.S. at 728). The coverage in this case was neither all pervasive nor constant leading up to trial. Certainly there was no barrage of inflammatory publicity immediately prior to trial or in the six months leading up to trial. Based on the foregoing, the state court reasonably could have concluded that this was not an extreme case wherein prejudice should be presumed from pretrial publicity.

As discussed above and in claim 55, *post*, the trial judge considered the impact of pretrial publicity on the jurors who served on Petitioner's case. None of the twelve selected jurors had been exposed to media accounts of Toton's disciplinary problems. Sanchez, 12 Cal.4th at 61-63. Only two jurors had heard of the case. Id. It is well-established that "juror impartiality . . . does not require ignorance." Skilling, 561 U.S. at 381 (citing Irvin, 366 U.S. at 722) (Jurors are not required to be "totally ignorant of the facts and issues involved"; "scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case."); Reynolds, 98 U.S. at 155–156 ("[E]very case of public interest is almost, as a matter of necessity, brought to the attention of all the intelligent people in the vicinity, and scarcely any one can be found among those best fitted for jurors who has not read or heard of it, and who has

not some impression or some opinion in respect to its merits.").

Petitioner's suggestion that the manner in which Toton conducted voir dire was self-interested is unsupported by the evidence for reasons discussed in claims 21-24, *ante*. Moreover, even if defense counsel's failure to request voir dire about attorney discipline publicity was deficient performance, nothing in the evidentiary record suggests presumed or actual prejudice. The noted substantial evidence against Petitioner suggested no reasonable probability of a more favorable outcome even had defense counsel requested voir dire about publicity from Toton's disciplinary proceeding.

The state court could reasonably have concluded that Petitioner failed to establish that defense counsel's performance fell below an objective standard of reasonableness and that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland, 466 U.S., at 687-694. For the reasons above, this Court agrees with the state court that there was no reasonable likelihood that Petitioner did not receive a fair trial despite the limited voir dire regarding pretrial publicity.

Accordingly, the state court's rejection of this claim was not contrary to, or an unreasonable application of, clearly established federal law, or an unreasonable determination of the facts in light of the evidence presented in the state court proceeding, viewed most favoring the prosecution. Jackson, 443 U.S. at 319. See 28 U.S.C. § 2254(d).

Claim 49 is denied.

i. Review of Claim 50

Petitioner next claims ineffective assistance by counsel's failure to object to prosecutorial misconduct during closing argument.

The California Supreme Court summarily denied claim 50 (SPet. Claim SS) raised in Petitioner's state petition for habeas corpus. In re Sanchez, S049502 (DD).

That court also considered and rejected the claim on direct appeal, finding that:

> In his closing argument, co-counsel Frank consistently pointed out the prosecution's inaccurate statements to the jury, reminding it of the evidence presented. Counsel's performance in demonstrating for the jury the prosecutor's

> improper argument reveals counsel's attention to detail rather than incompetence. Counsel's careful references during the prosecutor's misstatements demonstrates that defense counsel was aware of the misstatements and, in exercising reasonable professional judgment, chose not to object for tactical reasons. In any event, we find no reasonable probability that defense counsel's failure to object prejudiced defendant's case.

Sanchez, 12 Cal.4th at 71.

Petitioner faults defense counsel's failure to object when prosecutor Ryals argued in closing that Petitioner killed Mr. Tatman, suggesting the jury was sentencing Petitioner for the Tatman homicide, and argued that the Bocanegras would not have been killed but for the actions of Petitioner.

However, the state court, based on the record before it, could have found it reasonable for the defense not to object in such circumstances. (See claim 42; see also Flieger v. Delo, 16 F.3d 878, 886 (8th Cir. 1994) (reasonable trial strategies do not amount to ineffective assistance even where unsuccessful).

The Tatman conviction was presented to the jury as evidence in aggravation and the jury appropriately admonished and instructed in this regard. Prosecution argument that Petitioner had a principal role in the Tatman killing, and that the Bocanegras would not have been killed without his assistance, did not in all reasonable likelihood mislead the jury or affect the death sentence imposed. The weight of evidence against Petitioner as an aider and abettor of the homicides was substantial. Evidence showed that Petitioner grabbed and held Mr. Bocanegra while Joey got a knife (RT 2843, 2853-54); that Petitioner beat Mr. Bocanegra while Joey stabbed him (RT 2696-2706, 2719-21, 2725, 2843-44, 2854, 2858); that Petitioner rushed Mrs. Bocanegra and told Joey to "shut her up" (RT 2844, 2858); that Petitioner pushed Mrs. Bocanegra into a back room and hit her on the head with a bar while Joey stabbed her (RT 2710-14, 2720-21, 2725, 2752, 2844), and that while this occurred Mrs. Bocanegra's hands were bound and she was likely gagged (RT 2708, 2723, 2749-51, 2754-55, 2774-2775).

Moreover, the jury certainly was made well aware that Mr. Tatman's stabbing wounds were non-fatal injuries and that Petitioner's conviction for Mr. Tatman's murder was based on

his aiding and abetting Reyes. (Id.; RT 2693-94.) Generally, counsel are "given latitude in the presentation of their closing arguments, and courts must allow the prosecution to strike hard blows based on the evidence presented and all reasonable inferences therefrom." Ceja, 97 F.3d at 1253–1254 (quoting Baker, 10 F.3d at 1415).

Petitioner has not made a sufficient showing he was prejudiced by defense counsel's failure to object to alleged prosecutorial misconduct during closing argument. The evidence against Petitioner was not insubstantial considering the multiple murder special circumstance in the Bocanegra murders and the substantial evidence in aggravation presented during the penalty phase. There is no reasonably likelihood the outcome would have been different absent the alleged prosecutorial misconduct. See Donnelly, 416 U.S. at 643 (improper jury argument by the state does not present a claim of constitutional magnitude unless it is so prejudicial that the petitioner's trial was fundamentally unfair . . . [t]o establish prejudice, the petitioner must demonstrate either persistent and pronounced misconduct or that the evidence was so insubstantial that, in all probability, but for the remarks, no conviction would have occurred).

The state court could reasonably have concluded that Petitioner failed to establish that defense counsel's performance fell below an objective standard of reasonableness and that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland, 466 U.S., at 687-694.

Accordingly, the state court's rejection of this claim was not contrary to, or an unreasonable application of, clearly established federal law, or an unreasonable determination of the facts in light of the evidence presented in the state court proceeding, viewed most favoring the prosecution. Jackson, 443 U.S. at 319. See 28 U.S.C. § 2254(d).

Claim 50 is denied.

j. Review of Claim 51

In his next claim, Petitioner alleges ineffective assistance by counsel during penalty phase closing Argument.

The California Supreme Court summarily denied claim 51 (SPet. Claim TT) raised in

Petitioner's state petition for habeas corpus. In re Sanchez, S049502 (DD). In this case, "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, and this Court "must determine what arguments or theories supported or . . . could have supported, the state court's decision; and then it must ask whether it is possible fair-minded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." Id. (emphasis added).

Generally, counsel are "given latitude in the presentation of their closing arguments, and courts must allow the prosecution to strike hard blows based on the evidence presented and all reasonable inferences therefrom." Ceja, 97 F.3d at 1253–1254 (quoting Baker, 10 F.3d at 1415); see also Molina, 934 F.2d at 1445 (prosecutor has wide latitude during closing argument to make reasonable inferences based on the evidence).

Petitioner contends that defense counsel's closing argument failed to respond to the prosecutor's improper argument regarding Petitioner's involvement in the Tatman and Bocanegra homicides. To this end, Petitioner repeats his allegations in claims 7, 42 and 50, *ante*, that defense counsel failed to point out evidence discrediting prosecution informant Hernandez (RT 2842, 2847-2848, 3051), and that Petitioner never told Hernandez that he (Petitioner) had stabbed anyone, (RT 2847-2848), and that he (Petitioner) did not inflict the fatal stab wounds upon the Bocanegras, (RT 2846), and that he (Petitioner) had no robbery motive. (RT 2852.) Nonetheless, for the reasons stated in claims 7, 42 and 50, the state court could reasonably have found that the performance of defense counsel was not deficient and did not prejudice the outcome of trial proceedings.

The trial judge appropriately admonished the jury that argument is not evidence. As to the evidence, the state court could reasonably have found it weighed substantially against the Petitioner as an aider and abettor of the homicides. The murders occurred about one month after Petitioner's release from prison for the 1982 assaults. (RT 2877-2879 2973-2974.) The evidence reasonably showed that Petitioner grabbed and held Mr. Bocanegra while Joey got a knife (RT

2843-2854), beat Mr. Bocanegra while Joey stabbed him (RT 2696-2706, 2719-2721, 2725, 2843-2844, 2854, 2858), rushed Mrs. Bocanegra and told Joey to "shut her up" (RT 2844, 2858), pushed Mrs. Bocanegra into a back room while Joey stabbed her, hitting her on the head with a bar (RT 2710-2714, 2720-2721, 2725, 2752, 2844), and that Mrs. Bocanegra's hands were bound and she was likely gagged (RT 2708, 2723, 2749-2751, 2754-2755, 2774-2775).

The state court also could have reasonably determined there was no basis upon which Petitioner could have effectively impeached Hernandez. Petitioner has not shown that Hernandez gave contradictory, inconsistent or false testimony, or that Hernandez was motivated by an undisclosed plea bargain. No facts or discrepancies between the testimony and the physical evidence establish or compel the conclusion that Hernandez, by virtue of his alleged substance addition, his plea deal, or otherwise, was motivated to and did testify falsely or inaccurately. (SPet. Ex. 900, pp. 4, 11; SResp. Ex. B.) Having cross-examined Hernandez at the preliminary hearing, Toton determined on that basis not to interview him. (SPet. Ex. 137, p. 4.) During cross-examination at the guilt and special circumstance phase, Hernandez's testimony was consistent with Petitioner's statements and the physical evidence that he had not been offered any disposition of then pending criminal matters prior to agreeing to testify at the Petitioner prosecution. (CT 576-577.) During cross-examination at the penalty phase, Hernandez admitted a deal on a then pending charge in exchange for his testimony in Petitioner. (RT 2850-2851.) Petitioner has not demonstrated that Hernandez's testimony was false or misleading, or that defense counsel acted unreasonably in not interviewing Hernandez.

Petitioner goes on to argue that defense counsel failed to explain the Bocanegra and Tatman evidence and verdicts, and failed to dispel the suggestion Tatman homicide was a capital crime for which they would sentence Petitioner (RT 3055), and failed to support the "lingering doubt" defense (RT 3063-3082). Petitioner points out that, as discussed in claim 42, prosecutor Ryals improperly argued that the jury was to decide whether Petitioner killed Mr. Tatman. (RT 3034-3036.) However, the record reflects that defense counsel pointed out improper argument and reminded the jury of the evidence presented in favor of the lingering doubt defense. (RT

3063-3082.)

As with the claims above, the jury was made well aware that Mr. Tatman's stabbing wounds were non-fatal injuries and that Petitioner's conviction for Mr. Tatman's murder was based on his aiding and abetting Reyes. (RT 235, 2693-2695.) Defense counsel made his argument to the jury that Petitioner did not intend to kill Mr. Tatman (CT 109; RT 2695), and the Bocanegras (CT 479, 500; see SHCP Ex. 419), and that there may have been a third assailant in the Bocanegra murders. (Pet. Exhs. 121, p. 2; 417, pp. 1-2; SHCP Ex. 137, Att. A.) Given Petitioner's desire to plead guilty to the Bocanegra murders, (SPet. Exhs. 520, p. 2; 700), the unrebutted evidence presented at the penalty phase, the admonitions of the trial judge that argument is not evidence, and the potential aggravating and mitigating effects of circumstances surrounding the Tatman murder, it is not reasonably probable that even had defense counsel further responded to Ms. Ryals's closing statements, a different sentence would have been returned.

Accordingly, it could reasonably be found that the prosecution arguments were not so prejudicial as to make trial fundamentally unfair. See Donnelly, 416 U.S. at 643 (improper jury argument by the state does not present a claim of constitutional magnitude unless it is so prejudicial that the petitioner's trial was fundamentally unfair . . . [t]o establish prejudice, the petitioner must demonstrate either persistent and pronounced misconduct or that the evidence was so insubstantial that, in all probability, but for the remarks, no conviction would have occurred); see also Furman, 190 F.3d at 1006 (rejecting habeas claim where, although some of prosecutor's arguments were improper, jury was told comments were not evidence, and evidence against defendant was substantial).

The state court could have reasonably concluded that Petitioner failed to establish that defense counsel's performance fell below an objective standard of reasonableness and that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland, 466 U.S., at 687-694.

A fair-minded jurist could therefore reasonably conclude that Petitioner failed to

establish rejection of the claim was contrary to, or an unreasonable application of, clearly established federal law, or an or an unreasonable determination of the facts in light of the evidence presented in the state court proceeding, viewed most favoring the prosecution. Jackson, 443 U.S. at 319. See 28 U.S.C. § 2254(d).

Claim 51 is denied.

k. Review of Claim 52

Petitioner claims cumulative ineffectiveness during the penalty phase, citing to claims 43-51, which he contends demonstrate defense counsel's failure to present evidence of Petitioner's minimal culpability, mitigating factors and defenses to the Tatman and Bocanegra homicides.

The California Supreme Court summarily denied claim 52 (SPet. Claim UU) raised in Petitioner's state petition for habeas corpus. In re Sanchez, S049502 (DD).

The California Supreme Court considered this issue on direct appeal and rejected it, finding that:

> Defendant claims that in combination, the errors at the penalty phase caused cumulative prejudice warranting a reversal of penalty. After review of the record, we disagree. Any prosecutorial misconduct that did occur did not significantly influence the fairness of defendant's trial or detrimentally affect the jury's determination of the appropriate penalty. [Citation]

Sanchez, 12 Cal.4th at 84.

For the reasons discussed in claims 43-51, the state court could reasonably have determined that Petitioner failed to establish in those claims that defense counsel was ineffective at penalty phase. These claims are insubstantial when considered cumulatively. See Karterman, 60 F.3d at 580; Rupe, 93 F.3d at 1445.

Respondent contends claim 52 is not cognizable because it creates and retroactively applies a "new rule" of constitutional law within Teague v. Lane, 489 U.S. 288. However, the Court finds the claim fails not because Petitioner seeks to apply a new rule of criminal procedure under Teague, but rather on grounds the claim lacks merit for the reasons stated.

Accordingly, this Court does not find Petitioner has established that defense counsel's

cumulative performance at penalty phase fell below an objective standard of reasonableness and that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland, 466 U.S., at 687-694.

The state court's rejection of this claim was not contrary to, or an unreasonable application of, clearly established federal law, or an unreasonable determination of the facts in light of the evidence presented in the state court proceeding, viewed most favoring the prosecution. Jackson, 443 U.S. at 319. See 28 U.S.C. § 2254(d).

Claim 52 is denied.

l. Review of Claim 53

In this claim, Petitioner alleges ineffective assistance of counsel due to conflict of interest arising from publicity about defense counsel Toton's pending disbarment.

The California Supreme Court summarily denied claim 53 (SPet. Claim VV) raised in Petitioner's state petition for habeas corpus. In re Sanchez, S049502 (DD). In this case, "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, and this Court "must determine what arguments or theories supported or . . . could have supported, the state court's decision; and then it must ask whether it is possible fair-minded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." Id. (emphasis added).

The Sixth Amendment provides that a criminal defendant shall have the right to "the Assistance of Counsel for his defense." As a general matter, a defendant alleging a Sixth Amendment violation must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. An exception exists for cases in which counsel actively represents conflicting interests. Mickens, 535 U.S. at 166; Cuyler, 446 U.S. at 345-50. In such a case, prejudice is presumed. Id. However, Petitioner must establish that "an actual conflict of interest actually affected the adequacy of [defense counsel's] representation." Sullivan, 446 U.S. at 348-49.

Thus, "until a defendant shows that his counsel *actively represented* conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance." Id., at 350 (emphasis in original).

Petitioner cites to the facts in claims 23, 24 and 43 and alleges that lead defense counsel Toton's disbarment publicity placed Toton in an actual conflict of interest of a personal and financial nature, preventing his effective assistance at penalty phase in ways not fully disclosed to Petitioner. The trial judge, according to Petitioner, did not adequately inquire into the matter and thereby allowed Toton to remain on the case. Petitioner alleges the trial judge never questioned Toton specifically about the debarment (Sealed RT July 26, 1988, at pp. 80-84), never obtained a copy of the debarment hearing decision, and agreed to Toton's proposal to have co-defense counsel Frank talk to Petitioner about the debarment. (Id., at p. 82-84.) Petitioner asserts that Toton sought to avoid the issue of debarment. Toton refused to appear at the debarment hearing. (SHCP Ex. 517, p. 8.) He refused to comment to reporters about the issue. (SCHP Exhs. 703, 704.)

This Court finds it unlikely that Toton's pending debarment influenced his actions as defense counsel, for reasons discussed by the state court. See Sanchez, 12 Cal.4th at 45-48, summarized as follows. Toton's refusal to allow Petitioner to plead guilty lengthened rather than shortened the duration of this proceeding. Toton participated in arrangements for defense investigation and engaged in pre-trial preparation. (RT [5/16/88] 3-4.) He conducted pre-trial discovery (CT 649-663, 769), made preemptory challenges (CT 836-840) filed evidentiary motions (CT 841-45, 846-53, 854-58, RT 80, 97-113), conducted vigorous witness examination and cross-examination (CT 518-625; RT 2664-2670), and made a reasoned closing argument (RT 169-196). The evidentiary record simply does not suggest the pace, manner and method of Toton's representation was influenced by the disciplinary proceedings. Toton was not disbarred until eight months after the court and defendant learned of the proceedings against him, and several month after completion of the penalty phase of defendant's trial. Sanchez, 12 Cal.4th at 45-48.

Even if there were a conflict, Petitioner was aware of the possible problems with Toton's continued representation and his right to conflict free representation, having discussed these matters with co-counsel Frank for approximately an hour and he expressly waived any such conflict. Sanchez, 12 Cal.4th at 46; RT [7/27/88] 4-10. Based thereon, the state supreme court could reasonably have found that Petitioner validly waived any such conflict on the record and decided to keep Toton as counsel. See Sanchez, 12 Cal.4th at 37-39, 45-46.

Petitioner alleges that it was likely that one or more jurors was aware of Toton's adverse publicity and, given Toton's failure to withdraw, was prejudiced by it. However, he offers no evidentiary predicate supporting the allegation. The evidence does not suggest the trial court's failure to question juror's about Toton's debarment rendered trial "fundamentally unfair." (See RT 591-609 (juror Jones), RT 647-669 (juror Mooney), RT 1168-1183 (juror Roberts), RT 1338-1355 (juror Crowder), RT 1813-1831 (juror Razo), RT 1879-1892 (juror Stell), RT 2117-2136 (juror G. Clark), RT 2137-2155 (juror P. Clark), RT 2401-2412 (juror O'Toole), RT 2435-2448 (juror Raymond), RT 2454-2472 (juror Rodriguez), RT 2554-2566 (juror Zamora)). For reasons more fully discussed in claims 49 *ante*, and 55, *post*, this Court agrees with the California Supreme Court's determination that there was "no showing the jury was unfair or biased." Sanchez, 12 Cal. 4th at 62, n.6. As noted by that court, during voir dire only two of the jurors selected, Razo and Rodriguez, had heard of the case. (RT 1814-1815; 2458-2460, 2471.) Neither of those two jurors mentioned having hearing of Toton. Both of those jurors indicated they could put what they had heard out of mind while deliberating. Id. Petitioner proffers no evidence these statements were somehow untrue. The state court could have reasonably determined that none of the jurors selected were exposed to media coverage of Toton's disciplinary matters. Sanchez, 12 Cal.4th at 61; claim 55, *post*. Moreover, the state court could reasonably find that questioning jurors about the publicity was likely to be more prejudicial than that publicity itself. (SHCP Ex. 137, ¶ 29.)

Petitioner has not established that defense counsel's performance at the penalty phase fell below an objective standard of reasonableness and that, but for counsel's unprofessional errors,

the result of the proceeding would have been different. Strickland, 466 U.S., at 687-694. It was not objectively unreasonable for the state court to find there was no reasonable probability any juror was aware of the debarment proceeding and influenced by it. See Sanchez, 12 Cal.4th at 61.

Accordingly, the Court finds that a fair-minded jurist could have found that Petitioner failed to establish that the state court rejection of the claim was contrary to, or an unreasonable application of, clearly established federal law, or an or an unreasonable determination of the facts in light of the evidence presented in the state court proceeding, viewed most favoring the prosecution. Jackson, 443 U.S. at 319. See 28 U.S.C. § 2254(d).

Claim 53 is denied.

m. Review of Claim 54

In his next claim, Petitioner alleges that juror George Razo was not an impartial juror.

The California Supreme Court summarily denied claim 54 (SPet. Claim KK) raised in Petitioner's state petition for habeas corpus. In re Sanchez, S049502 (DD). In this case, "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, and this Court "must determine what arguments or theories supported or . . . could have supported, the state court's decision; and then it must ask whether it is possible fair-minded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." Id. (emphasis added).

"[T]he right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors." Irvin, 366 U.S. at 722; see also Skilling, 561 U.S. at 377-78. "[P]art of the guarantee of a defendant's right to an impartial jury is an adequate voir dire to identify unqualified jurors." Morgan v. Illinois, 504 U.S. 719, 729 (1992). "Voir dire 'is conducted under the supervision of the court, and a great deal must, of necessity, be left to its sound discretion.'" Ristaino v. Ross, 424 U.S. 589, 594 (1976) (quoting Connors v. United States, 158 U.S. 408, 413 (1895)). "[T]he trial court retains great latitude in deciding what questions should be asked on voir dire." Mu'Min, 500 U.S. at 424. No hard-and-fast formula

dictates the necessary depth or breadth of voir dire, see United States v. Wood, 299 U.S. 123, 145–146 (1936), and "[t]he Constitution . . . does not dictate a catechism for voir dire, but only that the defendant be afforded an impartial jury." Morgan, 504 U.S. at 729. A trial court's failure to ask certain questions does not violate the Constitution unless it "render[s] the defendant's trial fundamentally unfair." Mu'Min, 500 U.S. at 426.

Petitioner contends that, during voir dire, Razo admitted his exposure to a news article about this case and stated that the murder of his cousin four years earlier would not affect his deliberations (RT 1815, 1822), but after the trial, Razo stated to a defense investigator that his cousin's murder may have had some impact on him in Petitioner's case. (SPet. Exhs. 124, App. B, ¶ 5; 124, ¶ 13.)

The record before the state court shows that juror Razo stated during voir dire that he recalled reading an article in the Bakersfield Californian that included Petitioner's picture and stated his involvement in a number of alleged criminal activities. (RT 1814-1816.) Razo stated that the article and the murder of his cousin four years earlier would not affect his deliberations. (RT 1821-1822.) The evidence in the record suggests it unlikely that Razo's deliberation was affected by the article. (See claim 49, *ante*.) Nor are Razo's post-trial hearsay and unsigned statements competent evidence that he was other than truthful during voir dire concerning his cousin's murder. See Fed. R. Civ. P. 802; Fed. R. Evid. 606(b); Cal. Evid. Code § 1150.

In addition, Petitioner has not demonstrated prejudice, i.e., that the error had a "substantial and injurious effect or influence in determining the jury's verdict." Brecht, 507 U.S. at 638. For the reasons just discussed, the state court could reasonably have concluded that Razo's deliberations were unaffected by the article.

Accordingly, it was not objectively unreasonable for the State Supreme Court to find there was no reasonable probability juror Razo was other than an impartial juror. 28 U.S.C. § 1746; Ortiz v. INS, 179 F.3d 1148, 1153-54 (9th Cir. 1994) (no ineffective assistance where no demonstration of prejudice).

The state court could reasonably have concluded that Petitioner failed to establish that the

performance of defense counsel at the penalty phase fell below an objective standard of reasonableness and that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland, 466 U.S., at 687-694.

The Court finds that a fair-minded jurist could have found that Petitioner failed to establish that the state court rejection of the claim was contrary to, or an unreasonable application of, clearly established federal law, or an unreasonable determination of the facts in light of the evidence presented in the state court proceeding, viewed most favoring the prosecution. Jackson, 443 U.S. at 319. See 28 U.S.C. § 2254(d).

Claim 54 is denied.

n. Review of Claim 55[9]

In this claim, Petitioner alleges court error by failure to voir dire the jury regarding publicity about defense counsel's pending disbarment.

The California Supreme Court considered this claim on appeal and found that the defense had not objected on this ground or sought a curative admonition at trial and thus waived the issue on appeal. Sanchez, 12 Cal.4th 61-62. That court also found that there was "no showing the jury was unfair or biased", Sanchez, 12 Cal. 4th at 62, n.6, and that "the trial court's voir dire adequately insured an impartial jury, without unnecessarily exposing the jury to the very information defendant found could prejudice his case." Sanchez, 12 Cal.4th at 62.

"[T]he right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors." Irvin, 366 U.S. at 722; see also Skilling, 561 U.S. at 377-78. "[T]he trial court retains great latitude in deciding what questions should be asked on voir dire." Mu'Min, 500 U.S. at 424. A trial court's failure to ask certain questions does not violate the Constitution unless it "render[s] the defendant's trial fundamentally unfair." Mu'Min, 500 U.S. at 426.

Two specific inquires of voir dire are constitutionally compelled: inquiries into racial prejudice against a defendant charged with a violent crime against a person of a different racial

[9] The legal basis of the Eighth Amendment was stricken as unexhausted. ECF No. 60 at 9:5.

group, id., at 424; and, in a capital case, inquiries into a juror's views on capital punishment. Morgan, 504 U.S. at 730-732. Petitioner does not raise such a basis for compelled inquiry in this claim. Instead he claims that the voir dire questionnaire, the trial court, and defense counsel all failed to inquire whether prospective jurors had heard anything about the attorneys in this case.

The Court is unpersuaded by this claim for reasons discussed in claim 49, *ante*. During voir dire, the following eight jurors indicated they had never heard of the case, did not know counsel, and did not subscribe to and did not usually read the Bakersfield Californian: juror Jones (CT 258; RT 594, 596-597, 606); juror Mooney (CT 256, RT 647, 664); juror Roberts (CT 237, RT 1170); juror Stell (CT 184, RT 1882); juror G. Clark (CT 229, RT 2120); juror P. Clark (CT 228; RT 2140-2141); juror O'Toole (CT 220, RT 2401-2402, 2406); and juror Raymond (CT 217, RT 2438-2439). Two jurors, juror Crowder (CT 207; RT 1342-1343) and juror Zamora (CT 213; RT 2554, 2563) regularly read the Bakersfield Californian but were unaware of the case and did not know counsel.

Only two of the jurors selected, Razo and Rodriguez, stated they had heard of the case. (RT 1814-1815; 2458-2460, 2471-2472.) Neither mentioned having hearing of Toton; both indicated they did not believe everything they read in newspapers and could put what they had heard out of mind while deliberating. Id. Petitioner proffers no evidence these juror statements were untrue. The state court could reasonably have found that prospective jurors were properly voir dired regarding any pretrial publicity without exposing them to the allegedly prejudicial information.

Based on the record, the state court could reasonably have found that specific voir dire regarding Toton's disbarment proceeding was unnecessary and could serve to education the jurors on the potentially prejudicial information. See Mu'Mun, 500 U.S. at 425-428 (1991) (trial court's failure to ask questions must "render the defendant's trial fundamentally unfair" and may be overturned only for "manifest error.").

Nor has Petitioner pointed to evidence that demonstrates prejudice, i.e., that the error had

a "substantial and injurious effect or influence in determining the jury's verdict." Brecht, 507 U.S. at 638 (1991). For the reasons just discussed, the state court could reasonably have concluded that, despite the limited voir dire regarding Toton's pretrial publicity, Petitioner received a fair trial.

Accordingly, the state court could reasonably have concluded that Petitioner failed to establish that defense counsel's performance fell below an objective standard of reasonableness and that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland, 466 U.S., at 687-694.

The state court rejection of the claim was not contrary to, or an unreasonable application of, clearly established federal law, or an unreasonable determination of the facts in light of the evidence presented in the state court proceeding, viewed most favoring the prosecution. Jackson, 443 U.S. at 319. See 28 U.S.C. § 2254(d).

Claim 55 denied.

o. Review of Claim 56

In his next claim, Petitioner alleges prejudicial and misleading victim photos were erroneously admitted at trial. He complains of autopsy photographs, excluded at the guilt phase, and admitted over defense objection at the penalty phase, and of crime scene victim photographs not objected to by the defense that were admitted during the penalty phase. According to Petitioner, these photos were cumulative of other testimony and misleading as to Petitioner's culpability in the homicides as they showed injuries not inflicted by Petitioner. He claims the photographs had an impact on jurors.

The California Supreme Court summarily denied claim 56 (SPet. Claim NN) raised in Petitioner's state petition for habeas corpus. In re Sanchez, S049502 (DD).

Additionally, the state supreme court found on direct appeal that admission of autopsy photographs was not prejudicial error:

> We have examined [the autopsy photographs] and have determined "they are not so horrific or shocking that we can conclude the trial court abused its discretion in admitting them." [Citation] The jury was familiar with the facts of the crime, and the photographs had substantial probative value in demonstrating defendant's

> culpability as an aider and abettor, and as corroborative of Hernandez's testimony implicating defendant in the crimes. Moreover, the probative value of the photographs was not diminished simply because the scalp wounds alone were not fatal to the victims. The photographs corroborated the testimonial evidence and were "relevant to a determination of the appropriateness of the death penalty." [Citation]
>
> Defendant's claim that there was no dispute as to the circumstances of the murders is not supported by the facts. Defense counsel Frank argued at the penalty phase that defendant should be spared the death penalty if the jury had a "lingering doubt" about the extent of defendant's participation in the Bocanegra killings.
>
> . . . [T]he autopsy photographs depicting the Bocanegras' scalp wounds were clearly probative of (i) the manner in which the victims were wounded, (ii) defendant's culpability as an aider and abettor, (iii) the malice and aggravation of the crime, and (iv) the appropriate ultimate penalty. [Citation] . . . [T]he court did not err in admitting the autopsy photographs at the penalty phase.

Sanchez, 12 Cal.4th 64-65.

A due process claim can be stated where graphic photos of victims make the trial fundamentally unfair. Jammal, 926 F.2d at 919. However, photos that are relevant to the crime charges and elements thereof are admissible. See Villafuerte, 75 F.3d at 1343. Under California law, "photographs which disclose the manner in which the victim was wounded are relevant on the issues of malice and aggravation of the crime and the penalty." Thompson, 50 Cal.3d at 182.

The Court finds that, based on the evidentiary record, and for the same reasons discussed in claim 45, the state court could reasonably have found that the two autopsy photos of Mr. Bocanegra and Mrs. Bocanegra's scalp wounds (People's Exhs. 13, 14), and the victim and crime scene photos (People's Exhs. 5-9, 15-43 and 55-66) served to corroborate testimony as to circumstances of the murders, defense counsel arguments of diminished culpability (see RT 3051-3055), and were relevant and probative as aggravation evidence and going to penalty selection. Autopsy photographs of scalp wounds to Mr. Bocanegra and Mrs. Bocanegra were properly admitted as relevant to expert testimony and issues of aggravation and penalty and were not unnecessarily gruesome. The crime scene and autopsy photographs could reasonably be seen by the state court as relevant to circumstances of the murders, identities of murders and murders' states of mind.

It appears unlikely that Petitioner was subjected to prejudice from defense counsel's

failure to object to the introduction of crime scene photographs depicting the wounds of the Bocanegras and Mr. Tatman. The trial court did not find the photographs prejudicial as depicting a "blood and guts type of thing. . . ." (RT 2881-2882.) The California Supreme Court could reasonably have found the photographs relevant and probative of charges and elements including intent to kill, aggravation and penalty, such that defense counsel's failure to object did not necessarily demonstrate ineffective assistance. See Nefstad, 66 F.3d 335, at *3 (holding no violation of due process where prosecutor during closing argument shows photographs of victim before and after murder because relevant to intent).

Admission of the photographs did not render trial "fundamentally unfair." Batchelor v. Cupp, 693 F.2d 859, 865 (9th Cir. 1982) (admission of photographs lies largely within the discretion of the trial court, whose ruling will not be disturbed . . . unless the admission of the photographs rendered the trial fundamentally unfair). Defense counsel Frank argued his lingering doubt theory, (RT 3048-3072), that Petitioner did not intend to kill or assist in killing Mr. Tatman (id.,), and that Petitioner had no criminal intent when he went to the Bocanegra residence (id.).

Additionally, even without the photographs, it is not reasonably probable the jury would have returned a sentence less than death. The evidence in aggravation including the circumstances surrounding the murders of the Bocanegras and Mr. Tatman, and Petitioner's 1982 assaults on Ammarie and Pena, was not insubstantial. (RT 2863-2874.)

Accordingly, the state court could have found that Petitioner failed to establish that defense counsel's performance at penalty phase fell below an objective standard of reasonableness and that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland, 466 U.S., at 687-694.

This Court does not find that the state court rejection of the claim was contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme Court, or that the state court's ruling was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding, viewed most favoring the

prosecution, Jackson, 443 U.S. at 319. See 28 U.S.C. § 2254(d).

Claim 56 is denied.

p. Review of Claim 57

Petitioner next claims that the trial court erred by inadequately and erroneously explaining the guilt verdicts and by improperly restricting defense counsel's closing argument regarding the guilt verdicts.

The California Supreme Court summarily denied this claim (SPet. Claim II) raised in Petitioner's state petition for habeas corpus. In re Sanchez, S049502 (DD).

The state supreme court also considered and rejected this claim on direct appeal. That court found that Petitioner failed to meet the state procedural requirement of timely objection and thus waived the issue on appeal and was procedurally barred on collateral review, noting that:

> [C]ounsel did not object to the court's incorrect reading of the multiple-murder special-circumstances verdict. Hence, if any error occurred, it was waived. [Citation] Moreover, even if counsel had objected, we would find any error the court made in reading incorrectly the multiple-murder special-circumstance findings, or any confusion caused by the court's verdict as to the Tatman charges, could have been rendered harmless by an admonition to the jury.

Sanchez, 12 Cal.4th at 75.

The state supreme court went on to consider the trial court's verdict misstatement and defense attorney Frank's argument to the jury clarifying and arguing the Tatman verdict, as follows:

> Prior to penalty phase arguments, at defense counsel Frank's request, the trial court read the information and summarized the guilt verdict, including the special circumstances findings, for the jury. In summarizing the verdict, the court purported to read from the August 3, 1988, minute order which . . . found true the multiple-murder special circumstance with respect to the Bocanegra murders only and did not include the Tatman murder in the special-circumstance disposition. Purporting to read from the August 3 minute order, the court inexplicably included Tatman as part of the [special circumstance] finding when it summarized the verdict to the jury. That finding is not in the record copy of the minute order.
>
> Also during penalty phase argument, Frank explained to the jury the meaning of the felony-murder charges in the Tatman verdict, and discussed defendant's role as an accomplice in the Tatman robbery and murder in an apparent attempt to clarify the court's allegedly inconsistent verdicts finding defendant guilty of the first degree murder and robbery of Tatman, but finding not true the robbery-murder special circumstance. Frank's explanation of the felony-murder verdict was

interrupted by Ryals's successful objection. Defendant now complains that the court's erroneous inclusion of the Tatman murder as part of the multiple-murder special-circumstance finding in the Bocanegra murders, and its failure to explain (or allow counsel to adequately explain) its allegedly inconsistent verdict and special-circumstance finding in the Tatman murder verdicts amounted to "the use of false or misleading evidence in capital sentencing" in violation of defendant's Fourteenth Amendment right to due process, and the Eighth Amendment right to a fair trial. [Citation]

In addition, Frank's penalty phase argument explained to the jury the meaning of the Tatman verdict: "The significance of what [defendant] was and wasn't convicted of, I would submit to you, establishes a lot of facts, number one, that he himself did not kill Woodrow [Wilson] Tatman. You heard the evidence. I think you can infer from the evidence, from the verdicts that it was not Ted Sanchez who killed Mr. Tatman, it was Robert Reyes. I submit to you that you can logically infer from what you've heard that Ted Sanchez did not kill Mr. Tatman nor did he share in Robert Reyes' intent to kill Mr. Tatman. Ted's role in that tragic incident was limited to removing some of Mr. Tatman's property. You heard the evidence. Mr. Tatman was not supposed to even have known that his property had been taken . . . ."

;

Frank next repeated to the jury: "Robert Reyes took it upon himself to kill, but Ted had no part in that." Frank then explained the multiple-murder special-circumstance findings and argued the circumstances of the Bocanegra murders as a mitigating factor. . . .

"Now let's turn to the charges involving the Bocanegras. Teddy was charged in count two of the Information with having killed Mr. Bocanegra and in count three of the Information with having killed Mrs. Bocanegra. Each count carried with it the special circumstance that the murder had been committed during the course of a robbery. Although he was found guilty of the murders of Mr. and Mrs. Bocanegra, the special circumstance that the murders occurred during the course of a robbery were not found true. In addition, he was found not guilty of robbing the Bocanegras as was alleged in count five.

"I submit to you that the importance of all this is that you can infer that when Ted- that when Ted went over to the Bocanegra house he did not do so with the intent to rob him. In fact, I would submit that you can infer that when he went over to that house he didn't intend to commit any criminal acts against the Bocanegras, and that it wasn't until after Joey and his father started fighting that Teddy thought about engaging in any criminal activity.

"Now, I bring all this to your attention because the law says that you can take into account the circumstances of the crimes when you deliberate on the issue of penalty . . . .

"Now this factor is general, looked upon as being an aggravating factor, one that doesn't usually contain any mitigating value, but I submit to you that, in this case, if you look closely at the facts and circumstances of what transpired at the Tatman and Bocanegra residence[s], you will find significant mitigating values there."

Frank thereafter told the jury that it was Reyes, not defendant, who killed Tatman, and that defendant "had no criminal intent when he went over to [the Bocanegras'] house." He also argued that these same facts could be interpreted as mitigating evidence . . . Frank's argument likely clarified for the jury any misperceptions about the verdict that occurred in light of the court's statement of the verdict.

Sanchez, 12 Cal.4th at 74-76. The state court, upon considering the foregoing found the misstatement to be alternatively procedurally barred and harmless:

> We conclude any error the court made in the court's verdict statement was harmless. Defendant requested the court read the verdict and special circumstance findings, and failed to correct the court or offer clarifying instructions in order to remedy any misperceptions the jury may have had about the verdict. Moreover, counsel's explanation of the verdict to the jury during argument more than clarified any potential confusion the jury may have experienced following the court's explanation. The prosecutor did not mention the erroneous verdict, or capitalize on its inclusion. Defendant was convicted of three counts of first degree murder, including one supportable special-circumstance allegation, as well as two counts of use of a deadly weapon, and one count of robbery. Under these circumstances, there is no reasonable possibility that consideration of the court's potentially confusing reading of the guilt phase verdict could have improperly influenced the jury. [Citation]

Sanchez, 12 Cal.4th at 76.

Petitioner contends that the trial court misled the jury, telling them Petitioner was guilty of Mr. Tatman's first degree murder, and guilty of robbery of Mr. Tatman, but not guilty of the robbery special circumstance under California Penal Code section 190.2(a)(17). In Petitioner's view, the jury was unaware the verdict implicitly found that Petitioner was not Mr. Tatman's actual killer and that Petitioner was found not to have intended the killing of Mr. Tatman.

The Court finds, however, that the state supreme could reasonably have determined that the trial court reading of the guilt verdicts was adequately clarified by defense counsel's penalty phase argument. Defense attorney Frank pointed out to the jury where the evidentiary record supported inference from the verdicts that Petitioner did not intend to kill Mr. Tatman and did not kill him. Sanchez, 12 Cal.4th at 74-77. Frank's argument was sufficient to make harmless any error by the trial court in explaining the verdicts.

Petitioner contends the trial court errantly explained the verdict regarding the "multiple murder" special circumstance, stating such was predicated on the murders of Mr. Tatman and Mr. Bocanegra when in fact it was predicated on the murders of Mr. & Mrs. Bocanegra. Petitioner claims this misled the jury into believing the Tatman murder was a capital crime and as such was an aggravating factor. Here as well, the state supreme court could reasonably have

found defense counsel Frank's argument and the court's admonitions and instructions to be sufficiently clarifying of misstatement by the trial court. Frank argued at penalty phase that, based on the evidence, Petitioner had no criminal intent when he arrived at the Bocanegra home, and explained to the jury the meaning of the felony-murder charges in the Tatman verdict, and discussed defendant's role as an accomplice in the Tatman murder and robbery. Id.; RT 3052-3072. These defense arguments sufficiently clarified the trial court's allegedly inconsistent verdicts finding defendant guilty of the first degree murder and robbery of Mr. Tatman but finding not true the robbery-murder special circumstance.

Petitioner contends that the trial court improperly restricted Frank's closing argument regarding the Tatman conviction and felony murder rule, on grounds the rule was not part of the evidence. Petitioner maintains this was error in that the prosecution had argued to the jury that Petitioner killed Mr. Tatman, treating the first degree felony-murder conviction as a capital crime. However, as Respondent correctly notes, the felony murder rule was not in evidence or part of the jury instructions. Defense counsel Frank was not restricted in arguing the circumstances surrounding the Tatman murder and verdict. Petitioner was able to argue the inference that he did not intend to kill Mr. Tatman and did not kill him. Defense counsel Frank's closing argument stated and clarified the specific charges levied and those upon which Petitioner was convicted and argued for mitigation based on the facts and circumstances in the evidentiary record. (RT 3050-3072.)

The state record does not reasonably suggest the likelihood that the trial court verdict statement improperly influenced the jury. Any error in the trial court's statement of the verdicts, that the multiple murder circumstance was based on the murders of Mr. Tatman and Mr. Bocanegra, was harmless because, based on Frank's penalty phase and closing arguments (RT 3050-3072) and the instructions given (RT 2611-2616, 3082-3097; CT 979-1021), there is no reasonable probability the jury mistakenly believed Tatman was a capital crime.

Accordingly, Petitioner has not established that defense counsel's performance at penalty phase fell below an objective standard of reasonableness and that, but for counsel's

unprofessional errors, the result of the proceeding would have been different. Strickland, 466 U.S., at 687-694.

This Court does not find that the state court rejection of the claim was contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme Court, or that the state court's ruling was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding, viewed most favoring the prosecution, Jackson, 443 U.S. at 319. See 28 U.S.C. § 2254(d).

Claim 57 is denied.

q. Review of Claim 58[10]

In his next claim, which includes multiple subclaims, Petitioner alleges inadequate and unconstitutional jury instructions at the penalty phase. The subclaims are reviewed separately.

i. Lingering Doubt

Petitioner alleges that the trial court rejected his "lingering doubt" instruction even though California law mandates mitigating consideration of lingering doubt and defense counsel argued discrepancies in Hernandez's testimony created lingering doubt as to Petitioner's guilt.

The state supreme court reached and rejected this subclaim on direct appeal, finding that the trial court did not err in rejecting Petitioner's specific instruction on lingering doubt:

> Defendant's proposed instruction asked the jury to "consider as a mitigating factor residual or lingering doubt as to Mr. Sanchez's guilt for the crimes of which he has been convicted." Although defendant recognizes that the state and federal Constitutions do not require a residual doubt instruction, he asserts the instruction should have been given in this case because it was warranted by the evidence. He relies on section [California Penal Code §] 190.3, factor (f), which gives the judge discretion to instruct the jury "on any points of law pertinent to the issue," and case law that holds section 190.3, factor (f) may require a court to give the "residual doubt" instruction should the evidence warrant it. [Citation] Claiming that the evidence was insufficient to find him guilty of the first degree murders of Mr. and Mrs. Bocanegra, defendant contends "residual doubt" was "a circumstance of the capital crimes that could be considered by the jury under both [section] 190.3, factors (a) and (k)."
>
> We find no error. It is true, as defendant claims, that the jury's consideration of residual doubt is proper; defendant may assert his possible innocence to the jury as a factor in mitigation under section 190.3, factors (a) and (k). [Citation] But

[10] The legal basis of the Fifth Amendment, and the legal basis of the Sixth Amendment except with regard to the lingering doubt instruction was stricken as unexhausted. ECF No. 60 at 9:6-8.

> there is no requirement, under either state or federal law, that the court specifically instruct the jury to consider any residual doubt of defendant's guilt. [Citation]
>
> Here, the trial court instructed the jury that it could consider "[t]he circumstances of the crime of which defendant was convicted in the present proceeding and the existence of any special circumstance found to be true" (§ 190.3, factor (a)), and "any other circumstance which extenuates the gravity of the crime, even though it is not a legal excuse for the crime, and any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial" (Id., factor (k)). These instructions on the scope of mitigating circumstances sufficiently encompassed the concept of residual doubt about defendant's guilt. [Citation]
>
> In addition, as we have observed, defense counsel told the jury that the circumstances of the crimes could be viewed as mitigating evidence of defendant's intent to kill. He also emphasized to the jury that section 190.3, factor (k) allows it to "consider any aspect of the defendant's character or record that he offers as a basis for a sentence less than death," and asked the jury whether it had "some lingering doubts about what [it] would have seen" if it had been inside the Bocanegra residence at the time of the murders. In light of the proper instructions given to the jury, and counsel's argument, we conclude the trial court did not err in rejecting defendant's specific instruction on lingering doubt. [Citation]

Sanchez, 12 Cal.4th at 77-83.

"[T]he Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Lockett, 438 U.S. 586 at 604; Eddings v. Oklahoma, 455 U.S. 104, 113-114 (1982) (adopting rule in Lockett). "The standard against which we assess whether jury instructions satisfy the rule of Lockett and Eddings was set forth in Boyde, 494 U.S. 370 (1990)." Johnson v. Texas, 509 U.S. 350, 367-68 (1993). In Boyde, the Supreme Court held that "there is no . . . constitutional requirement of unfettered sentencing discretion in the jury, and States are free to structure and shape consideration of mitigating evidence 'in an effort to achieve a more rational and equitable administration of the death penalty.'" Boyde, 494 U.S. at 377 (quoting Franklin, 487 U.S. at 181 (plurality opinion)).

In evaluating the instructions, the "reviewing court must determine 'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence.'" Johnson, 509 U.S. at 367 (quoting

Boyde, 494 U.S. at 380). "[W]e do not engage in a technical parsing of this language of the instructions, but instead approach the instructions in the same way that the jury would—with a 'commonsense understanding of the instructions in the light of all that has taken place at the trial.'" Id., at 368 (quoting Boyde, 494 U.S. at 381). Further, a single instruction "may not be judged in artificial isolation," but must be considered in light of the instructions as a whole and the entire trial record." Estelle v. McGuire, 502 U.S. 62, 72 (1991).

The failure to identify whether factors are aggravating or mitigating is plainly not contrary to or an unreasonable application of Supreme Court authority. In Pulley v. Harris, the Supreme Court reviewed California's sentencing system, including the manner in which the jury considered relevant factors in deciding the penalty. Pulley, 465 U.S. at 51. The Supreme Court noted that the 1977 law (like the 1978 law applicable in this case) did not identify or separate the aggravating or mitigating factors. Id. at 53 n.14. The Court found California's death penalty law to be constitutional. Id. at 51 ("Assuming that there could be a capital sentencing system so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review, the 1977 California statute is not of that sort.").

In Tuilaepa v. California, the Supreme Court again considered California's death penalty sentencing scheme. The Supreme Court rejected the argument that California's "single list of factors" was unconstitutional. The Court stated:

> This argument, too, is foreclosed by our cases. A capital sentencer need not be instructed how to weigh any particular fact in the capital sentencing decision. In California v. Ramos, for example, we upheld an instruction informing the jury that the Governor had the power to commute life sentences and stated that "the fact that the jury is given no specific guidance on how the commutation factor is to figure into its determination presents no constitutional problem." 463 U.S., at 1008–1009, n. 22, 103 S. Ct., at 3457–3458, n. 22. Likewise, in Proffitt v. Florida, we upheld the Florida capital sentencing scheme even though "the various factors to be considered by the sentencing authorities [did] not have numerical weights assigned to them." 428 U.S., at 258, 96 S. Ct., at 2969. In Gregg, moreover, we "approved Georgia's capital sentencing statute even though it clearly did not channel the jury's discretion by enunciating specific standards to guide the jury's consideration of aggravating and mitigating circumstances." Zant, 462 U.S., at 875, 103 S. Ct., at 2742. We also rejected an objection "to the wide scope of evidence and argument" allowed at sentencing hearings. 428 U.S., at 203–204, 96 S. Ct., at 2939. In sum, "discretion to evaluate and weigh the circumstances relevant to the particular defendant and the crime he committed" is not impermissible in the capital sentencing process. McCleskey v. Kemp, 481 U.S.

> 279, 315, n. 37, 107 S. Ct. 1756, 1779, n. 37, 95 L.Ed.2d 262 (1987). "Once the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty ... the jury then is free to consider a myriad of factors to determine whether death is the appropriate punishment." Ramos, supra, 463 U.S., at 1008, 103 S. Ct., at 3457. Indeed, the sentencer may be given "unbridled discretion in determining whether the death penalty should be imposed after it has found that the defendant is a member of the class made eligible for that penalty." Zant, *supra*, 4[62] U.S., at 875, 103 S. Ct., at 2742; see also Barclay v. Florida, 463 U.S. 939, 948–951, 103 S. Ct. 3418, 3424–3425, 77 L.Ed.2d 1134 (1983) (plurality opinion). In contravention of those cases, petitioners' argument would force the States to adopt a kind of mandatory sentencing scheme requiring a jury to sentence a defendant to death if it found, for example, a certain kind or number of facts, or found more statutory aggravating factors than statutory mitigating factors. The States are not required to conduct the capital sentencing process in that fashion. See Gregg, *supra*, 428 U.S., at 199–200, n. 50, 96 S. Ct., at 2937–2938, n. 50.

Tuilaepa, 512 U.S. at 975. The Court finds that, based on the state record, the jury was adequately instructed that it could consider the circumstances of the convictions in the present proceeding including any special circumstance found to be true and any other mitigating circumstances under § 190.3, factor (k), encompassing the concept of residual or lingering doubt about Petitioner's guilt.

There is no persuasive argument that the instruction given in this case in any way foreclosed the jury from considering any relevant mitigating evidence. As noted by Respondent, the Supreme Court has examined the language in California's jury instruction on mitigation multiple times, and upheld it against constitutional challenges every time. See Ayers v. Belmontes, 549 U.S. 7 (2006); Brown v. Payton, 544 U.S. 133, 141, 142 (2005); Boyde, 494 U.S. 370. Thus, the state court rejection of the claim was reasonable. Even if constitutional trial error did occur, Petitioner is not entitled to relief because any such error did not have a "substantial and injurious effect or influence in determining the jury's verdict." Brecht, 507 U.S. at 638.

The trial court's use of the standard penalty phase instruction, California Criminal Jury Instruction, (CALJIC), No. 8.84.1 (1986 rev.), regarding California Penal Code § 190.3 factor (k), is adequate to permit jurors to consider relevant mitigating evidence. Boyde, 494 U.S. 370 at 381-382; Lockett, 438 U.S. at 604. The Eighth Amendment does not require that a jury be instructed on particular statutory mitigating factors. Buchanan v. Angelone, 522 U.S. 269, 275-

77 (1998).

Petitioner then failed to established that defense counsel's performance at the penalty phase fell below an objective standard of reasonableness and that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland, 466 U.S., at 687-694.

Respondent contends this subclaim is not cognizable because it creates and retroactively applies a "new rule" of constitutional law within Teague v. Lane, 489 U.S. 288. However, the Court finds the claim fails not because Petitioner seeks to apply a new rule of criminal procedure under Teague, but rather on grounds the claim lacks merit for the reasons stated.

The Court finds the state court rejection of the subclaim was not contrary to, or an unreasonable application of, clearly established federal law, or an unreasonable determination of the facts in light of the evidence presented in the state court proceeding, viewed most favoring the prosecution. Jackson, 443 U.S. at 319. See 28 U.S.C. § 2254(d).

This subclaim is denied.

ii. California Penal Code § 190.3 Sentencing Factors

Petitioner next alleges that the trial court's use of CALJIC No. 8.84.1 (1986 rev.), which includes (Cal. Pen. Code § 190.3) sentencing factors "a" (consideration of current offense), "b" (consideration of violent criminal activity), and "c" (consideration of prior felony conviction), erroneously allowed the jury to inflate the aggravating weight of Petitioner's guilt phase crimes. Petitioner contends the jury improperly applied sentencing factors regarding presence of "violent criminal activity" and "prior felony convictions" to the charged offenses and to Petitioner's 1982 assaults on store owner Hassan Ammarie and friend Arturo Pena.

The state supreme court reviewed this subclaim on direct appeal and rejected it, providing that:

> [California Penal Code] Section 190.3 requires the jury to consider the circumstances of the offense (§ 190.3, factor (a)), the presence of violent criminal activity, (id., factor (b)), and prior felony convictions (id., factor (c)). The jury was instructed in the statutory language. [Citation] Defendant now claims the court erred by failing to clarify the differences between the above factors, thus

> allowing the jury to give multiple consideration to the aggravating evidence under all these factors. He also asserts that the instructions erroneously permitted the jury to consider defendant's prior assaults under both factors (b) and (c), and improperly inflated the weight the jury should have given to either prior crime.
>
> We have noted that section 190.3, factor (b), concerns crimes other than those for which defendant is being prosecuted [Citation], and we have directed that courts should give clarifying instructions "to avoid any confusion" that may be caused by the above factors. [Citation.] But we have consistently found that the absence of clarifying instructions is harmless [Citation], and that the standard instructions do not "inherently encourage 'double-counting' under section 190.3." [Citation] Therefore, "even if one or more jurors mistakenly consider a particular criminal incident under the wrong factor, there is little risk that a reasonable jury will give a single incident duplicative consideration." [Citation] Moreover, both the prosecutor and defense counsel separately explained the proper use of the evidence under the separate factors. Thus, any potential confusion the jury may have faced in light of the instructions was adequately addressed by both counsel's arguments. Accordingly, given the arguments and the absence of any improperly admitted evidence, we find that the court's failure to clarify the scope of each factor did not affect the outcome of the trial.

Sanchez, 12 Cal.4th at 79.

The legal standard for review of penalty phase instructions is also set forth in the subclaim above, to wit, "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." Boyde, 494 U.S. at 380.

Petitioner's allegations lack merit. It is plainly not contrary to Supreme Court precedent to instruct the jury with all sentencing factors. The Supreme Court stated in Gregg v. Georgia:

> The petitioner objects, finally, to the wide scope of evidence and argument allowed at [penalty] hearings. We think that the Georgia court wisely has chosen not to impose unnecessary restrictions on the evidence that can be offered at such a hearing and to approve open and far-ranging argument. So long as the evidence introduced and the arguments made at the [penalty] hearing do not prejudice a defendant, it is preferable not to impose restrictions. We think it desirable for the jury to have as much information before it as possible when it makes the sentencing decision.

Gregg, 428 U.S. at 203-204 (citations omitted).

The Court finds there is no reasonable likelihood the jury misinterpreted the instruction by inflating aggravation from the guilt phase crimes. It is well established that a sentencing court need not identify which factors are aggravating and which are mitigating. Pulley, 465 U.S. at 51 and 53 n.14; Tuilaepa, 512 U.S. at 979-80.

The state court could reasonably have found that the prosecution guilt phase argument was relevant only under the first sentencing factor. In fact, defense counsel Frank argued as much to the jury, that the guilt phase crimes should be considered only with regard to the first sentencing factor, (RT 3066-3067), ameliorating any juror confusion as to the current offense factor "a".

The Ninth Circuit has found the second factor, which refers to crimes for which the defendant has not been convicted, not to be unconstitutionally vague, Bonin v. Calderon, 59 F.3d 815, 848 (9th Cir. 1995), and that the third factor on its face aggravates for prior felony convictions precluding any reasonable probability the jury aggravated for the charged offenses. Id. The penalty phase evidence was relevant only to the second and third factors. The jury then could properly have considered the 1982 assaults under both the second and third factors, and that the prosecution's argument in this regard was not improper. People v. Melton, 44 Cal.3d 713, 764 (1988) (no constitutional obstacle to separate consideration of properly distinct aspects of the penalty determination, even when those aspects happen to coexist in a single incident).

Additionally, any error was harmless given the substantial weight of evidence in aggravation. Clemons v. Mississippi, 494 U.S. 738, 753 (1990) ("what is important . . . is an individualized determination on the basis of the character of the individual and the circumstances of the crime.").

Respondent contends this subclaim is not cognizable because it creates and retroactively applies a "new rule" of constitutional law within Teague v. Lane, 489 U.S. 288. However, the Court finds the claim fails not because Petitioner seeks to apply a new rule of criminal procedure under Teague, but rather on grounds the claim lacks merit for the reasons stated.

The Court finds that the state court rejection of the subclaim was not contrary to, or an unreasonable application of, clearly established federal law, or an unreasonable determination of the facts in light of the evidence presented in the state court proceeding, viewed most favoring the prosecution. Jackson, 443 U.S. at 319. See 28 U.S.C. § 2254(d).

This subclaim is denied.

iii. Instructing Which Sentencing Factors were Aggravating/Mitigating

Petitioner next alleges that the trial court improperly rejected defense instructions addressing which sentencing factors were aggravating and which were mitigating, (CT 1078-83), allowing the jury to improperly consider the absence of a mitigating factor as itself an aggravating factor.

The state supreme court considered and rejected this subclaim on direct appeal:

> Defendant claims the prosecutor improperly implied that the absence of mitigating evidence under [California Penal Code] section 190.3, factors (e) and (f) should be considered as aggravating evidence. [Citation] We find no error. The prosecutor simply told the jury that there "was no evidence" of factor (e), and also argued that she could not recall hearing any factor (f) evidence, but that if the jury heard it the evidence could be considered in mitigation. Moreover, the jury was specifically instructed, pursuant to defendant's request, that the "absence of any particular factor in mitigation is not to be treated as any factor in aggravation." It is presumed that the jury followed the court's instruction. [Citation]

Sanchez, 12 Cal.4th at 77-83.

The legal standard for review of penalty phase instructions is also set forth in the subclaim above, to wit, "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." Boyde, 494 U.S. at 380.

The Court finds it clearly established that a sentencing court need not identify which factors are aggravating and which are mitigating. Pulley, 465 U.S. at 51 and 53 n.14; Tuilaepa, 512 U.S. at 979-80. The failure to identify whether factors are aggravating or mitigating is not contrary to or an unreasonable application of Supreme Court authority. Pulley, 465 U.S. at 53 n.14; Tuilaepa, 512 U.S. at 975-80. This is fatal to Petitioner's subclaim, since he cannot show that the state court rejection of his claim was contrary to or an unreasonable application of Supreme Court precedent.

The Ninth Circuit arrived at the same conclusion in Williams v. Calderon: "The death penalty statute's failure to label aggravating and mitigating factors is constitutional." Williams v. Calderon, 52 F.3d 1465, 1484-1485 (9th Cir. 1995). The Ninth Circuit has found California's

death penalty statute does not violate due process by failure to label factors as aggravating or mitigating. See Williams, 52 F.3d at 1148-1485.

Respondent contends this subclaim is not cognizable because it creates and retroactively applies a "new rule" of constitutional law within Teague v. Lane, 489 U.S. 288. However, the Court finds the claim fails not because Petitioner seeks to apply a new rule of criminal procedure under Teague, but rather on grounds the claim lacks merit for the reasons stated.

The Court finds that the state court rejection of the subclaim was not contrary to, or an unreasonable application of, clearly established federal law, or an unreasonable determination of the facts in light of the evidence presented in the state court proceeding, viewed most favoring the prosecution. Jackson, 443 U.S. at 319; see 28 U.S.C. § 2254(d).

This subclaim is denied.

iv. Deleting Inapplicable Mitigating Factors

Petitioner alleges in this subclaim that the trial court erred in rejecting instructions deleting mitigating factors (Cal. Pen. Code § 190.3 (e) and (f)) which were not claimed by Petitioner and thus not relevant this case, i.e., factors that "victims participated in, or consented to their own deaths" or that Petitioner's actions were "morally justified." (CT 1078-1079.) Petitioner alleges that the prosecution argued the absence of evidence supporting these claims and thereby implied an illusory aggravating factor.

The state supreme court considered this claim on direct appeal and rejected it, noting that:

> Defendant contends the court erred when it rejected his request to delete inapplicable mitigating factors (e) (whether victim participated in crime) and (f) (moral justification for crime) of [California Penal Code] section 190.3 from its standard statutory instructions, and injected irrelevant considerations into the jury's penalty deliberations, depriving him of his right to a fair and reliable penalty determination under the Eighth and Fourteenth Amendments.
>
> The jury, however, was properly instructed to consider all the factors "if applicable" and later told to "take into account and be guided by" the applicable factors. [Citation] As we have in previous cases, we assume the jury properly followed the instruction and concluded that mitigating factors not supported by evidence were simply not "applicable." [Citation]

Sanchez, 12 Cal.4th at 79.

The Court finds this subclaim to be unavailing. As noted in discussion of the subclaims above, the jury was instructed with CALJIC No. 8.84.1. That instruction allowed the jury to "consider" each factor "if applicable", (CT 994-995; RT 3087-3089), precluding any reasonable probability Petitioner's rights were violated by a failure to delete sentencing factors (Cal. Pen. Code § 190.3 (e) and (f)).

The legal standard for review of penalty phase instructions is "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." Boyde, 494 U.S. at 380. In this instance, it was not contrary to Supreme Court precedent to instruct the jury with all sentencing factors where the instructions expressly indicated that the jury was to consider each factor only if applicable. The Supreme Court stated in Gregg v. Georgia:

> The petitioner objects, finally, to the wide scope of evidence and argument allowed at [penalty] hearings. We think that the Georgia court wisely has chosen not to impose unnecessary restrictions on the evidence that can be offered at such a hearing and to approve open and far-ranging argument. So long as the evidence introduced and the arguments made at the [penalty] hearing do not prejudice a defendant, it is preferable not to impose restrictions. We think it desirable for the jury to have as much information before it as possible when it makes the sentencing decision.

Gregg, 428 U.S. at 203-04. In Williams v. Calderon, the Ninth Circuit stated:

> Williams argues that it was error to read to the jury the entire list of factors the state considered relevant to the sentencing decision, even when some did not apply. To the contrary, the jury instructions expressly indicated that the jury was to consider each factor only "if applicable." Moreover, "[i]t seems clear ... that the problem [of jury inexperience] will be alleviated if the jury is given guidance regarding the factors about the crime and the defendant that the State, representing organized society, deems particularly relevant to the sentencing decision." Gregg v. Georgia, 428 U.S. 153, 192, 96 S. Ct. 2909, 2934, 49 L.Ed.2d 859 (1976) (plurality opinion). The reading of the complete list gave the jury more guidance, not less. We find nothing in the Constitution prohibiting the very practice Gregg encouraged.

Williams, 52 F.3d 1465 at 1481.

Consistent with the foregoing, this Court finds that the state court could reasonably have found it unlikely that the jury applied the challenged instruction in a way that prevented

consideration of constitutionally relevant evidence. There was no requirement that a trial court redact the instructions to include only those factors deemed applicable. Moreover, the instruction itself advises the jury to consider the factors "if applicable." In Bonin v. Calderon, the Ninth Circuit again rejected the argument posited by Petitioner. Bonin, 59 F.3d at 847-48. The Bonin court noted that "the cautionary words 'if applicable' warned the jury that not all of the factors would be relevant and that the absence of a factor made it inapplicable rather than an aggravating factor." Id.

Respondent contends this subclaim is not cognizable because it creates and retroactively applies a "new rule" of constitutional law within Teague v. Lane, 489 U.S. 288. However, the Court finds the claim fails not because Petitioner seeks to apply a new rule of criminal procedure under Teague, but rather on grounds the claim lacks merit for the reasons stated.

The Court finds that that the state court rejection of the subclaim was not contrary to, or an unreasonable application of, clearly established federal law, or an or an unreasonable determination of the facts in light of the evidence presented in the state court proceeding, viewed most favoring the prosecution. Jackson, 443 U.S. at 319. See 28 U.S.C. § 2254(d).

This subclaim is denied.

v. Limiting Aggravation

Petitioner next alleges that the trial court erred by failing to instruct the jury it could not consider aggravating factors not included in the instructions. He claims this potentially allowed unrestricted aggravation. (RT 3087-3089, 3095.)

The state supreme court considered and rejected this subclaim on direct appeal, finding that there was no violation of state law:

> Defendant also asserts the trial court erred by failing to instruct the jury not to consider non-statutory aggravating evidence in determining penalty. We have repeatedly rejected this contention, and defendant has not persuaded us to reconsider our conclusion. [Citation] Nor was the trial court required to label various factors as exclusively aggravating or mitigating. [Citation]

Sanchez, 12 Cal.4th at 79-80.

The legal standard for review of penalty phase instructions is as set forth in the subclaim above, to wit, "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." Boyde, 494 U.S. at 380.

This Court agrees with the state court's rejection of the subclaim. At bottom, "what is important at the selection stage is an individualized determination on the basis of the character of the individual and the circumstances of the crime." Zant, 462 U.S. at 879. There is no constitutional prohibition against non-statutory aggravating factors. Harris v. Pulley, 692 F.2d 1189, 1193-94 (1982), overruled on other grounds, 465 U.S. 37 (1984); Zant, 462 U.S. at 878-79. As noted, California's death penalty scheme allows for a sufficiently individualized sentence determination. Tuilaepa, 512 U.S. at 975. The trial court's failure to instruct the jury that it could not consider non-statutory aggravating factors is plainly not contrary to or an unreasonable application of Supreme Court authority. Pulley, 465 U.S. at 51, 53 n.14; Tuilaepa, 512 U.S. at 975-80.

The California Supreme Court found the specific instructions given allowed a fully individualized evaluation of aggravating and mitigating evidence. Sanchez, 12 Cal.4th at 79-80, citing People v. Hawthorne, 4 Cal.4th 43 at 74-74. Petitioner's citation to People v. Boyd, 38 Cal.3d 762 (1985) is not authority otherwise. Nor is it "the province of a federal habeas court to re-examine state court determinations on state law questions." Estelle, 502 U.S. at 67-68. Furthermore, as the Supreme Court stated in Gregg v. Georgia:

> The petitioner objects, finally, to the wide scope of evidence and argument allowed at [penalty] hearings. We think that the Georgia court wisely has chosen not to impose unnecessary restrictions on the evidence that can be offered at such a hearing and to approve open and far-ranging argument. So long as the evidence introduced and the arguments made at the [penalty] hearing do not prejudice a defendant, it is preferable not to impose restrictions. We think it desirable for the jury to have as much information before it as possible when it makes the sentencing decision.

Gregg, 428 U.S. at 203-04.

Respondent contends this subclaim is not cognizable because it creates and retroactively applies a "new rule" of constitutional law within Teague v. Lane, 489 U.S. 288. However, the Court finds the claim fails not because Petitioner seeks to apply a new rule of criminal procedure under Teague, but rather on grounds the claim lacks merit for the reasons stated.

The Court finds that the state court rejection of the subclaim was not contrary to, or an unreasonable application of, clearly established federal law, or an unreasonable determination of the facts in light of the evidence presented in the state court proceeding, viewed most favoring the prosecution. Jackson, 443 U.S. at 319; see 28 U.S.C. § 2254(d).

This subclaim is denied.

vi. Limiting Modifiers

Petitioner alleges that the trial court erred in denying his requested special instruction that sought to delete the adjective "extreme" from the reference in [mitigation factor] (d) to being under the influence of mental or emotional disturbance, and the adjective "substantial" from the reference in [mitigation factor] (g) to being under the domination of another person. He claims this prevented presentation of his mitigation evidence. (CT 1078-1079.)

The state supreme court considered and rejected this claim on direct appeal, finding that:

> Defendant contends the trial court violated the Eighth Amendment by refusing his requested deletion of the adjectives "extreme" and "substantial" in instructions given in the language of section 190.3, factors (d) (whether defendant was under the influence of extreme mental or emotional disturbance at time of offense), and (g) (whether defendant acted under extreme duress or substantial domination of another person). We have rejected this argument in numerous cases, and defendant has failed to persuade us that we should reconsider these decisions. (See Turner, supra, 8 Cal.4th at pp. 208-209, and cases cited [catchall provision of section 190.3, factor (k) referring to "any other circumstance which extenuates the gravity of the crime" allows consideration of non-extreme mental or emotional conditions when read in conjunction with instructions on factors (d) and (g)].)

Sanchez 12 Cal. 4th at 80.

> The jury, however, was properly instructed to consider all the factors "if applicable" and later told to "take into account and be guided by" the applicable factors. [Citation] As we have in previous cases, we assume the jury properly followed the instruction and concluded that mitigating factors not supported by evidence were simply not "applicable." [Citation]

Sanchez, 12 Cal.4th at 79.

The Constitution requires that the jury must "not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Lockett, 438 U.S. at 604. The test is "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." Boyde, 494 U.S. at 380. Further, a single instruction "may not be judged in artificial isolation," but must be considered in light of the instructions as a whole and the entire trial record. Estelle, 502 U.S. at 72.

Here, the Court finds that the trial court's use of CALJIC No. 8.84.1 (1986 rev.), regarding California Penal Code § 190.3 factor (k), was adequate to permit jurors to consider relevant mitigating evidence. Boyde, 494 U.S. at 381-82 (1990). The state supreme court rejected this subclaim, finding sufficient the trial court's instruction that (Cal. Pen. Code § 190.3(k)) includes:

> [A]ny other circumstance which extenuates the gravity of the crime, even though it is not a legal excuse for the crime, and any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial.

The Ninth Circuit has rejected Petitioner's argument where, as here, the jury was advised it could consider any other mitigating matter. See Hendricks v. Vasquez, 974 F.2d 1099, 1109 (9th Cir. 1992). Moreover, as noted by the California Supreme Court, factors (d) and (g) cannot be read in isolation. It is clear that factor (k) on its face allows the jury to consider non-extreme and non-substantial mental or emotional conditions when read in conjunction with instructions on factors (d) and (g). See Sanchez, 12 Cal. 4th at 80.

The Supreme Court has stated that factor (k) directed the jury to consider "any other circumstance that might excuse the crime. . . ." Boyde, 494 U.S. at 382. Nothing suggests the instruction in issue here precluded the jury from considering the mitigating evidence proffered

by Petitioner. See e.g., Id. at 378. The Supreme Court has found that "[t]he factor (k) instruction is consistent with the constitutional right to present mitigating evidence in capital sentencing proceedings." Ayers, 549 U.S. at 24.

In addition, the Supreme Court has reviewed this instruction on several occasions. It has rejected claims that the instruction restricts the jury's consideration of mitigating evidence in every instance. See, e.g., Ayers, 549 U.S. at 7; Brown, 544 U.S. at 133; Boyde, 494 U.S. 370.

Respondent contends this subclaim is not cognizable because it creates and retroactively applies a "new rule" of constitutional law within Teague v. Lane, 489 U.S. 288. However, the Court finds the claim fails not because Petitioner seeks to apply a new rule of criminal procedure under Teague, but rather on grounds the claim lacks merit for the reasons stated.

The Court finds that the state court rejection of the subclaim was not contrary to, or an unreasonable application of, clearly established federal law, or an unreasonable determination of the facts in light of the evidence presented in the state court proceeding, viewed most favoring the prosecution. Jackson, 443 U.S. at 319. See 28 U.S.C. § 2254(d).

This subclaim is denied.

vii. "Pinpoint" Mitigation Instructions

In this subclaim, Petitioner alleges that the trial court erred in denying his requested special "pinpoint" instructions relating to the defense theory of mitigating childhood and family facts and circumstances. He argues that without the pinpoint instruction there is a reasonable likelihood the jury did not understand the defense and could consider all factors in the instructions as mitigation.

The state supreme court considered and rejected this subclaim on direct appeal, stating that:

> Defendant complains that the court erred in rejecting his instructions discussing his childhood and background, that were required to augment the section 190.3, factor (k) instruction. We disagree. The jury was fully aware that it could consider defendant's childhood in mitigation under factor (k); it was further instructed that this factor allowed the jury to consider "any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death." In addition, the jury was instructed that it was "free to assign whatever moral or sympathetic value you deem appropriate to each and all of the

> various factors" and that [t]o return a judgment of death, each of you must be persuaded that the aggravating evidence and/or circumstances is so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." These instructions, combined with the arguments of Ryals (informing the jury it could consider as mitigating defendant's background and character) and Frank (telling jury that factor (k) includes any evidence of defendant's character or background that he offers), lead us to conclude that there is no possibility the jury misunderstood its sentencing obligation to consider defendant's background and character in determining the appropriate penalty. [Citation]

Sanchez, 12 Cal.4th at 82.

As recited above, in reviewing penalty phase instructions, the test is "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." Boyde, 494 U.S. at 380. Further, a single instruction "may not be judged in artificial isolation," but must be considered in light of the instructions as a whole and the entire trial record. Estelle, 502 U.S. at 72.

Here, the state court could reasonably have found that the jury was not precluded from considering mitigating evidence including childhood and family evidence. The trial court rejected Petitioner's proffered special instruction, using instead CALJIC No. 8.84.1 (1986 rev.), which advised the jury to consider the circumstances of the present conviction (pursuant to Cal. Pen. Code § 190.3(a)) and any other extenuating circumstance and aspect of the defendant's character or record (pursuant to Cal. Pen. Code § 190.3(k)). (CT 994-995; RT 3087-3089.) Additionally, the prosecution argued to the jury that it was not precluded from considering mitigating evidence. (RT 3043-3044.) Defense counsel Frank did the same. (RT 3053-3060).

At the time Petitioner's conviction became final on October 7, 1996, it was established that use of CALJIC No. 8.84.1 was adequate to permit jurors to consider relevant mitigating evidence. Boyde, 494 U.S. at 381-82 (1990). The Ninth Circuit has rejected Petitioner's argument where, as here, the jury was advised it could consider any other mitigating matter. See Hendricks, 974 F.2d at 1109. The Supreme Court has never required a sentencing court to instruct a jury on how to weigh and balance factors in aggravation and mitigation. As discussed in the subclaims above, in Tuilaepa v. California, the Supreme Court stated, "[a] capital

sentencer need not be instructed how to weigh any particular fact in the capital sentencing decision." Tuilaepa, 512 U.S. at 979. Similarly, in Kansas v. Marsh, the Supreme Court stated:

> In aggregate, our precedents confer upon defendants the right to present sentencers with information relevant to the sentencing decision and oblige sentencers to consider that information in determining the appropriate sentence. The thrust of our mitigation jurisprudence ends here. "*[W]e have never held that a specific method for balancing mitigating and aggravating factors in a capital sentencing proceeding is constitutionally required*."

Marsh, 548 U.S. at 175 (quoting Franklin, 487 U.S. at 179) (citing Zant, 462 U.S. at 875–876, n.13). Petitioner has not made any sufficient evidentiary showing otherwise.

Respondent contends this subclaim is not cognizable because it creates and retroactively applies a "new rule" of constitutional law within Teague v. Lane, 489 U.S. 288. However, the Court finds the claim fails not because Petitioner seeks to apply a new rule of criminal procedure under Teague, but rather on grounds the claim lacks merit for the reasons stated.

For the reasons stated, the Court is persuaded the state court rejection of the subclaim was not contrary to, or an unreasonable application of, clearly established federal law, or an or an unreasonable determination of the facts in light of the evidence presented in the state court proceeding, viewed most favoring the prosecution. Jackson, 443 U.S. at 319. See 28 U.S.C. § 2254(d).

This subclaim is denied.

viii. Aggravation "Beyond a Reasonable Doubt" Instruction

Petitioner alleges in the next subclaim that the trial court erred in denying his requested special instructions requiring the jury to find aggravation outweighed mitigation beyond a reasonable doubt and that a death sentence was appropriate beyond a reasonable doubt. The trial court instead gave the statutory instruction, CALJIC No. 8.84.2 (1986 rev.), renumbered CALJIC No. 8.88 (1989 rev.).

The state supreme court considered and rejected this claim on appeal, stating that:

> Defendant contends the trial court violated the federal Constitution by rejecting

> his instruction that would have required the jury unanimously to find the existence of an aggravating factor before considering it and to find beyond a reasonable doubt that the aggravating factors outweighed the mitigating factors before choosing the penalty of death. Instead, the court instructed the jury pursuant to former CALJIC No. 8.84.2, which informed the jury it must "be guided by the applicable factors of aggravating and mitigating circumstances upon which [it] had been instructed." The instruction also emphasized to the jury that the penalty determination did not involve a mere mechanical weighing process, but required an individual assessment of the aggravating and mitigating circumstances (and assignment of "whatever moral or sympathetic value" it deemed appropriate) in determining the sentence. Defendant claims CALJIC No. 8.84.2 failed to inform the jury it must find that the aggravating factors outweighed the mitigating factors and that, if it found mitigating factors outweighed aggravating factors, it must impose a sentence of life without parole. We have previously rejected these contentions, and defendant has failed to persuade us to reconsider our decisions. [Citation]
>
> As we have previously recognized, nothing in the federal Constitution requires the jury unanimously to find the existence of an aggravating factor, or to find beyond a reasonable doubt that the People proved each aggravating factor, that the aggravating circumstances outweighed the mitigating ones, or that death is appropriate. [Citation] Unlike the determination of guilt, "the sentencing function is inherently moral and normative, not factual" [Citation] and thus "not susceptible to a burden-of-proof quantification." [Citation] . . . Former CALJIC No. 8.84.2 adequately conveyed to the jury the seriousness of its obligation in determining the appropriate penalty, and we find no error in giving the instruction. [Citation]

Sanchez, 12 Cal.4th at 80-81.

Petitioner could correctly argue that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 U.S. 358, 364 (1970). In California, for a defendant to be eligible for the death penalty, the jury must, beyond a reasonable doubt, find him guilty of murder in the first degree, and must find true one of the special circumstances set forth in Cal. Penal Code § 190.2. Tuilaepa, 512 U.S. at 975.

However, once a defendant is convicted, "the prosecution has no burden of proof that death is the appropriate penalty, or that one or more aggravating factors or crimes exist, in order to obtain a judgment of death." People v. Anderson, 25 Cal. 4th 543, 589 (2001). Instead, the clearly established law at the time Petitioner's conviction became final vested the jury with

"unbridled discretion in determining whether the death penalty should be imposed after it has found that the defendant is a member of the class made eligible for that penalty." Tuilaepa, 512 U.S. at 979-80.

There is no Supreme Court authority which constitutionally requires that a jury be instructed on a burden of proof in the sentence selection phase in a capital case. Further, "[t]he United States Supreme Court has never stated that a beyond-a-reasonable-doubt standard is required when determining whether a death penalty should be imposed." Harris, 692 F.2d at 1195. Nor is there any Supreme Court authority which would require a burden of proof or persuasion be assigned to any of the jury's penalty phase determinations. On the contrary, the Supreme Court has held that no "specific method for balancing mitigating and aggravating factors in a capital sentencing proceeding is constitutionally required." Marsh, 548 U.S. at 175. California's death penalty sentencing scheme has been consistently upheld as constitutional by the Supreme Court. Tuilaepa, 512 U.S. at 975-80; Pulley, 465 U.S. at 53.

The Court finds the statutory instruction, CALJIC 8.84.2, did appropriately advise the jury to consider the applicable factors of aggravating and mitigating circumstances and that to find for death each juror must be persuaded that the aggravating evidence and/or circumstances is so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole. (CT 1018; RT 3095-3096.) Due process requires no more. Harris, 692 F.2d at 1194. California is not required to adopt specific standards for instructing the jury on consideration of aggravating and mitigating circumstances. Zant, 462 U.S. at 890.

The state court then could reasonably find the requirement under California's death penalty statute, that the jury weigh aggravating and mitigating factors before imposing the death penalty, adequately guarantees the jury's discretion will be guided and its considerations deliberate.

Respondent contends this subclaim is not cognizable because it creates and retroactively applies a "new rule" of constitutional law within Teague v. Lane, 489 U.S. 288. However, the Court finds the claim fails not because Petitioner seeks to apply a new rule of criminal procedure

under Teague, but rather on grounds the claim lacks merit for the reasons stated.

The Court finds that the state court rejection of the subclaim was not contrary to, or an unreasonable application of, clearly established federal law, or an unreasonable determination of the facts in light of the evidence presented in the state court proceeding, viewed most favoring the prosecution. Jackson, 443 U.S. at 319. See 28 U.S.C. § 2254(d).

This subclaim is denied.

ix. Written Aggravation Findings

Petitioner alleges in his next subclaim that the trial court erred in not instructing the jury to make written findings as to aggravating and mitigating factors, denying him due process and meaningful appellate review under the Eighth Amendment.

The state supreme court reviewed and rejected this claim on direct appeal, noting that:

> Defendant contends the trial court erred by failing to require the jury to render written findings on the aggravating factors it selected. We have repeatedly held that such findings are not required, and accordingly, find no error. [Citation]
>
> Federal law is in accord. See Harris, 692 F.2d at 1195, overruled on other grounds 465 U.S. 37 (1984).

Sanchez, 12 Cal.4th at 82.

The state court decision is not contrary to Supreme Court precedent. See Harris, 692 F.2d at 1195–96. Moreover, the California procedure provides a sufficient record for appellate review by requiring the judge to provide a written statement upholding or overturning the jury's verdict without requiring written findings by the jury on the aggravating circumstances. In Proffitt v. Florida, the Supreme Court upheld the Florida death penalty statute which was comparable to California's procedure. 428 U.S. 242, 250-251 (1976). In the Florida statute, the jury is required to make a penalty recommendation to the trial judge, unaccompanied by any specific findings, and thereafter the judge determines the actual sentence and specifies in writing the reasons in support of the sentence. Id. at 249-250. In interpreting the Florida law, the Supreme Court emphasized, "Since . . . the trial judge must justify the imposition of a death sentence with written findings, meaningful appellate review of each such sentence is made

possible . . . ." Id. at 251. In a similar way, the California procedure provides for meaningful appellate review with respect to the disclosure of the reasons supporting a sentence of death.

The California procedure was approved by the Supreme Court in Pulley v. Harris, where it was stated:

> If the jury finds the defendant guilty of first degree murder and finds at least one special circumstance, the trial proceeds to a second phase to determine the appropriate penalty. Additional evidence may be offered and the jury is given a list of relevant factors. § 190.3. "After having heard all the evidence, the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section, and shall determine whether the penalty shall be death or life imprisonment without the possibility of parole." Ibid. If the jury returns a verdict of death, the defendant is deemed to move to modify the verdict. § 190.4(e). The trial judge then reviews the evidence and, in light of the statutory factors, makes an "independent determination as to whether the weight of the evidence supports the jury's findings and verdicts." Ibid. The judge is required to state on the record the reasons for his findings. Ibid. If the trial judge denies the motion for modification, there is an automatic appeal. §§ 190.4(e), 1239(b). The statute does not require comparative proportionality review or otherwise describe the nature of the appeal. [Footnote omitted.] It does state that the trial judge's refusal to modify the sentence "shall be reviewed." § 190.4(e). This would seem to include review of the evidence relied on by the judge. As the California Supreme Court has said, "*the statutory requirements that the jury specify the special circumstances which permit imposition of the death penalty, and that the trial judge specify his reasons for denying modification of the death penalty, serve to assure thoughtful and effective appellate review, focusing upon the circumstances present in each particular case*." People v. Frierson, 25 Cal.3d 142, 179, 158 Cal. Rptr. 281, 302, 599 P.2d 587, 609 (1979).
>
> . . .
>
> The jury's "discretion is suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." Gregg, 428 U.S., at 189, 96 S. Ct., at 2932. Its decision is reviewed by the trial judge and the State Supreme Court. On its face, this system, without any requirement or practice of comparative proportionality review, cannot be successfully challenged under Furman and our subsequent cases.

Pulley, 465 U.S. at 51-53 (emphasis added).

Respondent contends this subclaim is not cognizable because it creates and retroactively applies a "new rule" of constitutional law within Teague v. Lane, 489 U.S. 288. However, the Court finds the claim fails not because Petitioner seeks to apply a new rule of criminal procedure under Teague, but rather on grounds the claim lacks merit for the reasons stated.

For the reasons stated, the Court finds that the state court rejection of the subclaim was

not contrary to, or an unreasonable application of, clearly established federal law, or an or an unreasonable determination of the facts in light of the evidence presented in the state court proceeding, viewed most favoring the prosecution. Jackson, 443 U.S. at 319. See 28 U.S.C. § 2254(d).

This subclaim is denied.

x. Proportionality

Petitioner next alleges that the California death penalty statute fails to require intra-case and inter-case proportionality and to provide for meaningful proportionality review, denying him protection from arbitrary imposition of the death penalty and denying him equal protection with non-capital felons and preventing the jury from considering all mitigation factors.

The state supreme court considered and rejected this subclaim on appeal, finding that:

> Defendant complains that the lack of intra-case and inter-case proportionality review in this case renders the 1978 sentencing scheme under California's death penalty law arbitrary under the Eighth Amendment and in violation of his equal protection rights because such review is afforded to noncapital defendants. We have rejected the argument in numerous cases. [Citation]

Sanchez, 12 Cal.4th 83.

Generally, errors of state law are not cognizable on federal habeas. Estelle, 502 U.S. at 67. If a challenged instruction, viewed in the context of the overall charge, shows a denial of due process which renders the trial unfair, habeas relief may lie. See Cupp, 414 U.S. at 147; Henderson v. Kibbe, 431 U.S. 145, 154 (1976). A claim that instructional error violates a defendant's constitutional rights depends on the evidence and the overall instructions. Villafuerte v. Stewart, 111 F.3d 616, 624 (9th Cir. 1997).

In this instance, the state court could reasonably find Petitioner's intra-case and inter-case proportionality subclaim to be foreclosed by the Supreme Court's decision in Pulley, 465 U.S. 37. In Pulley, the high court reviewed California's death penalty procedure, and in particular, considered the fact that California did not require any sort of comparative proportionality review. Id. The Supreme Court found that the Eighth Amendment did not require a "state appellate

court, before it affirms a death sentence, to compare the sentence in the case before it with the penalties imposed in similar cases if requested to do so by the prisoner." Id. at 43-44. Further, the Supreme Court held that "[o]n its face, [California's] system, without any requirement or practice of comparative proportionality review, cannot be successfully challenged under Furman [v. Georgia, 408 U.S. 238 (1972)] and our subsequent cases." Id. at 53.

In order to satisfy constitutional requirements, a death penalty law must narrow the class of death-eligible defendants, and provide for individualized penalty determination. McCleskey v. Kemp, 481 U.S. 279, 308 (1987). California's 1978 death penalty meets these requirements, People v. Rodriguez, 42 Cal.3d 730, 777-779 (1986), and has been upheld as constitutional by the United States Supreme Court. Ramos, 463 U.S. at 993-94. The federal court has rejected proportionality review, Pulley, 465 U.S. at 53. So has the California Supreme Court. People v. Cox, 53 Cal.3d 618, 692 (1991), disapproved on other grounds by People v. Doolin, 45 Cal.4th 390, 417 (2009).

Respondent contends this subclaim is not cognizable because it creates and retroactively applies a "new rule" of constitutional law within Teague v. Lane, 489 U.S. 288. However, the Court finds the claim fails not because Petitioner seeks to apply a new rule of criminal procedure under Teague, but rather on grounds the claim lacks merit for the reasons stated.

The Court finds that the state court rejection of the subclaim was not contrary to, or an unreasonable application of, clearly established federal law, or an unreasonable determination of the facts in light of the evidence presented in the state court proceeding, viewed most favoring the prosecution. Jackson, 443 U.S. at 319. See 28 U.S.C. § 2254(d).

This subclaim is denied.

xi. Conclusions

For the reasons discussed in the subclaims above, the state court could reasonably have found that Petitioner failed to establish state court rejection of claim 58 was contrary to, or an unreasonable application of, clearly established federal law, or an or an unreasonable determination of the facts in light of the evidence presented in the state court proceeding, viewed

most favoring the prosecution. Jackson, 443 U.S. at 319. See 28 U.S.C. § 2254(d).

Claim 58, including all its subclaims, is denied.

r. Review of Claim 59[11]

In his next claim, Petitioner alleges that the trial court, during the (Cal. Pen. Code § 190.4(e)) automatic motion to independently review the evidence, erred by failing to consider mitigating evidence when imposing death.

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

> Defendant contends the trial court committed prejudicial error in denying his automatic motion for modification of the death sentence (§ 190.4, subd. (e)) because it failed to consider mitigating evidence of defendant's dysfunctional family and his kindness to his siblings (§ 190.3, factor (k)). We are not persuaded.
>
> After reviewing section 190.3, factors (a)-(i), and concluding that several statutory mitigating factors did not apply to defendant, (the court did note that defendant may have been high on PCP during the murders pursuant to factor (h)), the court asked: "Are there other circumstances that mitigate against the aggravation of the [defendant], I think not." Moreover, before denying the modification motion, the court stated that it had considered defendant's motion to reduce penalty and the People's response, both of which referred to defendant's mitigating evidence. Thus, although the court did not specifically mention defendant's mitigating evidence of his family life, the court's statement regarding section 190.3, factor (k) evidence shows it considered all pertinent penalty phase evidence, including testimony about defendant's family life and his behavior toward his siblings, but merely found it unpersuasive. The record is clear that in ruling on the motion for modification, the trial court independently assessed the weight of the evidence under each factor, and stated its reasons for denying defendant's motion. [Citation] We conclude on this record that all constitutional and statutory considerations were observed in the court's ruling. [Citation]

Sanchez, 12 Cal.4th at 83.

At the time Petitioner's conviction became final, Cal. Penal Code § 190.4(e) provided that:

> In every case in which the trier of fact has returned a verdict or finding imposing the death penalty, the defendant shall be deemed to have made an application for modification of such verdict or finding pursuant to Subdivision 7 of Section 11. In ruling on the application, the judge shall review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in Section 190.3, and shall make a determination as to whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence presented. The judge shall state on the record the reasons for his findings.

[11] The legal basis of the Fifth and Sixth Amendment were stricken as unexhausted. ECF No. 60 at 9:9-10.

> The judge shall set forth the reasons for his ruling on the application and direct that they be entered on the Clerk's minutes. The denial of the modification of the death penalty verdict pursuant to subdivision (7) of Section 1181 shall be reviewed on the defendant's automatic appeal pursuant to subdivision (b) of Section 1239. The granting of the application shall be reviewed on the People's appeal pursuant to paragraph (6).

Cal. Penal Code § 190.4(e).

Petitioner alleges that the trial court, during the (Cal. Pen. Code § 190.4(e)) automatic motion to modify and independently review of the evidence, did not mention and thus ignored much 190.3(k) mitigating evidence of his abysmal childhood, adolescence in an alcoholic, violent and dysfunctional family and his love and loyalty toward siblings, when it imposed the death penalty following its independent review. (CT 1103; RT [10/ 27-31, 1988] at pp. 2-16.) He claims the trial judge was not guided by aggravating and mitigating circumstances in upholding death and thus failed to comply with the mandate of California Penal Code § 190.4(e).

The death penalty is constitutional if it "is imposed only after a determination that the aggravating circumstances outweigh the mitigating circumstances present in the particular crime committed by the particular defendant, or that there are no such mitigating circumstances." Blystone, 494 U.S. at 305. To the extent automatic modification under California's capital sentencing statute was part of the manner by which California fulfills its constitutional duty to tailor and apply its death sentencing scheme in a rational manner, see Pulley, 465 U.S. at 52, the evidentiary record shows the trial court reviewed the verdict, considered and discussed the aggravating and mitigating circumstances and factors and made an individualized determination of whether death was the proper punishment. RT [10/31/88] pp. 7-10; see Turner v. Calderon, 281 F.3d 851, 871 (9th Cir. 2002). The California Supreme Court's conclusion that the trial court's review was proper under state law is binding on this Court. Wainwright v. Goode, 464 U.S. 78, 84 (1983) (per curiam).

The Court finds this claim raises solely an issue of state law without any claimed constitutional error, Estelle, 502 U.S. at 68, leaving the federal court unable to review it. As noted, habeas relief does not lie for errors of state law. Estelle, 502 U.S. at 67; Pulley, 465 U.S.

at 41 ("A federal court may not issue the writ on the basis of a perceived error of state law."). Petitioner's claim that the trial court incorrectly conducted its review of the jury's sentencing verdict is not cognizable on federal habeas. See Turner, 281 F.3d at 871. The Supreme Court has not held that such a review is required, and the high court has found California's review procedure to be constitutional. Pulley, 465 U.S. at 51-53.

Respondent contends this claim is not cognizable because it creates and retroactively applies a "new rule" of constitutional law within Teague v. Lane, 489 U.S. 288. However, the Court finds the claim fails not because Petitioner seeks to apply a new rule of criminal procedure under Teague, but rather on grounds the claim lacks merit for the reasons stated.

For the reasons stated, the Court finds that the state court rejection of the claim was not contrary to, or an unreasonable application of, clearly established federal law, or an unreasonable determination of the facts in light of the evidence presented in the state court proceeding, viewed most favoring the prosecution. Jackson, 443 U.S. at 319. See 28 U.S.C. § 2254(d).

Claim 59 is denied.

s. Review of Claim 60

In his penultimate claim, Petitioner alleges that the cumulative effect of constitutional error during the penalty phase warrants habeas relief. He cites to and incorporates claims 36-59 and argues cumulative error therefrom.

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

> Defendant claims that in combination, the errors at the penalty phase caused cumulative prejudice warranting a reversal of penalty. After review of the record, we disagree. Any prosecutorial misconduct that did occur did not significantly influence the fairness of defendant's trial or detrimentally affect the jury's determination of the appropriate penalty. [Citation]

Sanchez, 12 Cal.4th at 84.

The California Supreme Court also summarily denied claim 60 (SPet. Claim WW) as raised in Petitioner's state petition for habeas corpus. In re Sanchez, S049502 (DD).

Claims 36-59, *ante*, each fail for the reasons discussed above. Petitioner then cannot

make a sufficient showing that he was prejudiced by defense counsel's cumulative ineffectiveness during the penalty phase. The state court could reasonably have found that Petitioner failed to show the cumulative effect of alleged penalty phase errors deprived him of due process. These claims are insubstantial when considered cumulatively. See Karterman, 60 F.3d at 580; see also Rupe, 93 F.3d at 1445.

Respondent contends this claim is not cognizable because it creates and retroactively applies a "new rule" of constitutional law within Teague v. Lane, 489 U.S. 288. However, the Court finds the claim fails not because Petitioner seeks to apply a new rule of criminal procedure under Teague, but rather on grounds the claim lacks merit for the reasons stated.

Accordingly, the Court finds that a fair-minded jurist could have found that Petitioner failed to establish that the state court rejection of the claim was contrary to, or an unreasonable application of, clearly established federal law, or an or an unreasonable determination of the facts in light of the evidence presented in the state court proceeding, viewed most favoring the prosecution. Jackson, 443 U.S. at 319. See 28 U.S.C. § 2254(d).

Claim 60 is denied.

t. Review of Claim 61

In his final claim, Petitioner alleges that his death sentence is grossly disproportionate given his actions, his merely vicarious culpability as an aider and abetter, and his severe neurological and psychiatric impairments, violating his rights under the Eighth and Fourteenth Amendments.

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

> Defendant contends his death sentence is disproportionate to his culpability under the Eighth Amendment and article I, section 17 of the California Constitution, which preclude punishment that is disproportionate to a defendant's individual culpability. [Citation] Defendant complains that the constitutional proscription against a disproportionate penalty has been especially violated in this case because his accomplices in the murders received either 25 years to life pursuant to a negotiated plea (Robert Reyes), or had the charges dismissed on insufficient evidence grounds (Joey Bocanegra).
>
> Defendant relies on People v. Dillon (1983) 34 Cal.3d 441, 479, in which the court reduced a life sentence imposed on a 17-year-old with no prior convictions

> for a noncapital first degree felony murder to a sentence for second degree murder. But, as we have subsequently stated, Dillon does not mandate the type of intra-case proportionality review sought by defendant. See People v. Hill, 3 Cal.4th 959, 1013 (1992).
>
> As the People observe, intra-case proportionality review is "an examination of whether defendant's death sentence is proportionate to his individual culpability irrespective of the punishment imposed on others." People v. Adcox, 47 Cal.3d 207, 274 (1987). "The Eighth Amendment to the federal Constitution does not require us to incorporate into our proportionality determination any comparison of defendant's sentence with that of another culpable person, whether charged or uncharged." Hill, 3 Cal.4th at p. 1014; Pulley, 465 U.S. 37, 53 (1984) [upholding California's absence of comparative proportionality review].)
>
> Accordingly, we reject defendant's plea for "intra-case proportionality." The evidence shows that he committed three brutal first degree murders of innocent and defenseless victims as an accomplice, only thirty-three days after he was released from state prison on parole from an eight-year prison term imposed for two violent assaults. In light of the evidence presented at trial, the penalty is proportionate to defendant's culpability. [Citation]

Sanchez, 12 Cal.4th at 84-85.

The California Supreme Court also denied claim 61 (SHCP Claim XX) raised in Petitioner's state petition for habeas corpus. In re Sanchez, S049502 (DD).

Petitioner purports to question the viability of Pulley. Yet he does not explain how and why the Pulley decision is infirm, or provide any authority showing that it is. Instead he argues simply that Pulley should not be applied to him because his liability was only vicarious and he is actually innocent of the charged murders.

The claim is not persuasive. Petitioner does not provide any sufficient basis for questioning the holding in Pulley or its application in his proceeding. Pulley was clearly established authority at the time Petitioner's conviction became final on October 7, 1996.

Petitioner does not distinguish or limit application of Pulley based on facts of this case. Petitioner alleges his death sentence is disproportionate because the more culpable Reyes and Joey were not sentenced to death. However, this argument cannot succeed given that there is no federal proportionality requirement. Pulley, 465 U.S. 37. The Supreme Court held that "[o]n its face, [California's] system, without any requirement or practice of comparative proportionality review, cannot be successfully challenged under Furman [v. Georgia, 408 U.S. 238 (1972)] and our subsequent cases." Id. at 53. California's 1978 death penalty has been upheld as

constitutional by the United States Supreme Court. Ramos, 463 U.S. at 993-94. The federal court has rejected proportionality review, Pulley, 465 U.S. at 53, as has the California Supreme Court. Cox, 53 Cal.3d at 692. Moreover, the state court could reasonably find Petitioner's death sentence is not disproportionate to his culpability given the facts and circumstances of the crimes and his involvement in the crimes. (See claims 1-4 and subclaim "x" of claim 58, *ante*.)

Petitioner alleges that his death sentence is disproportionate given California's extraordinarily large death pool. The Eighth Amendment requires that a state capital sentencing system must: "1) rationally narrow the class of death-eligible defendants; and 2) permit a jury to render a reasoned, individualized sentencing determination based on a death-eligible defendant's record, personal characteristics, and the circumstances of his crime." Marsh, 548 U.S. at 173-74. As noted in claim 58, subclaim "x", it was established at the time Petitioner's conviction became final that California's system complied with these requirements. Pulley, 465 U.S. at 53-54. Petitioner has not shown that Pulley does not control this case.

Petitioner's re-argument of actual innocence fails for the reasons discussed in claims 2 and 4, *ante*.

In sum, the Court finds this claim is entirely foreclosed by Pulley. Therein, the Supreme Court determined that the Eighth Amendment did not require a "state appellate court, before it affirms a death sentence, to compare the sentence in the case before it with the penalties imposed in similar cases if requested to do so by the prisoner." Pulley, 465 U.S. at 43-44. The California Supreme Court, applying state law, rejected Petitioner's intra-case proportionality argument, stating that:

> The evidence shows that he committed three brutal first degree murders of innocent and defenseless victims as an accomplice, only thirty-three days after he was released from state prison on parole from an eight-year prison term imposed for two violent assaults. In light of the evidence presented at trial, the penalty is proportionate to defendant's culpability.

Sanchez, 12 Cal.4th at 84-85. The Bocanegra murders in which Petitioner participated were violent, progressed over a period of time, and were bloody. (RT 2731, 2733, 2735-2736, 2739-

2741, 2747-2749, 2752-2753, 2756, 2790-2797, 2799-2806, 2808-2820, 2829-2830, 2833-2834.) The Tatman murder in which Petitioner participated involved massive blunt force blows to the chest during a violent assault and stabbing. (RT 2646, 2650-2651, 2655, 2688-2695, 2718, 2842, 2846-2848, 2860.) Petitioner has not shown a reasonable probability that his sentence was grossly disproportionate to the crimes, see Hamelin v. Michigan, 501 U.S. 957, 959 (1991), so as to deny him a fair trial and a more favorable outcome.

Accordingly, for the reasons discussed above, the Court finds that the state court rejection of the claim was not contrary to, or an unreasonable application of, clearly established federal law, or an or an unreasonable determination of the facts in light of the evidence presented in the state court proceeding, viewed most favoring the prosecution. Jackson, 443 U.S. at 319; see 28 U.S.C. § 2254(d).

Claim 61 is denied.

VII.

MOTION FOR EVIDENTIARY HEARING

On March 18, 2003, Petitioner filed a motion seeking an evidentiary hearing on claims 2, 4, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 20, 21, 22, 24, 25, 28, 30, 31, 32, 33, 34, 36, 37, 38, 40, 43, 44, 45, 46, 47, 48, 50, 51, 52, 54 and 60. (ECF No. 120.) Petitioner alleges in his motion that the state supreme court denied him a full and fair evidentiary hearing to resolve the following facts showing prejudice, facts that were not presented at trial because of ineffective assistance of counsel and prosecutorial misconduct:

1) Jailhouse informant Seeley's statements, disclosed to the defense prior to trial but not presented at trial by either side, that Reyes, the third person at the Bocanegra crime scene, confessed to a more culpable role in Mr. Bocanegra's murder, that Petitioner played no part in killing Mr. Bocanegra, and that Reyes admitted being the initial aggressor against Mrs. Bocanegra.

2) Inconsistencies between the physical evidence and jailhouse informant Hernandez's testimony at trial where he wanted to trade information for favorable treatment, exaggerated the

amount of time he spoke to Petitioner about the crime, failed to admit he was arrested for being under the influence of heroin, and failed to admit he had been a heroin addict for over five years.

3) Principal perpetrator Joey Bocanegra's violent temper, substance abuse through the night and early morning before killing his parents, history of requesting money for drugs from his parents and becoming violent if they refused his request.

4) Testimony by prosecution witnesses, the crime scene analyst and the forensic pathologist, supporting Petitioner's defense that Reyes was Joey's main assistant in the Bocanegra murders.

5) Petitioner's severe organic brain damage, low IQ, and serious psychiatric disorders, known to defense counsel before trial but not investigated and presented at trial.

6) Defense counsel's unreasonable acquiescence in the prosecution's use of statements Petitioner made to Detectives Stratton and Boggs which should have been excluded under Miranda, and to reporter Trihey which should have been placed in context and shown they were inconsistent with an inference that he intended to kill.

Respondent filed his opposition on July 18, 2003, arguing that an evidentiary hearing is not warranted because the claims lack merit, there is no sufficient offer of proof, and the new evidence presented by Petitioner does not cast doubt on the California Supreme Court's finding that Petitioner failed to set forth facts which constitute a constitutionally cognizable claim. (ECF No. 137.) Petitioner filed a reply on September 19, 2003, re-arguing his position on the motion. (ECF No. 140.)

Section 2254(d), as amended by the AEDPA, provides:

> An 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).

In Cullen v. Pinholster, the Supreme Court held that "review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits," and thus "evidence introduced in federal court has no bearing on § 2254(d)(1) review." Pinholster, 131 S. Ct. at 1398, 1400. Although the central holding of Pinholster pertained to § 2254(d)(1), the Supreme Court observed that "§ 2254(d)(2) includes the language 'in light of the evidence presented in the State court proceeding,'" providing "additional clarity" that review under § 2254(d)(2) is also limited to the record before the state court. Id. at 1400 n.7. Therefore, for claims that were adjudicated on the merits in state court, Petitioner can only rely on the record that was before the state court to satisfy the requirements of § 2254(d). See Landrigan, 550 U.S. at 474.

Petitioner seeks an evidentiary hearing on the forty-one claims set forth above. All of those claims were adjudicated on the merits in the state court. See Richter, 562 U.S. at 99 ("[w]hen a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary). For the reasons stated above, Petitioner fails to demonstrate that any of the forty-one claims overcomes the limitation of § 2254(d). Thus, Pinholster effectively bars a habeas court from any further factual development on these claims. Id. at 1411 n.20.

Petitioner further claims that he is entitled to a hearing under 28 U.S.C. § 2254(e)(2). Pinholster suggests this is not so. "Section 2254(e)(2) continues to have force where § 2254(d)(1) does not bar federal habeas relief." Id. at 1401. Analysis of the claims under § 2254(d) must precede the granting of an evidentiary hearing under § 2254(e)(2). Id. Thus, only if Petitioner overcomes § 2254(d) can the Court consider a hearing under § 2254(e)(2). As Justice Breyer stated: "If the federal habeas court finds that the state-court decision fails [§ 2254](d)'s test (or if [§ 2254](d) does not apply), then an [§ 2254](e) hearing may be needed." Id. at 1412 (Breyer, J., concurring in part and dissenting in part).

As discussed above, § 2254(d) applies to all forty-one claims since they were adjudicated on the merits, and Petitioner fails to overcome § 2254(d) with respect to any of the forty-one claims.

For the reasons stated, Petitioner's motion for evidentiary hearing shall be denied.

VIII.

MOTION AND RENEWED MOTION TO PRESERVE TESTIMONY

On June 25, 2014, Petitioner filed a motion to preserve testimony by deposing the following seven witnesses:

Name	Case Relation	Age
Theodore S. Donaldson	Trial Defense Psychiatrist	87
Eugene F. Toton	Lead Trial Defense Attorney	78
Patricia L. McGregor	Trial Defense Investigator	70
Maria E. Valenzuela	Friend of victim, Mrs. Bocanegra	68
Susan M. Peninger	Trial Defense Investigator	67
Jeri A. Doane	Post-conviction Psychologist	67
David V. Foster	Post-conviction Psychologist	67

Each of these individuals previously filed a declaration in support of the instant petition. (ECF No. 150.)

Petitioner argues good cause to preserve evidence because these witnesses are of advanced age and their proposed testimony will be probative of the claimed ineffective assistance of counsel, mental defenses, and Petitioner's actions and lack of culpability, as alleged in the petition. Respondent filed his opposition on August 27, 2014, arguing there is no good cause for such relief because Petitioner is not entitled to an evidentiary hearing, and even if he were, there is no showing of the probity of proposed testimony or that these witnesses would be unavailable. (ECF No. 154.) Moreover, Respondent states his need for further discovery should the motion be granted. Petitioner replied on September 3, 2014, re-arguing good cause to preserve testimony relating to declarations of these aged witnesses already on file, and stating

that further discovery needs of Respondent can be litigated after the motion to preserve evidence is granted.

On May 1, 2015, Petitioner filed a motion renewing the pending motion to preserve testimony. (ECF No. 160.)

A judge may authorize discovery and may limit it under the Federal Rules of Civil Procedure upon a showing of the reasons for the request and good cause. Rules Governing § 2254 Cases, Rule 6. Discovery should be allowed if it will help illuminate issues underlying applicant's claim. Gaitan-Campanioni v. Thornburgh, 777 F. Supp. 1355, 1356 (E.D. Tex. 1991). Availability of discovery during habeas is vested in the sound discretion of the district court. Campbell v. Blodgett, 982 F.2d 1356, 1358, (9th Cir. 1993).

Federal Rule of Civil Procedure 27 provides in pertinent part that:

> The court where a judgment has been rendered may, if an appeal has been taken or may still be taken, permit a party to depose witnesses to perpetuate their testimony for use in the event of further proceedings in that court.
>
> The party who wants to perpetuate testimony may move for leave to take the depositions, on the same notice and service as if the action were pending in the district court. The motion must show:
>
> (A) the name, address, and expected substance of the testimony of each deponent; and
>
> (B) the reasons for perpetuating the testimony.
>
> If the court finds that perpetuating the testimony may prevent a failure or delay of justice, the court may permit the depositions to be taken and may issue orders like those authorized by Rules 34 and 35. The depositions may be taken and used as any other deposition taken in a pending district-court action.

This Rule does not limit a court's power to entertain an action to perpetuate testimony and may be used in habeas proceedings. Calderon v. U.S. Dist. Court for Northern Dist. of California, 144 F.3d 618, 621 (9th Cir. 1998); accord Martin v. Reynolds Metals Corp., 297 F.2d 49, 55 (9th Cir. 1961) (court has the power to order taking of deposition for purpose of perpetuating evidence).

Good cause under Rule 27 may be found "[w]here specific allegations before the court

show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is . . . entitled to relief . . . ." Bracy v. Gramley, 520 U.S. 899, 908-09 (1997), citing Harris v. Nelson, 394 U.S. 286, 300 (1969).

Here, the Court finds that Petitioner has not made a sufficient factual showing to establish good cause as required by Habeas Corpus Rule 6(a). Apart from age, Petitioner offers no facts suggesting unavailability of these witnesses or reasons why this testimony will be lost if not preserved. See Penn. Mut. Life Ins. Co., v. U.S., 68 F.3d 1371, 1373 (C.A.D.C. 1995). While age of the deponent may be relevant in determining whether there is sufficient basis to perpetuate testimony, Penn. Mut. Life Ins. Co., 68 F.3d at 1375, this Court, for purposes of this proceeding, does not find age alone a sufficient basis to grant relief. Even if it were, Petitioner supports probity of the proposed testimony only by citing generally to proposed deponents' declarations in the record. Petitioner does not state with sufficient specificity the expected substance of the testimony and how it would lead to evidence, admissible under AEDPA, relevant to claims in his petition and entitlement to relief. Petitioner has not made a sufficient showing that the proposed discovery would lead to relevant evidence likely to be lost. See Martin, 298 F.2d at 55.

In sum, nothing reasonably suggests a basis to believe the proposed testimony would lead to factual development showing entitlement to relief, and that the proposed testimony might otherwise be lost. See Bracy, 520 U.S. at 908-09; see also Gilday v. Callahan, 99 F.R.D. 308, 309 (D.C. Mass. 1983) (no "good cause" under Rule 6 where the facts petitioner seeks to dispute had been resolved by state court).

For the reasons stated, Petitioner's motion to preserve evidence, as renewed, shall be denied.

IX.

MOTION FOR CASE MANAGEMENT CONFERENCE

On May 1, 2015, Petitioner filed a motion requesting a case management conference to discuss any assistance the Court might require to resolve the pending motion for evidentiary hearing. (ECF No. 159.)

However, there is no need for a case management conference given the discussion above denying the motion for evidentiary hearing. The motion for case management conference shall be denied.

X.

REQUEST TO SEAL AND PROTECT SUPPLEMENTAL LODGED DOCUMENTS

On June 23, 2015, Respondent filed a request that the following documents be filed under seal and protected from disclosure: (1) the Request to Seal the November 25, 1987 Reporter's Transcript & Penal Code Section 987.9 Materials, totaling two (2) pages, (2) the November 25, 1987 Reporter's Transcript (conditionally sealed Lodged Document # II), totaling Seven (7) pages, (3) all Penal Code Section 987.9 Materials (conditionally sealed Lodged Document # QQ), totaling ninety-five (95) pages, and (4) a [Proposed] Order Sealing the conditionally sealed Lodged Documents # II and # QQ), totaling one (1) page.

Respondent argues that these documents, sealed state court records, contain confidential information that should be protected from disclosure in this proceeding. Local Rule 141; California Penal Code Section 987.9(d).

The Court notes that Petitioner has been served with copies of these supplemental record documents. He has not opposed Respondent's request and the time for doing so has passed. Local Rule 141(c).

Documents may be sealed only by written order of the Court, upon the showing required by applicable law. Local Rule 141(a). Confidential information may be protected by a protective order. Local Rule 141.1(a)(1).

The Court has reviewed the request to seal and protect documents and the supplemental lodged documents, and based thereon finds good cause to grant the request.

The supplemental lodged documents, sealed and unsealed, were not considered by the Court in its analysis and disposition of the foregoing claims. The Court notes that these documents, to the extent they are evidence of trial counsel's defense of Petitioner, do nothing but support effective assistance by trial counsel and the Court's above analysis and disposition. (See

[Sealed] Supplemental Lodged Documents #II and #QQ.)

XI.

CERTIFICATE OF APPEALABILITY

Because this is a final order adverse to the petitioner, Rule 11 of the Rules Governing Section 2254 Cases requires this court to issue or deny a Certificate of Appealability ("COA"). Accordingly, the Court has sua sponte evaluated the claims within the petition for suitability for the issuance of a COA. See 28 U.S.C. § 2253(c); Turner, 281 F.3d at 864–65 (9th Cir. 2002).

A state prisoner seeking a writ of habeas corpus has no absolute entitlement to appeal a district court's denial of his petition, and an appeal is only allowed in certain circumstances. Miller–El, 537 U.S. at 335–36 (2003). The controlling statute in determining whether to issue a COA is 28 U.S.C. § 2253, which provides as follows:

> (a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.
>
> (b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.
>
> (c) (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—
>
> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
>
> (B) the final order in a proceeding under section 2255.
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
>
> (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

The court may issue a COA only "if jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." Miller-El, 537 U.S. at 327; Slack v. McDaniel, 529 U.S. 473, 484 (2000). While the petitioner is not required to prove the merits of

his case, he must demonstrate "something more than the absence of frivolity or the existence of mere good faith on his . . . part." Miller-El, 537 U.S. at 338.

In the present case, the Court finds that, with respect to the following claims, reasonable jurists could disagree with the Court's resolution or conclude that the issues presented are adequate to deserve encouragement to proceed further:

1) Claim 8: Whether defense counsel provided ineffective assistance by failure to investigate and present testimony of jailhouse informant Charles Seeley.

2) Claim 59: Whether the trial court failed to consider Petitioner's mitigations evidence when it imposed the death penalty.

3) Claim 61: Whether imposition of the death penalty is constitutionally disproportionate as to Petitioner.

Therefore, a certificate of appealability is granted as these three claims.

As to the remaining claims and requests for evidentiary hearing and to preserve testimony, the Court concludes that reasonable jurists would not find the Court's determination that Petitioner is not entitled to relief debatable, wrong, or deserving of encouragement to proceed further. Petitioner has not made the required substantial showing of the denial of a constitutional right. He has not demonstrated good cause to preserve testimony. Accordingly, the Court hereby declines to issue a COA as to the remaining claims and requests for evidentiary hearing and to preserve testimony.

XII.

ORDER

Accordingly, for the reasons stated, it is HEREBY ORDERED that:

1. The Petition for Writ of Habeas Corpus (ECF No. 38) is DENIED,
2. Petitioner's motion for evidentiary hearing (ECF No. 120) is DENIED,
3. Petitioner's motion to preserve testimony (ECF No. 150) and renewed motion to preserve testimony (ECF No. 160) are DENIED,
4. Petitioner's motion for a case management conference (ECF No. 159) is

DENIED.

5. Respondent's request to seal and protect supplemental lodged documents (ECF No. 162) is GRANTED such that:

a. The Clerk of the Court is directed to file under seal, (1) Petitioner's Request to Seal November 25, 1987 Reporter's Transcript & Penal Code Section 987.9 Materials, totaling two (2) pages, (2) the November 25, 1987 Reporter's Transcript (conditionally sealed Lodged Document # II), totaling Seven (7) pages, (3) all Penal Code Section 987.9 Materials (conditionally sealed Lodged Document # QQ), totaling ninety-five (95) pages, and (4) a [Proposed] Order Sealing Supplemental Lodged Documents # II and # QQ), totaling one (1) page,

b. The above documents filed under seal and the information therein constitute confidential information which shall not be disclosed, in whole or part, to any person other than the Court and Court staff and individually named counsel for the parties for their use solely in connection with litigation of the habeas petition pending before this Court,

c. No publicly filed document shall include the above documents and/or the information therein unless authorized by the Court to be filed under seal, and

d. All provisions of this order shall continue to be binding after the conclusion of this habeas corpus proceeding and specifically shall apply in the event of a retrial of all or any portion of Petitioner's criminal case, except that either party maintains the right to request modification or vacation of this order.

6. A Certificate of Appealability is ISSUED as to the Court's resolution of claims 8, 59 and 61,

7. A Certificate of Appealability is DECLINED as to claims 1-7, 9-58, and 60, and as to the requests for evidentiary hearing and to preserve testimony,

8. Any and all scheduled dates are VACATED, and

9. The Clerk of the Court is directed to substitute RON DAVIS, acting Warden of San Quentin State Prison, as the Respondent warden in this action, and to enter judgment accordingly.

IT IS SO ORDERED.

Dated: July 22, 2015

SENIOR DISTRICT JUDGE

S049502

IN THE SUPREME COURT OF CALIFORNIA

IN RE TEDDY BRIAN SANCHEZ ON HABEAS CORPUS

The petition for writ of habeas corpus filed on October 19, 1995, is denied.

Except to the extent petitioner claims trial counsel was ineffective, the following claims are denied on the ground they were raised and rejected on appeal and come within none of the four exceptions that would permit their reconsideration on habeas corpus: claims A and B (to the extent they duplicate arguments raised on appeal, or retry issues concerning the sufficiency of the evidence), EE, HH, and II (declarations and exhibits filed with these claims do not add in any significant manner to the arguments already made on appeal). (*In re Waltreus* (1965) 62 Cal.2d 218, 255; *In re Lindley* (1947) 29 Cal.2d 709, 723 [sufficiency of evidence claims not cognizable on habeas corpus]; *In re Harris* (1993) 5 Cal.4th 813, 834-841[exceptions to *Waltreus* and related bars].)

Except to the extent petitioner claims trial and counsel were ineffective (See *People* v. *Mendoza Tello* 15 Cal.4th 264, 267), claim Y is also denied on the ground that it could have been, but was not, raised on appeal (to the extent it differs from arguments raised on appeal; declaration and exhibits do not assist petitioner's contention), and it comes within none of the four exceptions that would permit its consideration on habeas corpus. (*In re Harris, supra,* 5 Cal.4th 813, 834-841.)

All claims of cumulative error are subject to the same procedural bars that apply to the individual claims.

All claims are also denied on the merits. (See *Harris* v. *Reed* (1989) 489 U.S. 255, 264, fn 10.)

Petitioner's request to take judicial notice, filed June 17, 1996, is granted.

Petitioner's request to file the supplemental verification of his habeas corpus petition, dated September 20, 1996, is granted.

The Attorney General's motion to strike petitioner's informal reply exhibits 140, 141, 143, 524, and 525, filed on October 8, 1996, is denied.

Mosk, J., and Brown, J., would deny the petition solely on the merits.

George
Chief Justice

People v. Sanchez

Supreme Court of California

December 14, 1995, Decided ; December 14, 1995, Filed

No. S007780.

Reporter
12 Cal. 4th 1; 906 P.2d 1129; 47 Cal. Rptr. 2d 843; 1995 Cal. LEXIS 6801; 95 Cal. Daily Op. Service 9597; 95 Daily Journal DAR 16651

THE PEOPLE, Plaintiff and Respondent, v. TEDDY BRIAN SANCHEZ, Defendant and Appellant.

Subsequent History: Modified by, Rehearing denied by People v. Sanchez, 12 Cal. 4th 825b, 1996 Cal. LEXIS 1043 (1996)
Writ of certiorari denied Sanchez v. California, 519 U.S. 835, 117 S. Ct. 108, 136 L. Ed. 2d 61, 1996 U.S. LEXIS 5010 (1996)
Writ of habeas corpus denied, Motion denied by, Certificate of appealability granted, in part, Certificate of appealability denied, in part Sanchez v. Chappell, 2015 U.S. Dist. LEXIS 96408 (E.D. Cal., July 22, 2015)

Prior History: Superior Court of Kern County, No. 34648, Gerald K. Davis, Judge. People v. Sanchez, 1989 Cal. LEXIS 2984 (Cal., Sept. 5, 1989)

Disposition: We conclude the judgment should be affirmed in its entirety.

Counsel: Nina Rivkind, under appointment by the Supreme Court, for Defendant and Appellant.

Daniel E. Lungren, Attorney General, George Williamson, Chief Assistant Attorney General, Robert R. Anderson, Assistant Attorney General, Shirley A. Nelson and Judy Kaida, Deputy Attorneys General, for Plaintiff and Respondent.

Judges: Opinion by Lucas, C. J., with Kennard, Arabian, Baxter, George, and Werdegar, JJ., concurring. Separate concurring opinion by Mosk, J.

Opinion by: LUCAS, C. J.

Opinion

[*17] [1139] [***854] LUCAS, C. J.**

After defendant Teddy Brian Sanchez waived his right to a jury trial at the guilt and special circumstances phases, and submitted the case for a court trial on the basis of the preliminary hearing transcripts, the trial court found him guilty of the first degree murders of Juan Bocanegra, Juanita Bocanegra, and Woodrow Wilson Tatman (Pen. Code, § 187; all statutory references are to the Penal Code unless otherwise noted). The court found true the multiple-murder special-circumstance allegation (§ 190.2, subd. (a)(3)) as to the Bocanegra murders only, but found untrue the robbery-murder special-circumstance allegations that had been charged in the Tatman and Bocanegra murders (§ 190.2, subd. (a)(17)(i)). The court also found that defendant used a deadly and dangerous weapon within the meaning of section 12022, subdivision (b) in both Bocanegra murders, and that defendant was guilty of the robbery of Tatman, but not guilty of the robbery of Juan and Juanita Bocanegra (§ 211). At the conclusion of the

penalty trial, a jury returned a verdict of death. The trial court denied defendant's motion to modify the verdict and entered judgment. We affirm the judgment in its entirety.

I. FACTS

A. *Guilt Phase Facts*

1. *The Bocanegra Murders*

On the afternoon of February 3, 1987, the police found the bodies of Juan and Juanita Bocanegra in their home. Juanita was found in her sewing room, and Juan was found in the kitchen. Both had sustained extensive stab wounds and head injuries. A piece of **[**1140]** fabric was tied loosely around Juanita's neck, and another piece of cloth was found on her right wrist.

[*18] Kern County Sheriff's criminalist Gregory Laskowski analyzed the blood found at the scene and concluded that both victims were killed where their bodies were found. The blood splatter evidence showed that the attack began in the hallway near the bathroom. The fight then moved to the kitchen where large amounts of blood indicated that a struggle took place throughout the room. The evidence indicated a fierce struggle occurred throughout the house. Small amounts of diluted blood in the bathroom suggested that someone cleaned up after the attack.

Laskowski also found evidence of two types of shoe tracks on the floor of the Bocanegra kitchen; one print had a chevron pattern and another, partial print, contained a wavy sole design. A full wavy design shoe track in the bathroom was consistent with the print found in the kitchen. Both victims were found without shoes; Juanita's bloodstained slippers were found in the hallway.

Police found a knife block with four empty spaces in the kitchen. Two knives, without bloodstains, were in the kitchen sink. There were slash marks on the cabinets directly above the knife holder. That same evening, the police recovered a knife and sharpening stone that appeared to have blood on them. No fingerprints were found on these items. But police did find a bloody palm print belonging to defendant's accomplice Robert Reyes on the doorknob inside the Bocanegra front door. Autopsies performed on both Juan and Juanita revealed that they died as a result of massive hemorrhaging due to multiple stab wounds, although the type of instrument that inflicted the wounds could not be conclusively determined.

On February 4, 1987, the Bocanegras' Dodge Colt station wagon was found abandoned. There were extensive bloodstains on both the interior and exterior of the car. Fingerprints belonging to Joey Bocanegra were found on the interior driver's and right rear door windows and on the right rear door handle.

Two items of evidence linked defendant to the crimes. The missing Bocanegra television set was found in the same room at the Bakersfield Inn where defendant stayed at **[***855]** the time of the murders, and defendant sold the Bocanegras' vacuum cleaner to Maria Rodriguez, a clerk employed by the inn. The remaining evidence used to convict defendant was based primarily on the circumstances of the crime, and incriminating statements made by defendant to police investigator Bob Stratton, jailhouse informant Rufus Hernandez, and newspaper reporter Michael Trihey.

[*19] 2. *The Tatman Murder*

Woodrow Wilson Tatman was a frail, undernourished, 72-year-old man who often

drank alcohol and was confined to a wheelchair. He rented a room at the Bakersfield Inn, and spent his days drinking alcohol and watching television. Rose McGrew was employed by the inn as a maid and she also lived on the premises. She helped care for Tatman and had last been in his room on February 1, 1987. Maria Charboneau also worked and lived at the inn, and she took care of Tatman's Social Security checks, and managed his finances. In the first week of February, Tatman received two Social Security checks. On February 2, Charboneau gave Tatman between $ 80 and $ 100. That was the last time she saw him alive.

On the afternoon of February 4, 1987, McGrew noticed that Tatman's drapes were still drawn and that he had not yet picked up his mail, which included his Social Security check. McGrew entered the room and found Tatman's body, lying on the floor near his bed. He was covered with a bedspread. Tatman's television, radio and electric skillet were missing from the room.

The autopsy report indicated that Tatman was killed by massive blunt force injury to the left chest which collapsed his left lung and caused substantial hemorrhaging. The blow to the chest was consistent with a heel stomp or with the application of an instrument approximately two inches by three inches in size.

[1141]** Tatman also sustained several superficial stab wounds to the chest and lower abdomen, as well as a head injury. It appeared that the superficial injuries had been inflicted intra or post mortem, and none contributed to death. It could not be determined what instrument caused the lower abdominal injuries, although it appeared that the chest wounds were inflicted by a screwdriver. Dr. John Holloway, the forensic pathologist who performed the autopsy, could not determine whether the wounds were caused by one or more individuals.

a. *Statements Made to Jailhouse Informant Hernandez*

Rufus Hernandez was incarcerated with defendant for two months during 1987. He had been charged with receiving stolen property and second degree burglary. Defendant spoke to Hernandez about the Bocanegra murders and Hernandez entered into a plea bargain whereby he received six months in county jail and three years' probation in exchange for his testimony.

[*20] Hernandez testified that defendant told him he went with Joey Bocanegra to the Bocanegra house. Hernandez's testimony was inconsistent as to whether defendant said they went with the plan of robbing the Bocanegras or only with the plan of borrowing money from Juan Bocanegra. Defendant waited outside for Joey, but entered the house when he heard Joey and Juan arguing in the hallway. Defendant claimed he tried unsuccessfully to stop the fight by hitting Juan with a curved metal bar. He thereafter threw the bar in the front yard. Defendant did not say whether Joey had stabbed Juan before or after defendant hit him.

Juanita, who heard the commotion from another room, came out of the bedroom yelling. Defendant slipped in a puddle of blood as he jumped over Juan to reach Juanita. He thereafter grabbed Juanita and told Joey that he should shut up his mother. Joey then stabbed his mother repeatedly and pushed her into the sewing room, where she was found. Defendant did not tell Hernandez that he did

anything other than hold Juanita; instead defendant claimed that he saw Joey stab both victims with a kitchen knife. Defendant ended his story with the comment that after the murders he threw the bar into the front yard, and that the knife was thrown **[***856]** into a canal. Defendant noted that Joey took the television, a toolbox, and his parents' hatchback automobile. Hernandez thereafter reported defendant's statements to police investigator Stratton.

b. *Statements Made to Police Investigator Stratton*

On February 19, 1987, Stratton met with defendant in the Kern County jail. Defendant had contacted the police through his attorney because he wished to offer statements about the Bocanegra crimes. Before commencing the interview, defendant waived his right to counsel after receiving the admonitions required by *Miranda v. Arizona* (1966) 384 U.S. 436 [16 L. Ed. 2d 694, 86 S. Ct. 1602, 10 A.L.R.3d 974]. Thereafter, he told Stratton that about 10 a.m., on the day of the Bocanegra murders, he met Joey Bocanegra on the street and spoke to him for a few minutes before Joey walked home. Defendant then walked by the Bocanegra house and observed Joey leaving the home. At that point, the interview with Stratton ended.

One week later, Stratton again spoke to defendant. At this point, defendant asked Stratton a series of hypothetical questions, including: What if I was present in the house; what if Joey hit his dad after his dad had refused to give him some money; and what if Joey's dad hit him back and what if Joey got real mad and grabbed a knife and started stabbing his dad; what if Joey's mother didn't know what was happening because she was in another room?

[*21] c. *Statements Made to Homicide Detective Boggs*

On March 27, 1987, after waiving his *Miranda* rights, defendant was interviewed about the Tatman murder by Homicide Detective Boggs. Defendant had already been arrested for the Bocanegra murders and agreed to talk to the officer because he believed he could be spending the rest of his life in prison.

Boggs testified that defendant told him he wanted to rob Tatman of his refrigerator **[**1142]** because he needed one. Defendant told Boggs that, because he was so intoxicated (from ingesting alcohol and drugs) at the time of the robbery, he could not remember the sequence of events.

According to Boggs, defendant asked Reyes to pry open Tatman's bathroom window with Reyes's screwdriver. Once inside, Reyes removed the contents of Tatman's refrigerator, and defendant moved it to a room next door that had been rented by Vicky Ornalez, a friend of the perpetrators.

Defendant told Boggs that when he returned to Tatman's room, Tatman was awake and Reyes was standing over him with a screwdriver in his hand. Defendant claimed he had no idea why Reyes was acting this way because both men had discussed trying not to awaken Tatman while they removed his property. Reyes then hit Tatman in the chest, pulled Tatman off the bed and onto the floor, and made multiple lunging movements downward with the screwdriver in his hand. Defendant asserted that the bed partially blocked his view, but he nonetheless believed Reyes was stabbing Tatman. After Reyes completed the murder, both defendant and Reyes returned to Vickie Ornalez's room.

d. *Defendant's Postarrest Comments to Michael Trihey*

Michael Trihey was a reporter for the Bakersfield Californian. Prior to trial, he interviewed defendant five times about the charges pending against him. On April 25, 1988, the paper published a Trihey article entitled, *Accused Asks for Own Death, System Says No*. According to Trihey, defendant told him that he was a triple murderer and that the Bocanegras and Tatman were killed for their Social Security checks.

B. *Penalty Phase Evidence*

The prosecution introduced evidence of defendant's criminal activity involving the use or attempted use of force or violence. (§ 190.3, factor (b).) **[*22]** On May 7, 1982, defendant assaulted store owner Hassan Ahmad Ammarie after defendant asked Ammarie to get him some bacon and Ammarie refused. Defendant stabbed Ammarie in the left shoulder and neck. Ammarie was hospitalized for two weeks following the attack.

[*857]** On June 2, 1982, defendant attacked an acquaintance, Arthur Melendez Pena, after Pena refused to comply with defendant's demand for money.

Several witnesses who had testified at the preliminary hearing also testified at the penalty phase. Homicide Detective Boggs testified defendant had told him that after removing Tatman's possessions to Ornalez's room, he and Reyes kicked back, drank some whiskey, smoked some dope, ate some food and just relaxed for the rest of the evening. Informant Rufus Hernandez and Police Detective Stratton also testified that defendant told Hernandez that he took an active role in the Bocanegra and Tatman slayings--including beating Juan and Juanita Bocanegra, and beating and assisting Reyes in stabbing Tatman. Stratton repeated Hernandez's statements to him that defendant and Joey Bocanegra went to Juan and Juanita's house and planned to rob them and that Tatman was robbed for his Social Security check. Rose McGrew, the Bakersfield Inn maid, repeated her guilt phase testimony about how she discovered Tatman's body.

With regard to the Bocanegra murders, Hernandez testified that defendant entered the house with a bar and ran up to Joey's father and grabbed him and held him there until Joey went and got the knife and they just beat him and stabbed him. When Juanita walked out of her sewing room, defendant rushed HER: That's when they both started killing her. . . . They just stabbed her numerous times and hit her in the head a few times with the bar, and the time, at the same time of doing that I guess Joey somehow managed to get her back inside the room, I guess, while he was hitting her. . . . The prosecution also introduced six color photographs of the victims and forty-eight other color photographs of the Bocanegra and Tatman crime scenes. Criminalist Greg Laskowski testified that the blood splatter in the hallway of the Bocanegra house was consistent with the prosecution's theory that multiple stabbings occurred there.

Defendant's penalty phase evidence consisted of testimony by friends, relatives, and **[**1143]** a social anthropologist to the effect that defendant's dysfunctional and poverty-stricken, migratory family life severely hampered his ability to live a productive life. Defendant was rejected by his mother following his birth and was sent to live with his grandparents. When he was three

years old, defendant's mother and stepfather unexpectedly wrenched **[*23]** defendant from his grandparents' home to move to Arkansas. Shortly thereafter, defendant's mother left defendant's stepfather, and took defendant and his half brother to California. Defendant's mother remarried a man with three children, and the couple thereafter had five additional children.

Defendant's mother and his stepfather were alcoholics and drug abusers who were violent with each other and the children. His grandparents, who were often in charge of defendant, also drank heavily and abused drugs. Both defendant's mother and stepfather died in their middle 30's of acute alcoholism. Defendant tried to take care of his siblings, but took drugs to escape his difficult life. He eventually turned to crime because he had no marketable job skills to prepare him for life as an adult.

Penalty phase defense counsel Gary Frank attempted to persuade the jury that defendant should receive a sentence of life without the possibility of parole and spend the remainder of his life in prison.

II. DISCUSSION

A. *Guilt and Special Circumstance Phase Issues*

1. *Validity of Submission on Preliminary Hearing Transcripts*

On the second day of trial, July 11, 1988, defendant's chief guilt phase trial counsel, Toton, moved to submit the guilt and special circumstance phases on the preliminary hearing transcript. (Cocounsel Frank was also present during the proceedings.) Toton stated that defendant had agreed to waive his right to a jury trial and to confront witnesses, and to offer no additional evidence, subject to being allowed to argue the legal admissibility of the testimony. The next day, the court informed the parties that although it had not researched the issue, it would **[***858]** allow Toton to take tentative nonbinding waivers of constitutional rights from defendant. These nonbinding waivers included defendant's waiver of his right against self-incrimination.

The prosecutor, Ryals, opposed the motion. She stated that although she was willing to accept a stipulation from defendant that he was guilty of the charges and the special circumstance allegations and to proceed directly to a penalty trial, she would not stipulate to the submission of the case on the preliminary hearing transcripts.

On July 13, the court told the parties that it believed the *prosecution* had the right to a jury trial in the guilt and special circumstance phases but that **[*24]** it would entertain further argument from defendant. Toton informed the court that the submission proposal was a compromise made by defendant at Toton's request. Defendant originally had wanted to plead guilty to the capital charges, but Toton would not consent to such a plea, believing that a guilty plea would amount to ineffective assistance of counsel under *People v. Pope* (1979) 23 Cal. 3d 412 [152 Cal. Rptr. 732, 590 P.2d 859, 2 A.L.R.4th 1].

Ryals argued that if the court granted defendant's request to submit the case on the basis of the preliminary hearing transcripts, the prosecution would be foreclosed from proffering additional evidence gathered since the preliminary hearing. Ryals told the court that the additional evidence was essential to convict defendant and included testimony by

Rodriguez (who purchased property stolen from the murder scenes), reporter Trihey, to whom defendant confessed, a police officer, and an employee of the Bakersfield Inn. Toton and Ryals agreed that the prosecution should be allowed to present additional evidence at the guilt phase, and that the defense would present rebuttal evidence and argue the case. Toton then stated to the court:

Mr. Toton: Let me attempt then, because there is a lot of things going on, to see if my understanding is correct.

We are prepared to waive jury trial on the guilt phase, on the special circumstance.

Mrs. Ryals will present additional evidence. We will be able to present additional evidence and argue the matter.

At penalty phase, it will be statutory, and, in other words, we understand that she has to put on the facts and circumstances of the case itself.

Regular rules of evidence will apply at this point as if they were, as if there had been a jury trial on the guilt phase, and that Mr. Sanchez would be prepared to so waive his right to a jury trial on both and separately on both the guilt phase and the special circumstance.

Mr. Frank and I would be prepared to join that on the People's consent to also join.

THE COURT: It sounds all right, sounds good.

The trial court then allowed Toton to inform defendant of his constitutional rights, but ruled that the waivers would not bind defendant until the **[*25]** following morning. Defendant waived his rights to trial by jury and to confront and cross-examine witnesses, but was not asked to and did not repeat his waiver of the right against self-incrimination. He repeatedly acknowledged, however, that he was waiving his constitutional rights and that his decision was entered freely and voluntarily. Once the waivers were taken, the following colloquy occurred between the court and defendant:

THE COURT: I take it that . . . Mr. Frank and Mr. Toton have talked to you at some length about the waivers?

THE DEFENDANT: Yes, sir.

THE COURT: Do you feel you understood them?

THE DEFENDANT: Yes, sir, I believe I do.

THE COURT: And you have had some time to think about it, at least since about 10:30 this morning, and they talked to you later, I take it?

THE DEFENDANT: Yes, sir.

THE COURT: And you have thought about it?

THE DEFENDANT: Yes, sir.

[*859]** THE COURT: So far as you are losing your right to confront witnesses, those witnesses whose testimony will be presented to the court through the preliminary examination, you won't get a chance to cross-examine them in this court. You understand that?

DEFENDANT: Yes sir.

THE COURT: And you are giving that right up then?

THE DEFENDANT: Yes, sir.

THE COURT: Now, so far as the witnesses called . . . to augment the People's case and/or in your behalf, the live witnesses called in this case, you will have the right to confrontation and you understand that?

[*26] THE DEFENDANT: Yes, sir.

THE COURT: I have to tell you that some of the cases in the state of California say that when you present a case to the judge to determine the guilt or innocence on the basis of the preliminary hearing transcript, that's sometimes called a slow guilty plea.

THE DEFENDANT: Yes, sir.

THE COURT: I don't know whether you have heard that language before, but it's used in the cases.

THE DEFENDANT: Yes, sir.

THE COURT: And I want you to be aware of that. I am not telling you how I am going to decide this case, but there is an aura of that in the cases and you should be aware of that fact.

THE DEFENDANT: Yes, sir.

THE COURT: And do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: And you are willing to give up your right to a trial by jury both as to the guilt of the two homicides alleged and of the other enhancements and the special circumstances; is that right?

THE DEFENDANT: Yes.

[1145]** THE COURT: And you know you have the right, and we are ready to give you a jury on all those issues.

THE DEFENDANT: Yes, your Honor, I understand all that.

THE COURT: And you nonetheless give it up?

THE DEFENDANT: Yes, sir.

Shortly thereafter, the court again confirmed that defendant understood he was waiving important constitutional rights:

[*27] THE COURT: Are you satisfied with your decision?

THE DEFENDANT: Yes, sir, I am very confident.

THE COURT: Because you know we have got a record of everything here. It's going to be kind of hard to tell somebody else, gee, I didn't think about it. The judge coerced me. The [d]istrict [a]ttorney growled at me. My lawyers kicked me around. You know, it's going to be kind of hard to say that after you have been very candid with us here. Are you satisfied with that?

THE DEFENDANT: Yes, sir, I am very satisfied.

THE COURT: You seem satisfied. I believe you are satisfied. I will make that kind of a finding.

Defendant confirmed his intent to waive his jury trial and confrontation rights the following morning, but no mention was made by the court or counsel of defendant's right against self-incrimination.

(1a) Defendant now contends that because submitting the case on the basis of the preliminary hearing was tantamount to pleading guilty (or a slow plea), the trial court

committed reversible error under *Bunnell v. Superior Court* (1975) 13 Cal. 3d 592 [119 Cal. Rptr. 302, 531 P.2d 1086] (hereafter *Bunnell*) when it failed to advise in the *binding* waivers that defendant would be relinquishing his Fifth Amendment right against self-incrimination. He also contends that the court's failure to advise him of the direct consequences of a conviction requires reversal, as does the fact that he was unaware of the legal ramifications of his initial submission and waiver.

[*860]** a. *Slow Plea*

(2a) In *Bunnell*, this court held that a stipulation to submit a case for decision on preliminary hearing transcripts must be accompanied by advice regarding the personal waiver of a defendant's constitutional rights to jury trial, silence, and to confront and cross-examine, i.e., *Boykin-Tahl* advice and waivers. (*Boykin v. Alabama* (1969) 395 U.S. 238 [23 L. Ed. 2d 274, 89 S. Ct. 1709]; *In re Tahl* (1960) 1 Cal. 3d 122 [81 Cal. Rptr. 577, 460 P.2d 449].) The *Bunnell* court held, the record shall reflect that he had been advised of his right to a jury trial, to confront and cross-examine witnesses, and against self-incrimination. . . . Express waivers of the enumerated constitutional **[*28]** rights shall appear. . . . In all guilty plea and submission cases the defendant shall be advised of the direct consequences of conviction such as the permissible range of punishment provided by statute . . . . (*Bunnell*, *supra*, 13 Cal. 3d at p. 605.)

Thereafter, in *People v. Hendricks* (1987) 43 Cal. 3d 584 [238 Cal. Rptr. 66, 737 P.2d 1350] (hereafter *Hendricks*) we held that the mandate of *Boykin-Tahl* applies only to pleas of guilty and submissions on the preliminary hearing transcript, or slow pleas, by virtue of which [defendant] surrenders one or more of the three specified rights. (*Id*., at p. 592.) A slow plea is defined as a submission of the guilt phase to the court on the basis of the preliminary hearing transcripts that is tantamount to a plea of guilty because guilt is apparent on the face of the transcripts and conviction is a foregone conclusion if no defense is offered. (*People v. Wright* (1987) 43 Cal. 3d 487, 496 [233 Cal. Rptr. 69, 729 P.2d 260] [hereafter *Wright*].) (3) Deciding whether a submission is a slow plea is often difficult, and courts generally review such pleas based on defendant's willingness to contest guilt during the court trial. Submissions that are not considered slow pleas include those in which (1) the preliminary hearing involves substantial cross-examination of the prosecution witnesses and the presentation of defense **[**1146]** evidence or (2) the facts revealed at the preliminary examination are essentially undisputed but counsel makes an argument to the court as to the legal significance to be accorded them. (*Ibid*.; see *In re Mosely* (1970) 1 Cal. 3d 913, 924-925, fn. 9 [83 Cal. Rptr. 809, 464 P.2d 473] [extending, in dictum, *Tahl* advisement and waiver requirement to cases in which defendant's submission on preliminary hearing transcript is tantamount to a guilty plea].)

Defendant claims that because counsel did not argue for acquittal of all charges and presented no defense to some of the charges, his submission was a slow plea tantamount to a guilty plea. But as the *Wright* court observes, [a]n appellate court, in determining whether a submission is a slow plea, must assess the circumstances of the entire proceeding. It is not enough for a reviewing court to simply count the number of witnesses who testified at

the hearing following the submission. A submission that prospectively appeared to be a slow plea may turn out to be part of a full-blown trial if counsel contested the sufficiency of evidence for those counts or presented another potentially meritorious legal argument against conviction. Conversely, a submission that did not appear to be a slow plea because the defendant reserved the right to testify and call witnesses or to argue the sufficiency of the evidence (*see People v. Guerra (1971) 21* Cal. App. 3d 534, 538 [98 Cal. Rptr. 627]) may turn out to be a slow plea if the defense presented no evidence or argument contesting guilt. [P] If it appears on the **[*29]** whole that the defendant advanced a substantial defense, the submission cannot be considered to be tantamount to a plea of guilty. Sometimes, a defendant's best defense is weak. He may make a tactical decision to concede guilt as to one or more of several counts as part of an overall defense strategy. A submission under these circumstances is not a slow plea, and the trial court is not constitutionally compelled by Boykin and Tahl to administer the guilty-plea safeguards to assure that the tactical decision is voluntary and intelligent. (2b) The advisements and waivers in such a case are required only as a matter of the judicial policies that underlie our decision in *Bunnell*. (*Wright, supra,* 43 Cal. 3d at pp. 496-497.)

[*861]** (1b) In the present case, defendant's submission on the preliminary hearing transcripts was not a slow plea. Defense counsel Toton conducted substantial cross-examination of the prosecution witnesses during the preliminary hearing. Toton also called prosecution witnesses Hernandez and Detective Stratton to testify for the defense, and questioned Hernandez about whether he had agreed to testify against defendant with the intent of making a deal in his own case.

In addition, following the close of the prosecution's guilt phase presentation, Toton renewed his motions to strike portions of the trial testimony of Maria Rodriguez, Detective Boggs, and William Freeman (the patrolman who seized two screwdrivers from defendant that had been stolen from the Bocanegra residence), and then moved for a judgment of acquittal of all the charges.

In arguing the motion for acquittal, Toton asserted there was insufficient evidence of defendant's guilt of the robbery and murder charges, and that the People failed to charge properly the special circumstance allegations. In addition, Toton asserted that no physical evidence linked defendant to the Bocanegra murders. He argued that the prosecution presented no evidence of premeditation in those murders, and that defendant's hypothetical questions to Detective Stratton should not be used as evidence of murder. Toton also pointed out that defendant's incriminating statements to newsman Trihey implied knowledge of the crime, but not intent to kill, that there was no evidence that defendant robbed the Bocanegras or that defendant had the specific intent to kill either the Bocanegras or Tatman.

Toton's closing argument following the guilt phase was equally extensive. He asserted there was insufficient evidence, as a matter of law, to prove beyond a reasonable doubt that defendant committed the charged robberies and the Bocanegra murders because the testimony of Hernandez and Trihey **[*30]** was not credible. At best, he argued, the evidence in the Bocanegra murders supported a verdict of voluntary manslaughter. **[**1147]** He also

asserted that the prosecution had failed to prove the specific intent to kill necessary to support the special circumstance allegations.

It therefore appears that defense counsel's cross-examination was substantial, and that he argued constantly that the facts as presented at the preliminary hearing should be viewed as not supporting first degree murder convictions. These facts support the People's assertion that defendant's submission on the preliminary hearing transcripts for the guilt and special circumstance phases of the trial was not tantamount to a guilty plea. (*Wright*, *supra*, 43 Cal. 3d at p. 496.)

For submissions not tantamount to a guilty plea, a trial court's failure to advise the defendant of his right against self-incrimination is implicated only to the extent defendant *surrendered* the right. (*Hendricks*, *supra*, 43 Cal. 3d at p. 592.) Through the submission stipulated to here, defendant never surrendered his self-incrimination privilege because he chose not to testify during the guilt phase proceedings. Because defendant never surrendered his right against self-incrimination, there was no requirement of a personal, on-the-record waiver. (*Ibid*.)

b. *Consequences of Conviction*

(4) Defendant next contends that the trial court committed reversible error when it failed to advise him that a conviction of guilt and special circumstances could lead to a death sentence. Without an understanding of the possible consequences of submitting the guilt and special circumstances on the preliminary hearing transcripts, defendant asserts, any waiver of constitutional rights is invalid.

We find defendant's argument unavailing. On submission on a transcript of preliminary hearing, a defendant must be told of the potential maximum and minimum terms of imprisonment. (*People v. Dakin* (1988) 200 Cal. App. 3d 1026, 1033 [248 Cal. Rptr. 206].) Nonetheless, a court's failure to comply with this rule requires reversal only if it is reasonably probable a result more favorable to the defendant would have been reached in absence of the error. (*Wright*, **[***862]** *supra*, 43 Cal. 3d at p. 495; *People v. Watson* (1956) 46 Cal. 2d 818, 836 [299 P.2d 243].) We find no such prejudice. Defendant had been thoroughly advised by counsel of the consequences of pleading guilty and of the consequences of waiving his constitutional rights. He was well aware that he faced a possible death sentence, and, according to reporter **[*31]** Trihey, even asked for his own death. It is clear from the record that defendant would have waived his right to a jury trial and insisted on the submission of the guilt phase on the preliminary hearing transcripts even if he was specifically told by the court that he faced a possible death sentence.

c. *Other Claims*

(5) Defendant asserts that he was not told (1) of the legal ramifications of the agreement between Toton and Ryals to limit evidence to that presented at the preliminary hearing, and (2) of the absence of a defense to the Tatman robbery and the Tatman first degree felony-murder charges. Defendant especially notes that he was unaware the defense challenge to the charges would rest solely on the ground of insufficient evidence. Moreover, defendant claims, Toton never explained he limited his defense to rebuttal witnesses. The lack of any explanation as to the procedural aspects of submitting the case on the preliminary hearing transcripts, defendant

asserts, renders his waiver and submission void.

As to defendant's claims that he was unaware of the legal ramifications of his submission and waiver, and the probability of conviction, we conclude no such advisement was required in light of defendant's reservation of his right to present additional evidence and to contest his alleged guilt in argument to the court. As the People observe, *Bunnell*, *supra*, 13 Cal. 3d 592, requires that a defendant be advised of the probability that his submission will result in a conviction of the offenses only [i]f a defendant does not reserve the right to present additional evidence and does not advise the court that he **[**1148]** will contest his guilt in argument to the court . . . . (*Id*., at p. 605.)

2. *Sufficiency of the Evidence*

(6a) Defendant contends there was insufficient evidence of premeditation and deliberation to support his convictions for the first degree murders of both Juan and Juanita Bocanegra. In the alternative, he asserts that even if there was sufficient evidence to convict him of the Bocanegra murders on an aider and abettor theory, the evidence supported only a second degree murder conviction because the prosecution failed to prove that Joey intended to kill his parents with premeditation and deliberation, and that defendant aided and abetted in the murders. [1] (7) We need not be convinced beyond a reasonable doubt that the murders were premeditated. Our inquiry on **[*32]** appeal in light of the whole record [is] whether *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (*People v. Davis* (1995) 10 Cal. 4th 463, 511 [41 Cal. Rptr. 2d 826, 896 P.2d 119] [hereafter *Davis*]; see *Jackson v. Virginia* (1979) 443 U.S. 307, 318-319 [61 L. Ed. 2d 560, 573-574, 99 S. Ct. 2781].) The standard of review is the same when the People rely mainly on circumstantial evidence. (*People v. Stanley* (1995) 10 Cal. 4th 764, 793 [42 Cal. Rptr. 2d 543, 897 P.2d 481]; see also *People v. Bean* (1988) 46 Cal. 3d 919, 932 [251 Cal. Rptr. 467, 760 P.2d 996] [conviction based on circumstantial evidence will be affirmed if circumstances reasonably justify trier of fact's findings].) The record does not support either of defendant's contentions.

[*863]** (8a) As we have observed in numerous cases, we apply the tripartite test of *People v. Anderson* (1968) 70 Cal. 2d 15 [73 Cal. Rptr. 550, 447 P.2d 942], in deciding whether the evidence is sufficient to support a finding of premeditation and deliberation based on these three factors: (1) planning activity; (2) motive (established by a prior relationship and/or conduct with the victim); and (3) manner of killing. (*Id*., at pp. 26-27; *People v. Wharton* (1991) 53 Cal. 3d 522, 546-547 [280 Cal. Rptr. 631, 809 P.2d 290] [hereafter *Wharton*]; cf. *People v. Haskett* (1982) 30 Cal. 3d 841, 849, fn. 1 [180 Cal. Rptr. 640, 640 P.2d 776].) [T]his court sustains verdicts of first degree murder typically when there is evidence of all three types and otherwise requires at least extremely strong evidence of (1) or evidence of (2) in conjunction with

[1] Defendant's crimes were committed in February 1987, eight months before our October 1987 decision in *People v. Anderson* (1987) 43 Cal. 3d 1104 [240 Cal. Rptr. 585, 742 P.2d 1306], which overruled *Carlos v. Superior Court* (1983) 35 Cal. 3d 131 [197 Cal. Rptr. 79, 672 P.2d 862]. Therefore, whether or not defendant was the actual killer, we must find he harbored the intent to kill for the multiple-murder special circumstance to apply (*People v. Turner* (1984) 37 Cal. 3d 302, 328-329 [208 Cal. Rptr. 196, 690 P.2d 669].) Although the parties do not raise the issue because the case was tried to the court (and thus the intent to kill requirement did not arise in the usual context of jury instructions), we note the intent to kill requirement applied nonetheless.

either (1) or (3). (*Anderson*, *supra*, 70 Cal. 2d at p. 27.)

We have recently explained that the *Anderson* factors do not establish normative rules, but instead provide guidelines for our analysis. In *People v. Thomas* (1992) 2 Cal. 4th 489, 517 [7 Cal. Rptr. 2d 199, 828 P.2d 101] we observed: The *Anderson* analysis was intended as a framework to assist reviewing courts in assessing whether the evidence supports an inference that the killing resulted from preexisting reflection and weighing of considerations. It did not refashion the elements of first degree murder or alter the substantive law in any way.

Thereafter, in *People v. Perez* (1992) 2 Cal. 4th 1117, 1125 [9 Cal. Rptr. 2d 577, 831 P.2d 1159] (hereafter *Perez*) we reiterated the *Thomas* statement, and added that [t]he *Anderson* guidelines are descriptive, not normative. **[*33]** [Citation.] The goal of *Anderson* was to aid reviewing courts in assessing whether the evidence is supportive of an inference that the killing was the result of preexisting reflection and weighing of considerations rather than mere unconsidered or rash impulse. [Citation.] [P] In identifying categories of evidence bearing on premeditation and deliberation, *Anderson* did not purport to establish an exhaustive list that would **[**1149]** exclude all other types and combinations of evidence that could support a finding of premeditation and deliberation. . . . The *Anderson* factors, while helpful for purposes of review, are not a sine qua non to finding first degree premeditated murder, nor are they exclusive. (See *Davis*, *supra*, 10 Cal. 4th at p. 511.)

Finally, we have recognized that it is not necessary that the *Anderson* factors be present in some special combination or that they be accorded a particular weight. (*People v. Pride* (1992) 3 Cal. 4th 195, 247 [10 Cal. Rptr. 2d 636, 833 P.2d 643].) Nonetheless, we are guided by the factors in our determination whether the murder occurred as a result of preexisting reflection rather than unconsidered or rash impulse. (*Ibid*.)

(6b) We find substantial evidence supports the trial court's finding that Joey Bocanegra intended to kill his parents, that he premeditated and deliberated the murders, and that defendant can be found vicariously liable for the murders as an aider and abettor. (9) As we have observed, an aider and abettor must act with knowledge of the criminal purpose of the perpetrator and with an intent either of committing, or of encouraging or facilitating commission of, the offense. (*People v. Beeman* (1984) 35 Cal. 3d 547, 560 [199 Cal. Rptr. 60, 674 P.2d 1318] [hereafter *Beeman*].) We have also recognized that if the aider and abettor undertakes acts with the intent that the actual perpetrator's purpose be facilitated thereby, he is a principal and liable for the commission of the offense. (*People v. Croy* (1985) 41 Cal. 3d 1, 12, fn. 5 [221 Cal. Rptr. 592, 710 P.2d 392]; see also § 31, 190.2, subds. (c) & (d), 971.) Thus, the basis of liability for the perpetrator applies to the aider and abettor and extends to the natural and reasonable consequences of the acts he knowingly and intelligently aids and encourages. (*Beeman*, *supra*, 35 Cal. 3d at p. 560.) (6c) As we explain, we conclude that defendant shared Joey's intent to kill, and in assisting Joey in committing the crimes, understood, **[***864]** and facilitated, the full extent of Joey's criminal purpose.

Hernandez testified, and defendant admitted to Detective Stratton, that defendant initially waited outside while Joey entered his parents'

house. Defendant then entered the house after hearing the sounds of a fight between Joey and Juan. Defendant told Hernandez that he went inside the house to break up the fight between Joey and his father, but the facts belie his stated **[*34]** intent. When defendant entered the house, he saw Joey fighting with his father. Rather than come to Juan's aid, defendant grabbed a curved metal bar and commenced beating Juan.

Joey's actions, according to defendant's statements to prosecution witnesses, indicated that Joey deliberated over his father's killing. Joey initially struck Juan in the hallway and then, in the kitchen, obtained a knife that he used to stab Juan. In our view, Joey formed a clear intent to kill, at the latest, during the altercation with his father, and obtained a kitchen knife to carry out that plan. (8b) Our cases hold that planning activity occurring over a short period of time is sufficient to find premeditation. '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 . . . .' (*Perez*, *supra*, 2 Cal. 4th at p. 1127, quoting *People v. Thomas* (1945) 25 Cal. 2d 880, 900 [156 P.2d 7].)

(6d) There was also ample evidence of motive. The evidence supports a strong inference that Joey entered his parents' house to rob them. When his father resisted the robbery, Joey was motivated to murder him in order to gain access to both money and tangible goods, including a television set. Substantial **[**1150]** evidence supports a finding that Joey believed Juan stood in the way of his plan.

Finally, the trial court could infer from the evidence that the manner of killing tended to demonstrate Joey acted with premeditation and deliberation. The attack occurred in a series of rooms, indicating that Juan's repeated attempts to break away from his murderers were consistently thwarted by the attackers' relentless pursuit of him, even after he was gravely wounded. A rational finder of fact could infer that the manner of killing, when combined with Joey's retrieval of the knife in the kitchen, and defendant's retrieval of a metal bar used in clubbing a defenseless Juan, is sufficient to support the trier of fact's implied finding that Joey formed the plan to kill his parents during the altercation, located the murder weapon, and along with defendant, deliberately murdered his father. (See *Davis*, *supra*, 10 Cal. 4th at p. 511.)

The same evidence supports the trial court's finding that defendant shared Joey's intent and plan to kill Juan, and thus was liable, as an aider and abettor, for Juan's murder. (*Beeman*, *supra*, 35 Cal. 3d at p. 560.) The killing of Juan ended after a prolonged knife attack and beating from which Juan attempted to defend himself. Defendant's personal involvement in the murder was substantial. Far from merely acting as a lookout, or beating Juan after he was already dead, defendant was actively involved in assisting Joey **[*35]** in Juan's murder. Defendant's admitted act of arming himself with a curved metal bar before joining the altercation between Joey and Juan indicates he shared Joey's plan. (*Perez*, *supra*, 2 Cal. 4th at p. 1126 [evidence of planning activity shown by defendant's act of surreptitiously entering victim's house and obtaining knife from victim's kitchen]; *Wharton*, *supra*, 53 Cal. 3d at p. 547 [defendant's act of retrieving hammer constituted planning activity].) From this evidence, the trier of fact could reasonably

infer defendant knowingly engaged or assisted in Juan's murder as an aider and abettor. (*Beeman*, *supra*, 35 Cal. 3d at p. 556.)

As to Juanita's murder, defendant asserts the evidence similarly does not support the conviction. He claims that he did not personally **[***865]** kill Juanita [because] she was stabbed to death by Joey. He asserts that there is no evidence in the record that [he] held Juanita down, helped push her back to the sewing room, or had any contact with her while Joey was stabbing her. He contends that there is no evidence to support the People's theory that defendant aided Joey by hitting Juanita with a bar and that [t]here is simply no evidence that [his] initial grabbing of Juanita actually aided, or even was intended to aid, Joey's subsequent stabbing of his mother. Finally, defendant asserts in his reply brief that his efforts to tie and gag Juanita are altogether inconsistent with an intent to kill her.

Again, the evidence supports the court's verdicts and refutes defendant's contention. Hernandez testified defendant told him that during the murder of Juan, Juanita screamed. Defendant grabbed Juanita and told Joey to shut her up. Joey then stabbed his mother 26 times. A bloodstained garment was wrapped around Juanita's neck, and her wrists had been tied together with a piece of fabric. The pathologist (Holloway) opined that Juanita died of the stab wounds and that the ligature constriction of her neck was a possible contributing cause. She also had severe scalp injuries that Holloway concluded were consistent with those inflicted by a long bar or pipe less than one-half inch in diameter, similar to the instrument used by defendant to inflict Juan's scalp wounds. The trial court could reasonably infer from the evidence that Juanita was killed in order to keep her from being a percipient witness to the murder of her husband. Thus, viewing the evidence in the light most favorable to the People, we conclude a rational trier of fact could have been persuaded that the killing was the result of preexisting reflection and weighing of considerations rather than **[**1151]** mere unconsidered or rash impulse. (*Perez*, *supra*, 2 Cal. 4th at p. 1125.) Defendant's participation in Juanita's murder, like his aiding and abetting in Juan's killing, clearly supports a finding that defendant aided and abetted her murder. (*Beeman*, *supra*, 35 Cal. 3d at p. 560.)

Finally, defendant contends that the evidence showing he waded into a fight already in progress and struck the victim several ineffectual blows **[*36]** with an instrument found on the scene, proves no more than an unlawful killing. When nothing further is shown, defendant claims, the presumption is that the evidence supports differing degrees of guilt, based on the same conduct. Thus, defendant asserts, he should have been convicted of murder in the second degree. (See *People v. Woods* (1992) 8 Cal. App. 4th 1570, 1586-1587 [11 Cal. Rptr. 2d 231]; see also *People v. Wells* (1938) 10 Cal. 2d 610, 616-617 [76 P.2d 493].)

We reject defendant's interpretation of the evidence. Far from wading into a fight and being ineffectual, we have shown how the evidence clearly reflects that defendant aided and abetted Joey in killing both Juan and Juanita. We thus conclude there was sufficient evidence to support the verdict finding defendant guilty of first degree murder.

3. *Denial of Motions to Withdraw*

(10) Defendant asserts that his right to the effective assistance of counsel under the

federal and state Constitutions was violated when the trial court denied two motions to withdraw filed by defense counsel Toton and Frank.

The first motion was filed on the ground that defendant refused to follow their advice by speaking with newsman Trihey and discussing the Bocanegra murders. In denying the motion, the court asked defendant if he felt he could continue to work with counsel. The court told defendant: You've got a little say in it. Whatever you've done, if it's damaged your case, it's damaged your case; if it hasn't damaged your case, it hasn't. What's done is done. And it really comes down to a question now and again whatever has been done, whatever has been said is going to be there whether you have these attorneys or another attorney or attorneys appointed to represent you. The court then told defendant it would not relieve counsel from the case unless defendant told the court he no **[***866]** longer trusted them. Defendant replied: There is a little bit of mistrust there, but, you know, I'm willing to stay with them, but if they want out, you know, I won't stop them. The court thereafter denied the motion to withdraw, informing counsel that it had the highest regard for both attorneys, but whatever defendant had done has happened and any attorney on the case is going to have to live with that.

Two months later, following an article published in the Bakersfield Californian in which Trihey wrote that defendant told him he was a triple killer who deserves to die for his crimes, Frank filed a second motion to withdraw on the ground that his continued representation of defendant would require the proffering of perjured testimony, resulting in violations of the **[*37]** Rules of Professional Conduct. Toton joined the motion, and the court again denied it on the ground that trial was to begin shortly thereafter.

Defendant claims that the court's failure to grant both motions was an abuse of discretion that led counsel to submit the guilt phase on the preliminary hearing transcripts and resulted in a complete breakdown in the attorney-client relationship.

The determination whether to grant or deny a motion by an attorney to withdraw is within the sound discretion of the trial court and will be reversed on appeal only on a clear showing of abuse of discretion. (*People v. McKenzie* (1983) 34 Cal. 3d 616, 629 [194 Cal. Rptr. 462, 668 P.2d 769]; *People v. Lucky* (1988) 45 Cal. 3d 259, 282 [247 Cal. Rptr. 1, 753 P.2d 1052].) We find no abuse of discretion on this record. As the People observe, implicit in the court's denial of the motions is the finding that defendant's discussion of his case with the media was not an indication of his distrust or dissatisfaction with counsel. Rather, the conduct was merely indicative of his unwavering desire to admit culpability and to atone for his crimes. **[**1152]** Indeed, allowing counsel to withdraw would not have alleviated any prejudice to defendant caused by his contact with the press, nor does the record indicate that denying the motion to withdraw influenced defendant's desire to submit the guilt issue on the basis of the preliminary hearing transcripts. Even though counsel were dissatisfied with defendant's failure to heed their advice and not discuss the case with the media, the record shows defendant's right to counsel was not jeopardized by counsel's continuing representation. Thus, because defendant does not show that any disagreement with counsel resulted in a complete breakdown in the

attorney-client relationship that jeopardized his right to a fair trial, we conclude the trial court did not abuse its discretion in denying counsels' motions to withdraw. (See *People v. Douglas* (1990) 50 Cal. 3d 468, 542 [268 Cal. Rptr. 126, 788 P.2d 640] (conc. opn. of Mosk, J.) [In reviewing denial of motion to substitute attorneys, the court focuses on the ruling itself and the record on which it is made. It does not look to subsequent matters . . . .].)

4. *Disciplinary Proceedings Against Cocounsel Toton*

a. *Background*

On July 26, 1988, the last day of testimony in the guilt and special circumstances phase of trial, an article titled *Bakersfield Attorney Faces Disbarment* appeared on the front page of the morning edition of the Bakersfield Californian. The article noted that Toton, attorney for triple **[*38]** killer Ted Sanchez, faced potential disbarment for allegedly failing to (1) notify his clients of receipt of funds, (2) turn over funds in a timely manner, (3) provide an accounting of receipts, and (4) communicate with his clients. In addition, the article observed that Toton was scheduled to appear before the California State Bar's Review Department, which would thereafter make its disciplinary recommendation. Toton alone was aware of the proceedings prior to the article's publication.

The court met in chambers with Ryals, Toton, Frank, and defendant to discuss the article. Ryals requested the court make inquiry as to [defendant], as to his knowledge of the problems Mr. Toton is facing, of **[***867]** whether or not we are being rushed through this trial for Mr. Toton's benefit, if there is so much as a rush . . . . After Frank agreed to discuss the disciplinary proceedings with defendant that evening, the court agreed to meet in camera with the defense the following morning.

When Frank and defendant met with the court in camera the next morning, Frank indicated that he had met with defendant and learned that defendant had read the July 26 article, and that Frank had no knowledge of the disciplinary proceedings prior to reading the article. The following colloquy then occurred:

THE COURT: One of the things that concerns me about this incident is the fact of the date of August 25th and the fact that a jury trial was waived in this case, and now we're at that stage of the case where a [Penal Code section] 1118.1 is under submission. And I suppose somebody reviewing this case could say one of the reasons maybe that Mr. Toton suggested that the jury trial be waived was the fact that the trial could be completed prior to the time that the Californian suggests that there's going to be some kind of a ruling in his case. As--and clearly if we had had a jury, we would still have been going at that time, and I really seriously doubt whether we would have been in a position even to have begun to take evidence as of the 25th day of August. That situation worried me a little bit.

And I wonder if you have discussed this with your client.

Mr. Frank: Yes, your Honor. I advised [defendant] that the article certainly did imply that Mr. Toton's motivation for pursuing the presentation of the case in the manner in which he has, at least indicated, that perhaps he did that because of his own personal problems, plans or agenda.

I advised [defendant] that he had the right to be represented by an attorney who was

completely and absolutely free from any sort of conflict, **[*39]** that [defendant] had the right to have an attorney whose decision-making **[**1153]** process was unfettered by any of his own personal plans or problems, and that he had the right to have an attorney whose representation and whose decision-making process was based not on any of the attorney's considerations but on the best interests of [defendant], the client in this case.

The court then questioned defendant to verify that he had spoken to Frank about the disciplinary proceedings, that he had read the Bakersfield Californian article, and that he was unaware of any disciplinary action against Toton prior to the date of the article. The court asked defendant if he believed the article implied that one reason Mr. Toton was pushing this case forward was because of his own personal time considerations. DEFENDANT REPLIED: Not really sir, because we had discussed--you know, this was part--*I wanted to go this way in the beginning anyway*. So there was really--I never really felt that he was doing it for his own incidences [*sic*].

The court confirmed defendant's earlier position that it was his idea alone to waive the jury under any circumstances. The court next asked defendant if he wanted to make a motion for mistrial and for certain other motions in view of the publicity that this has gotten? THE FOLLOWING DISCUSSION ENSUED:

THE COURT: What I'm concerned [about] is that something will happen down the line and then you will say, gee, I didn't know what I was doing; I should have asked for a mistrial at that point in time. That would probably be too late, because I'm probably getting an indication that you want to waive any problems that Mr. Toton's difficulties might have in this case. Is that right?

THE DEFENDANT: Yes.

THE COURT: I didn't make that very clear.

THE DEFENDANT: Yeah.

THE COURT: What I'm saying is, I don't want you to go down the line and then all of a sudden say, gee, I've changed my mind.

THE DEFENDANT: Yeah.

THE COURT: Probably you can't do that. You understand that?

THE DEFENDANT: Yes, I understand that.

[*40] **[***868]** THE COURT: Are you satisfied with the state of the record at this point?

THE DEFENDANT: Yes sir. I'm very satisfied.

THE COURT: Nobody threatened you to get you to say this?

THE DEFENDANT: No, sir . . . .

THE COURT: Are you satisfied, sir, that Mr. Toton's dilemma with the State Bar had nothing to do with the waiver of the jury trial?

Mr. Frank: I am, yes.

THE COURT: And are you, Mr. Sanchez?

THE DEFENDANT: I am too.

The parties agree Toton was not disbarred until March 31, 1989, well after defendant's trial was completed. Against this background, we address below defendant's several

arguments regarding Toton's disbarment and its effect, if any, on the fairness of defendant's trial.

b. *Federal Constitutional Claims*

(11a) Defendant first asserts that on learning of the pending disciplinary action against Toton, the court was required to terminate Toton's appointment as defendant's counsel. Defendant claims that the court's failure to remove Toton as counsel denied him his right to the effective assistance of counsel under the Sixth Amendment, denied him due process under the Fourteenth Amendment, and deprived him of a reliable determination of penalty under the Eighth Amendment.

We are not persuaded. (12) In order to establish a violation of the right to effective assistance of counsel, a defendant must show that counsel's performance was inadequate when measured against the standard of a reasonably competent attorney, and that counsel's performance prejudiced defendant's case in such a manner that his representation so **[**1154]** undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. (*Strickland v. Washington* (1984) 466 U.S. 668, 686 [80 L. Ed. 2d 674, 692-693, 104 S. Ct. 2052] [hereafter *Strickland*]; *Wharton*, *supra*, 53 Cal. 3d at p. 575.) Moreover, a court need not **[*41]** determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. (*Strickland*, *supra*, 466 U.S. at p. 697 [80 L. Ed. 2d at p. 699].) Prejudice is shown when there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. (*In re Sixto* (1989) 48 Cal. 3d 1247, 1257 [259 Cal. Rptr. 491, 774 P.2d 164]; *Strickland*, *supra*, 466 U.S. at p. 694 [80 L. Ed. 2d at pp. 697-698].) If defendant fails to show that he was prejudiced by counsel's performance, we may reject his ineffective assistance claim without determining whether counsel's performance was inadequate. (*Strickland*, *supra*, 466 U.S. at p. 697 [80 L. Ed. 2d at pp. 699-700].)

To support his federal constitutional argument, defendant relies on two Illinois cases, in which the appellate courts reversed sentences of murder in cases where the same defense attorney was subject to disciplinary proceedings during separate murder trials for the same crime. (*People v. Williams* (1982) 93 Ill.2d 309 [67 Ill.Dec. 97, 444 N.E.2d 136] [hereafter *Williams*]; *People v. Rainge* (1983) 112 Ill.App.3d 396 [68 Ill.Dec. 97, 445 N.E.2d 535] [hereafter *Rainge*].)

In *Williams*, a jury convicted the defendant of two counts of murder, kidnapping, and rape, and sentenced him to death. The Illinois Supreme Court affirmed defendant's conviction and sentence, over his protest that he had been denied effective assistance of counsel. While the defendant's petition for rehearing on the appeal was pending, the defendant's attorney appeared before the same court in a disciplinary action in which the Hearing Board and Review Board of the Illinois Attorney Registration and Disciplinary Commission recommended that the attorney be disbarred because of misconduct in handling the estate of a client. The Illinois Supreme Court ordered the attorney disbarred. **[***869]** (*In re Weston* (1982) 92 Ill.2d 431 [65 Ill.Dec. 925, 442 N.E.2d 236].)

Based on the information presented to it in the attorney disciplinary action, the *Williams* court granted the defendant's petition for rehearing. After reconsidering the effectiveness of counsel in light of the disbarment, the court reversed the defendant's conviction and sentence. The court held that even though the evidence supported defendant's conviction, in light of the disbarment it no longer can say, with any degree of assurance, that [the defendant] received the effective assistance of counsel guaranteed by the Constitution. (*Williams*, *supra*, 444 N.E.2d at p. 142.)

In reversing the conviction, the *Williams* court cited numerous examples of inaction by counsel that it believed demonstrated ineffective assistance, **[*42]** including the failure to make a motion to suppress the physical evidence seized from [defendant's] car--evidence which was perhaps crucial to the State's case; the failure to object to the testimony concerning the Canadian study on hair comparisons; the failure to object to prejudicial material received by [the defendant's] jury . . .; the failure to object to testimony concerning the good character of the decedents . . . . (444 N.E.2d at pp. 142-143.) The court admitted that it had originally examined in the appeal the more significant errors . . . and found no plain error. (*Id*., at p.143.) But in light of counsel's disbarment, the court reconsidered its original affirmance of the conviction. The court stated: [W]e are now aware, for the first time, of the unique circumstances under which counsel in this case was operating at the time of the capital trial. In light of these facts, we can no longer characterize counsel's decision not to make the motion to suppress . . . evidence or to take other action on his client's behalf as professional misjudgments made with full knowledge of the applicable law and the facts. . . . [P] It is apparent to us that the unique facts in this case require **[**1155]** that we forgo application of either of the established tests, normally applied in determining whether a defendant has been deprived of his constitutional right to the assistance of counsel. [Citations.] As we originally indicated, the voluminous record here shows that there were many instances where counsel made able and vigorous objections and presentations, and we cannot characterize his performance as actual incompetence or as of such a low caliber as to reduce the trial to a farce or sham. We believe, however, considering the unique circumstances and sequence of events in this capital case, which will rarely, if ever, be duplicated, that the interests of justice require that . . . Williams be granted a new trial. (*Ibid*.)

Defendant Williams's two codefendants, Rainge and Adams, were separately tried and also found guilty of the above murders and sentenced to life imprisonment. (*Rainge*, *supra*, 445 N.E.2d 535.) Defendant Rainge was represented by the same attorney who had represented Williams. The Illinois Court of Appeal held in abeyance its decision in the *Rainge* case pending the decision in *Williams*, *supra*, 444 N.E.2d 136, because numerous issues raised in the supreme court by Williams, were common issues based upon the same record which were raised in the instant appeal by Rainge and Adams. (*Rainge*, *supra*, 445 N.E.2d at p. 544.) Thereafter, the *Rainge* court reversed Rainge's murder convictions because the similar interests of Williams and Rainge and the similar issue raised on the same record require that defendant Rainge be granted a new trial. As in [*Williams*], we base our decision upon 'the unique circumstances and sequence of events in this capital case which will rarely, if ever, be duplicated.' (*Rainge*,

supra, 445 N.E.2d at p. 547, quoting *Williams* , *supra*, 444 N.E.2d at p. 142; but see *People v. Neal* (1984) 123 Ill.App.3d 148 [78 Ill.Dec. 695, 462 N.E.2d 814, **[*43]** 816] [distinguishing *Williams* and *Rainge* and finding same counsel not incompetent in noncapital case].)

(11b) Defendant asserts that we should follow the *Williams* and *Rainge* courts and find that on the unique facts of this case, the State Bar proceedings against Toton tainted his representation of defendant and compromised the constitutionality of the conviction **[***870]** and sentence. But unlike Williams, who had asserted numerous instances of inaction by counsel to demonstrate he was denied the effective assistance of counsel (*Williams*, *supra*, 444 N.E.2d at p. 142), defendant points to no instances of inaction that, in light of the pending discipline, would allow the court to characterize Toton's representation as incompetent. Indeed, the record is clear that defendant agreed to the guilt phase submission on the basis of the preliminary hearing transcripts even though factual issues remained in the case. Although the *Williams* court had found no plain error prior to learning of the disciplinary action pending against counsel, once the court became aware of the disciplinary matter, it lost confidence that counsel's decision not to make the motion to suppress [certain evidence] or to take other action on his client's behalf as professional misjudgments made with full knowledge of the applicable law and the facts. (*Id*., at p. 143.)

By contrast, defendant herein does not assert that Toton's pending discipline prejudiced his case. The record would not support such an argument. Toton vigorously cross-examined prosecution witnesses at the preliminary hearing and during the guilt phase, made several defense motions, including one for appointed assistant counsel, which was granted, and motions for pretrial discovery, severance and additional motions that indicated he was vigorously representing his client. In addition, Toton made a comprehensive closing argument at the guilt phase. Thus, there is no indication on the record that counsel's representation was anything less than competent, and defendant fails to persuade us that counsel's representation was ineffective solely on the basis of the disciplinary action pending against him.

c. *State Constitutional Claim*

Defendant next asserts that even if we find no federal constitutional violation, he was denied his right to effective assistance of **[**1156]** counsel under article I, section 15 of the California Constitution which states that a defendant in a criminal case has the right . . . to have the assistance of counsel for the defendant's defense. . . . Defendant relies on our decision in *In re Johnson* (1992) 1 Cal. 4th 689 [4 Cal. Rptr. 2d 170, 822 P.2d 1317] (hereafter *Johnson*) to support his argument that Toton was unfit to represent him during his capital trial. **[*44]**

In *Johnson*, the defendant was convicted in July 1989 of selling cocaine in violation of Health and Safety Code section 11352. (*Johnson*, *supra*, 1 Cal. 4th at p. 694.) Unknown to the defendant, his counsel had been suspended from the practice of law prior to the representation pursuant to Business and Professions Code section 6102, following a conviction under Penal Code section 288, subdivision (a) (committing a lewd or lascivious act against a child using force or fear). In May 1989, while State Bar

disciplinary proceedings were pending against counsel, he resigned. We accepted the resignation in September 1989. (*Johnson*, *supra*, 1 Cal. 4th at p. 694.)

Although we refused to presume that a suspended attorney lacks professional competence (1 Cal. 4th at p. 699), we nonetheless reversed the Court of Appeal judgment denying habeas corpus relief. We held that representation by one who has resigned from the State Bar denies effective counsel, and observed: Representation by a person who has never been admitted to the practice of law or has fraudulently procured admission denies a defendant his rights under article I, section 15, as a matter of law. So too does representation by a person who, although formerly licensed, has resigned from the State Bar. The court will not examine the quality of the representation in such cases since an essential element of the constitutional right to counsel is counsel's status as a member of the State Bar. (*Id*., at p. 701, fn. omitted.) Thus, we held, once an attorney resigns from the State Bar with charges pending, and is immediately transferred to inactive status, that attorney, for all purposes, is no longer considered a member of the bar and is not licensed to practice law. Such an attorney's representation of a defendant, therefore, violates article **[***871]** I, section 15, and denies the defendant effective assistance of counsel. (1 Cal. 4th at p. 701.)

In reversing Johnson's conviction on ineffective assistance grounds, however, we emphasized that mere suspension of an attorney from practice under Business and Professions Code section 6102 upon conviction of any felony or other offense involving moral turpitude does not alone create a presumption of incompetence or deprive the defendant of his right to counsel under article I, section 15. (*Johnson*, *supra*, 1 Cal. 4th at p. 699.) Indeed, we observed that even a suspension of an attorney pursuant to section 6102 does not establish, as a matter of law, that the attorney is unfit to practice law, and a conclusion that an attorney who has committed an offense of moral turpitude is unfit to practice law is not necessarily a judgment on the attorney's professional competence. (*Johnson*, *supra*, 1 Cal. 4th at p. 699.)

We have not previously addressed whether, as in this case, disciplinary proceedings that are pending during an attorney's representation of a criminal defendant render the assistance of counsel ineffective when there is no **[*45]** suspension of the attorney or placement on inactive status. But under *Johnson*'s reasoning, we can conclude that the fact disciplinary proceedings were pending against counsel Toton did not *automatically* render Toton's performance inadequate or prejudice defendant's right to effective counsel. (See also *Strickland*, *supra*, 466 U.S. at p. 696 [80 L. Ed. 2d at p. 699].) As the People observe, While representing [defendant], defense counsel Toton was not even subject to suspension under Business and Professions Code section 6102 because he had not been convicted of any crime. In an attempt to establish the denial of his right to counsel, [defendant] equates defense counsel Toton's alleged failure to challenge the State Bar proceedings with the attorney's resignation from the State Bar in *Johnson*. In fact, unlike the attorney in *Johnson*, Toton was a member of the State Bar at all times during **[**1157]** his representation of defendant. 'Erring morally or by a breach of professional ethics does not necessarily indicate a lack of knowledge of the law.' (*Johnson*, *supra*, 1

Cal. 4th at p. 699.) We simply are not persuaded that Toton's unrelated disciplinary problems in any way influenced his representation of defendant or otherwise rendered him unfit as a matter of law. (See *Johnson*, *supra*, 1 Cal. 4th at pp. 699-702.)

d. *Alleged Conflict of Interest*

Defendant's claim that Toton's disciplinary proceedings rendered him incompetent 'is no more persuasive if considered under the rubric of conflict of interest. (13) A criminal defendant's right to effective assistance of counsel, guaranteed by both the state and federal Constitutions, includes the right to representation free from conflicts of interest. (*Wood v. Georgia* (1981) 450 U.S. 261, 271 [67 L. Ed. 2d 220, 230, 101 S. Ct. 1097]; *People v. Jones* (1991) 53 Cal. 3d 1115, 1134 [282 Cal. Rptr. 465, 811 P.2d 757].) To establish a violation of the right to unconflicted counsel under the federal Constitution, 'a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance.' [Citation.] To establish a violation of the same right under our state Constitution, a defendant need only show that the record supports an 'informed speculation' that counsel's representation of the defendant was adversely affected by the claimed conflict of interest.' (*People v. Kirkpatrick* (1994) 7 Cal. 4th 988, 1009 [30 Cal. Rptr. 2d 818, 874 P.2d 248].)

In *People v. Jones* (1991) 53 Cal. 3d 1115 [282 Cal. Rptr. 465, 811 P.2d 757] (hereafter *Jones*) we also observed that [c]onflicts of interest may arise in various factual settings. Broadly, they 'embrace all situations in which an attorney's loyalty to, or efforts on behalf of, a client are threatened by his responsibilities to another client or a third person or by his own interests.' (*Id*., at p. 1134, quoting *People v. Bonin* (1989) 47 Cal. 3d 808, 853 [254 Cal. Rptr. 298, 765 P.2d 460] [hereafter *Bonin*].) **[*46]**

(14a) Defendant contends that the alleged conflict of interest between himself and Toton was caused by Toton's own interest in expediting **[***872]** the trial prior to his disbarment, to the defendant's prejudice. Defendant asserts that the fact of the pending disciplinary action gave Toton a strong incentive to finish defendant's case as quickly as possible, implying that Toton's desire to end the case led to a constitutionally deficient performance.

Based on the appellate record, we are not persuaded by defendant's arguments. As we have observed, the record shows that Toton was not disbarred until *eight months after* the court and defendant learned of the proceedings against him, and one month after completion of the penalty phase of defendant's trial. There is no indication that the disciplinary proceedings influenced the pace of Toton's representation, and, indeed, there is substantial evidence on record that would support the opposite conclusion.

First and foremost, it was Toton who advised defendant not to plead guilty and instead to submit the guilt and special circumstance issues on the basis of the preliminary hearing transcripts. This alternative to a guilty plea allowed counsel to contest the People's case, present various defense motions to the court, and generally make a stronger case for defendant than would have been available following a guilty plea. Thus, counsel Toton actually prolonged the trial notwithstanding defendant's desire to proceed directly to the penalty phase.

Moreover, even if we were to perceive either an actual conflict of interest, as required by federal law, or to conclude the record supports an informed speculation of a conflict as required under our state Constitution, defendant intentionally and knowingly waived any conflict on the record. (*Ante*, at pp. 38-39.)

In addition, defense counsel Frank informed the court he was satisfied that Toton's pending discipline had nothing to do with the waiver of the jury trial. At a later in camera hearing attended by defense counsel Frank, defendant admitted that, in partially submitting his case, it was his desire to **[**1158]** waive jury trial under any circumstances, that he had had a lengthy discussion regarding his rights with defense counsel Frank, and that he wanted to maintain the status quo.

The fact that defendant did not discuss Toton's pending discipline with him does not assist defendant's conflict claim. Here, defendant asserts that his discussion with Frank could not substitute for a discussion with Toton. By his own admission, Frank knew nothing about his cocounsel's impending **[*47]** [discipline] until the news appeared on the front page of the Bakersfield newspaper . . . . Toton hid this important fact from his own assistant counsel until the news became public. Nothing in the record indicates that Frank knew any more about the [discipline] than did the readers of the Bakersfield Californian. Frank simply was not able to speak for Toton in discussing the impact of the [disciplinary proceedings] on the future conduct of the defense [nor was] Frank in [a] position to discuss with [defendant] how the [disciplinary] proceedings already might have affected Toton's guilt phase strategy. Defendant fails to show, however, how Toton's assurances or perspective would have assisted him in determining whether he wanted to waive the conflict, or how Toton would have provided him with a better explanation than that given by the court about the potential drawbacks of Toton's continued representation.

Defendant next asserts that the trial court failed in its duty to ensure that he knowingly and intelligently waived any conflict with counsel. (15) When a trial court knows or should know that defense counsel has a possible conflict of interest with his client, it must inquire into the matter [citations] and act in response to what its inquiry discovers [citation]. (*Jones*, *supra*, 53 Cal. 3d at p. 1136.) If the court determines that a waiver of a conflict is necessary, it must satisfy itself that '(1) the defendant has discussed the potential drawbacks of [potentially conflicted] representation with his attorney, or if he wishes, outside counsel, (2) that he has been made aware of the dangers and possible consequences of [such] representation in his case, (3) that he knows of his right to conflict-free representation, and (4) that he voluntarily wishes to waive that right.' (*Bonin*, *supra*, **[***873]** 47 Cal. 3d at p. 837, quoting *People v. Mroczko* (1983) 35 Cal. 3d 86, 110 [197 Cal. Rptr. 52, 672 P.2d 835].) A trial court's failure to inquire into the conflict or to adequately respond to its inquiry amounts to reversible error if the defendant can show that an actual conflict of interest existed and that that conflict adversely affected counsel's performance. (*Bonin*, *supra*, 47 Cal. 3d at pp. 837-838; cf. *Strickland*, *supra*, 466 U.S. at p. 692 [80 L. Ed. 2d at pp. 696-697].)

(14b) Defendant asserts that the trial court never asked [defendant] in clear, unambiguous language whether he was willing to waive his right to unimpaired counsel. He also complains

of the court's failure to determine whether [Toton's] alleged misuse of client funds might indicate that Toton had financial difficulties which might affect his work or handling of funds in [defendant's] case, [nor did the court] ask Toton about the timetable of state bar proceedings [or ask] how the bar proceeding might affect, or might have affected, Toton's conduct of [defendant's] case.

In deciding whether a defendant understands the nature of a possible conflict of interest with counsel, the trial court need not explore each **[*48]** foreseeable conflict and consequence. (*Jones*, *supra*, 53 Cal. 3d at p. 1137.) Nor does a defendant's waiver of conflict-free counsel extend merely to matters discussed on the record. (*Ibid*.) As we observed in *Maxwell v. Superior* Court (1982) 30 Cal. 3d 606, 621 [180 Cal. Rptr. 177, 639 P.2d 248, 18 A.L.R.4th 333], [r]ules that are that strict seem neither necessary nor workable. (See also *People v. Clark* (1992) 3 Cal. 4th 41, 140 [10 Cal. Rptr. 2d 554, 833 P.2d 561] [waiver found adequate even though all conceivable ramifications of conflict not explained].) Thus, looking at the whole record, we must determine whether defendant was aware of the potential drawbacks and possible consequences of retaining Toton, and whether he understood his right to conflict-free counsel and knowingly waived that right.

[1159]** It is clear that the record belies defendant's argument. The court's response to the asserted conflict of interest was appropriate under the circumstances; it was immediate and informed petitioner of his rights under the facts. As the record indicates, the court discussed the conflict with the parties, was careful to ensure defendant was aware that a conflict existed, and confirmed that his waiver of the conflict was voluntary and knowing. (*Ante*, at pp. 37-40.) Defendant even declined the court's invitation to make a motion for mistrial, emphasizing that he was satisfied with the state of the record. Thus, in light of all the circumstances, we conclude the court gave defendant an opportunity to declare a mistrial, to relieve counsel, and to voice his objections on the record. In our view, the trial court conducted an adequate inquiry into the conflict, and we are satisfied that defendant's waiver was knowing and voluntary. (See *Jones*, *supra*, 53 Cal. 3d at pp. 1137-1138.)

5. *Reporter Immunity Under the California Shield Law*

a. *Background*

As observed in the statement of facts (*ante*, at p. 21), following his arrest, defendant was interviewed by Michael Trihey, a reporter for the Bakersfield Californian. The newspaper published an article based on Trihey's five interviews with defendant. The article, entitled *Accused Asks for Own Death, System Says No*, was published on April 25, 1988. The article observed that Ted Sanchez says he's a murderer, a triple murderer, and that all three victims were killed for their social security checks. The article also revealed defendant's feelings of guilt: I am not an innocent man. If a man feels guilty he should be allowed to plead guilty, and revealed that he wanted to die in the gas chamber: I want to do the right thing. I should go **[*49]** straight to the gas chamber. I don't need no appeals. I deserve to die. In addition, the article noted that defendant reenacted the crimes for Trihey by raising one arm, covered with the tattoos he got in prison, to show how a fatal knife wound was inflicted. Earlier articles based on the same interviews, including one published on **[***874]** February 12, 1988, reported that defendant did not

actually kill either Juan or Juanita but felt he deserves to die because he was present when the slaying happened, because he helped the killers and because he didn't intervene to save the couple, who had been kind to him for years. The same article also quoted defendant as telling Trihey that, 'Joey grabbed a knife and started going at his dad' and, 'that's when Reyes stepped in' and began clubbing [Juan] Bocanegra. The article also stated that defendant told Trihey they all had been smoking PCP before committing the crimes. Defendant was quoted as admitting that at the time of the Bocanegra murders, 'I was scared . . . . It was just that I felt fear, and I didn't know how to respond to it. It could have been mixed emotions because of the PCP taking me . . . . I've been through a lot. I have done a lot of bad things. You know, I am no angel. [P] One thing, I have not murdered nobody. I've done a lot of other things but I haven't went that far yet.' Finally, the article quoted defendant as asserting he didn't want to talk about the Tatman case other than to say, 'I'm not guilty of that.'

During the guilt phase the prosecution subpoenaed Trihey as a witness to testify as to the events he reported in his April 25, 1988, article. Trihey and the Bakersfield Californian filed a motion to quash the subpoena and for a protective order against the disclosure of unpublished information obtained from defendant, on the ground that the information sought was protected by the California Shield Law (hereafter shield law). (Cal. Const., art. I, § 2, subd. (b); Evid. Code, § 1070.) [2] After the prosecutor assured the **[**1160]** court she intended to limit questioning of Trihey to published statements only, the court indicated that it would rule on a question by question basis. When **[*50]** the prosecutor called Trihey to testify, Toton objected. The court allowed Trihey to testify, subject to a motion to strike.

Trihey then testified that he interviewed defendant five times, and that defendant told him he was a triple murderer and that all three [victims] were killed for their social security checks. When Toton asked Trihey if he had made any tape recordings of any interviews with defendant, Trihey's counsel objected on the ground that the question violated the shield law. The court then discontinued the cross-examination pending the submission of defense counsel's points and authorities.

The next day, defendant argued that application of the shield law to protect unpublished information in Trihey's possession would deny him his Fifth Amendment right against self-incrimination, and his Sixth Amendment rights to confrontation and to the effective

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[2] California Constution, article I, section 2, subdivision (b), states in pertinent part: A publisher, editor, reporter, or other person connected with or employed upon a newspaper, magazine, or other periodical publication, or by a press association or wire service, or any person who has been so connected or employed, shall not be adjudged in contempt by a judicial, legislative, or administrative body, or any other body having the power to issue subpoenas, for refusing to disclose the source of any information procured while so connected or employed for publication in a newspaper, magazine or other periodical publication, or for refusing to disclose any unpublished information obtained or prepared in gathering, receiving or processing of information for communication to the public.

As used in this subdivision, 'unpublished information' includes information not disseminated to the public by the person from whom disclosure is sought, whether or not related information has been disseminated and includes, but is not limited to, all notes, outtakes, photographs, tapes or other data of whatever sort not itself disseminated to the public through a medium of communication, whether or not published information based upon or related to such material has been disseminated.

Evidence Code section 1070 contains substantially similar language. (See *Delaney v. Superior Court* (1990) 50 Cal. 3d 785, 796 [268 Cal. Rptr. 753, 789 P.2d 934] [hereafter *Delaney*].)

assistance of counsel, as well as his statutory right to introduce his entire conversation with Trihey. (Evid. Code, § 356 [when part of act, declaration, conversation, or writing is given in evidence by one party, the whole may be inquired into by adverse party].) Defense counsel moved the court either to strike Trihey's testimony or to order Trihey to furnish defendant with all unpublished information regarding the interviews. The court made the following ruling:

[*875]** THE COURT: I am going to rule that you haven't gotten over the hurdle of [*Hammarley v. Superior Court* (1979) 89 Cal. App. 3d 388 (153 Cal. Rptr. 608)] and [*Hallissy v. Superior Court* (1988) 200 Cal. App. 3d 1038 (248 Cal. Rptr. 635)] at this point, and that you may cross-examine Mr. Trihey concerning any of the printed material we have, either this current article or the one before.

I am also going to tell you that the court's ruling at this point is without prejudice and that the court does not intend to make a ruling in this case.

Thereafter, the court clarified its ruling in the following colloquy:

Mr. Toton: Number one, I can cross-examine Mr. Trihey on any published article.

THE COURT: Absolutely.

[*51] Mr. Toton: And the contents of any published article.

THE COURT: Absolutely.

Mr. Toton: I would be prohibited from inquiring behind the published material?

THE COURT: At this point.

Mr. Toton: I am not clear as to which [*Hammarley*], [*Hallissy*] prong is lacking.

THE COURT: Well, I don't think there is any, right now there is no issue that somehow Mr. Trihey is lying and can be impeached and so forth.

That penultimate paragraph [in *Hallissy*] that Mr. Werdel called to my attention is pretty strong language.

Mr. Toton: That is the one that starts off, [A]rguably?

THE COURT: Right.

Mr. Toton: So that if I understand, it's the second prong of [the *Hammarley* test **[**1161]** relied on by the *Hallissy* court] which is lacking; is that correct, your Honor?

THE COURT: Right.

Defendant now claims the trial court erred in limiting the scope of Trihey's testimony and renews his trial court objections.

b. *Newsperson's Shield Law*

In ruling that defendant had failed to meet the second prong of the *Hammarley* test, the court was referring to *Hammarley*'s construction of the shield law under Evidence Code section 1070, and its development of a four-pronged test that assisted the court in determining whether the statute should protect a newsperson from having to reveal undisclosed corroborating sources pertaining to the newsperson's interviews with a named individual who was the prosecution's principal witness in a murder case. (*Hammarley* **[*52]** v. *Superior Court* (1979) 89 Cal. App. 3d 388, 392-394 [153 Cal. Rptr. 608] [hereafter *Hammarley*].)

(16) The *Hammarley* court reviewed the legislative history and intent of the shield law. The court observed, The 'unpublished information' provisions of [Evidence Code] section 1070 were added by amendment in 1974. Prior to that time, the statutory privilege expressly encompassed only source disclosure. (*Hammarley*, *supra*, 89 Cal. App. 3d at p. 396, fn. omitted.) The court held that the statutory privilege protecting unpublished information is not limited to material which might lead to the disclosure of a [newsperson's] confidential sources, but encompasses all information acquired by the [newsperson] in the course of his professional activities which he has not disseminated to the public. (*Id*., at pp. 397-398.)

The *Hammarley* court then stated its test for determining whether a defendant has met his burden in overcoming the statutory protection. Faced with a claim of privilege, the burden is on the party seeking to avoid the privilege competently to demonstrate not only that the evidence sought is relevant and necessary to his case, but that it is not available from a source less intrusive upon the privilege. Moreover, as with any attempt to discover evidence subject to a claim of privilege, a defendant must show a reasonable possibility that the evidence sought might result in his exoneration. (89 Cal. App. 3d at p. 399.)

Nine years later, in *Hallissy v. Superior Court* (1988) 200 Cal. App. 3d 1038 [248 Cal. Rptr. 635] (hereafter *Hallissy*), the court **[***876]** used the *Hammarley* test to grant a newsperson immunity from revealing unpublished sources. A brief review of *Hallissy*'s facts is instructive.

A defendant was charged with three counts of first degree murder (§ 187, 198), and with the multiple-murder and murder-for-financial-gain special circumstances. (§ 190.2, subd. (a)(1) & (3).) Prior to the preliminary hearing, the defendant was interviewed by a reporter for the Contra Costa Times. (*Hallissy*, *supra*, 200 Cal. App. 3d at p. 1041.) Information gathered during the interview was published in the paper in an article entitled, *I Killed Many for Pay*. (*Ibid*.) Following publication of the article, the prosecutor amended the complaint to allege the murder-for-financial-gain special circumstance. (*Ibid*.) The defendant then subpoenaed Hallissy, the reporter, to appear at the preliminary hearing with the unpublished notes of the interview. (*Ibid*.) The trial court granted Hallissy's motion to quash the subpoena on the ground that the unpublished information was protected by the First Amendment of the United States Constitution, and by article I, section 2, subdivision (b), of the state Constitution.

[*53] In affirming the trial court, the Court of Appeal held that the defendant had failed to meet the second prong of *Hammarley*. (*Hallissy*, *supra*, 200 Cal. App. 3d at p. 1046.) The court observed, Arguably [defendant] approaches an adequate showing of relevancy: he wishes to attack his own credibility by using inconsistent statements that he may have made to the reporter during the interview. But he has made no attempt to demonstrate that this particular item of evidence, if it exists, is necessary to his case, the second prong of *Hammarley*. (*Hallissy*, **[**1162]** *supra*, 200 Cal. App. 3d at p. 1046.)

During the past five years, we have had the opportunity to review application of the shield law in the context of criminal cases. (See e.g., *Delaney*, *supra*, 50 Cal. 3d 785.) While using the *Hammarley* and *Hallissy* cases as a benchmark from which to develop our own test for determining whether the shield law

should protect a reporter under the particular facts of a case, we disapproved those cases to the extent they held that a criminal defendant must in every case show the lack of an alternative source regardless of the circumstances. (*Delaney*, *supra*, 50 Cal. 3d at p. 813, fn. 29.) We noted, however, that both *Hammarley* and *Hallissy* were consistent with the test we adopted in *Delaney* [a]s to the threshold showing required. (*Delaney*, *supra*, 50 Cal. 3d at p. 808, fn. 22.)

In fashioning its test for determining whether the shield law should apply to a particular set of facts, the *Delaney* court held that the law protects a newsperson from being held in contempt of court for refusal to disclose either unpublished information or the source of the reporter's information, whether published or unpublished. (*Delaney*, *supra*, 50 Cal. 3d at pp. 796-797; cf. *People v. Cooper* (1991) 53 Cal. 3d 771, 820-821 [281 Cal. Rptr. 90, 809 P.2d 865] [hereafter *Cooper*].) (17a) Nonetheless, the *Delaney* court recognized that a newsperson's protection under the shield law must yield to a criminal defendant's constitutional right to a fair trial when the newsperson's refusal to disclose information would unduly infringe on that right. (*Delaney*, *supra*, 50 Cal. 3d at p. 793.) In order to compel disclosure of information covered by the shield law, the defendant must make a threshold showing of a reasonable possibility that the information will materially assist his defense. The showing need not be detailed or specific, but it must rest on more than mere speculation. [Citation.] If the threshold showing is made, the court then balances various factors in determining whether to compel disclosure of the information. [Citation.] (*Cooper*, *supra*, 53 Cal. 3d at p. 820, paraphrasing *Delaney*, *supra*, 50 Cal. 3d at pp. 809-813.)

The trial court's ruling in this case predated both *Delaney*, *supra*, 50 Cal. 3d 785, and *Cooper*, *supra*, 53 Cal. 3d 771, but that fact does not bear on our **[***877]** decision. Indeed, defendant concedes *Delaney* states the applicable standard. **[*54]**

Defendant makes several arguments against application of shield law immunity in this case: (1) Trihey's assertion of the privilege was premature because the court had not adjudged him in contempt of court before he invoked immunity; (2) Trihey failed to lay the proper foundation for invoking the immunity; (3) even assuming immunity was properly invoked, defendant met *Delaney*'s threshold test for defeating a claim for immunity; (4) application of immunity in this case was prejudicial and denied defendant his federal constitutional rights to confrontation and discovery under the Sixth and Fourteenth Amendments (see, e.g., *Davis v. Alaska* (1974) 415 U.S. 308, 315 [39 L. Ed. 2d 347, 353, 94 S. Ct. 1105]; *Lee v. Illinois* (1986) 476 U.S. 530, 540 [90 L. Ed. 2d 514, 525-526, 106 S. Ct. 2056] [right to confront and cross-examine witnesses is functional right that promotes reliability in criminal trials]; *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 679 [89 L. Ed. 2d 674, 683, 106 S. Ct. 1431] [right to confront and cross-examine witnesses includes right to adequate cross-examination]; *Pennsylvania v. Ritchie* (1987) 480 U.S. 39, 56 [94 L. Ed. 2d 40, 56-57, 107 S. Ct. 989] [criminal defendants have right to government's assistance in compelling attendance of favorable witnesses]); and (5) Toton's failure to cross-examine Trihey on alleged inconsistent statements contained in the article deprived defendant of effective assistance of counsel. On this record, we are not persuaded by defendant's contentions.

(18) First, with respect to his assertion that the timing of Trihey's claim of immunity **[**1163]** should bar application of the shield law, defendant relies on *New York Times Co. v. Superior Court* (1990) 51 Cal. 3d 453 [273 Cal. Rptr. 98, 796 P.2d 811] (hereafter *New York Times*), in which we held that a precontempt petition for extraordinary relief under the shield law was prematurely filed. *New York Times*, however, does not assist defendant, for it was based on the reasoning that precontempt relief would deprive trial courts of the opportunity to decide in the first instance whether the shield law applies to the facts of a case. (*Id*. at p. 459.)

In *New York Times*, the court was asked to decide whether, in a products liability action against a car manufacturer for damages arising out of an automobile accident, the manufacturer could subpoena the unpublished photographs of the accident taken by a newspaper reporter. After the publisher invoked the shield law immunity and refused to comply with the manufacturer's subpoena, the trial court ordered the production of the photographs. Before being adjudged in contempt, the publisher petitioned the Court of Appeal for an extraordinary writ and stay of the court's order. (51 Cal. 3d at p. 457.) The Court of Appeal issued a writ of mandate ordering the trial court to deny the manufacturer's motion to compel, finding that, unlike **[*55]** application of immunity in a criminal proceeding, in which we have held that the defendant may overcome its application by showing that the immunity would deprive him of a fair trial under the federal constitution, the shield law provides 'absolute protection to nonparty journalists in civil litigation from being compelled to disclose unpublished information.' (*Ibid*.)

Although we granted the publisher relief in *New York Times*, we observed that because the shield law provides an immunity from contempt, and not a privilege, the writ petition was premature. (51 Cal. 3d at pp. 458-459.) This finding of prematurity was based on the practical concern that precontempt relief would frustrate the trial court's ability to determine whether the immunity should apply in the first instance. (*Id*. at p. 459.) We reasoned: Premature interference in trial court proceedings would deprive reviewing courts of adequate factual records for making this determination. Premature relief would also allow newspersons to avoid the responsibility of choosing between disclosing information or being held in contempt. A newsperson would have no incentive to make that choice until after a decision by a reviewing court. The result would be an increased burden on **[***878]** reviewing courts. (*Id*., at pp. 459-460.)

The above reasoning, while clearly based on practical grounds, does not foreclose a claim of immunity in the trial court by the nonparty witness during cross-examination. By invoking immunity while on the witness stand, the newsperson is making the choice, discussed in *New York Times*, between disclosing the information he or she believes falls under the ambit of the shield law, or being held in contempt. (51 Cal. 3d at p. 460.) That was the choice properly made by Trihey and the Bakersfield Californian when raising shield law immunity during cross-examination.

Defendant's claim that Trihey failed to lay a proper foundation for raising the shield law is equally unavailing. First, defendant failed to object on this ground. Accordingly, he has waived the claim on appeal. (Evid. Code, § 353, subd. (a).) Had he made the proper

objection, however, his claim would fail on the merits.

We held in *Delaney*, *supra*, 50 Cal. 3d at page 805, that under article I, section 2, subdivision (b) of the state Constitution, a newsperson claiming shield law protection must show that he is one of the types of persons enumerated in the law, that the information was 'obtained or prepared in gathering, receiving or processing of information for communication to the public,' and that the information has not been 'disseminated to the public by **[*56]** the person from whom disclosure is sought.' (*Delaney*, *supra*, 50 Cal. 3d at p. 805, fn.17, quoting Cal. **[**1164]** Const., art. I, § 2, subd. (b).) Once that showing is made, the burden shifts to the party opposing the immunity to show a *reasonable possibility* the information will materially assist his defense. (50 Cal. 3d at p. 808, italics in original.)

Trihey met his foundational requirements. In support of his motion to quash the People's subpoena, he filed a declaration stating that he was a news reporter employed by the Bakersfield Californian Newspaper, that his sources for the February 12, 1988, and April 25, 1988, articles on defendant [were] the source or sources of some information, procured while so connected or employed, for publication in the newspaper. Trihey also declared that the information gathered for the stories [was] unpublished and [had] not been disseminated to the public . . . except for the specific information published in said news article, and that [a]ll such unpublished information was obtained or prepared in the gathering, receiving or processing of information for communication to the public. Defendant has provided no evidence that would contradict Trihey's declaration and, in fact, concedes the subject notes and tapes were unpublished information within the meaning of the shield law. [3]

(19a) Once Trihey met the shield law requirements, defendant was required to show that nondisclosure would deprive him of his federal constitutional right to a fair trial. (*Delaney*, *supra*, 50 Cal. 3d at p. 805.) As observed, *ante*, this page, in order to meet this burden, defendant had to make a threshold showing that it was *reasonably possible* the unpublished information he sought was necessary to his defense. (*Delaney*, *supra*, 50 Cal. 3d at p. 808.)

(17b) Although *Delaney* did not and could not specify what evidence would meet its threshold test, the court did observe that the defendant need not prove evidence he sought to discover would lead to his exoneration and that the defendant's showing need not be detailed or specific, but it must rest on more than mere speculation. (*Delaney*, *supra*, 50 Cal. 3d at p. 809.) Some examples the court provided are instructive: [E]vidence may establish an 'imperfect defense,' a lesser included offense, a lesser related offense, or a lesser degree of the same crime; impeach the credibility of a **[***879]** prosecution **[*57]** witness; or, as in capital cases, establish mitigating circumstances relevant to the penalty determination. A criminal defendant's constitutional right to a fair trial includes these aspects of his defense. (*Ibid.*, fn. omitted.)

(19b) In attempting to meet his burden, defendant attacks his own credibility by

[3] Because defendant litigated the question on the assumption that the alleged notes and tapes (at least those pertaining to the interviews with Trihey) were unpublished information within the meaning of the shield law, we do not address the issue whether the fact that defendant himself was the source of some of the information rendered it outside the protection of the shield law.

claiming he made inconsistent statements during the course of the interviews that would have exposed his confused state of mind at the time the interviews took place. He asserts his alleged unpublished statements also could have been used to impeach Trihey's testimony that defendant had told him he was a triple murderer and that all three were killed for their social security checks. But defendant never shows how the information he sought would materially assist his defense, or how it differed in content from the testimony and published information available for cross-examination, including defendant's statements that he was scared, that he had taken phencyclidine (PCP), and that he had not murdered anyone. Defendant simply asserts that he needed discovery of, and cross-examination about, the unpublished records of the interviews to impeach Trihey's testimony. Unlike other statements attributed to [defendant] in the April 25th article, Trihey's 'triple murderer' assertion was not a direct quotation. Rather, it was a conclusion drawn by Trihey. Trihey's unpublished material might have shown that his 'triple murder' testimony was his own interpretation of [defendant's] account, not an actual admission. Moreover, discovery and cross-examination **[**1165]** might have proven that Trihey's conclusion was not supported by the interviews. The tapes might have shown that [defendant] never said he was a 'triple murderer' or a 'triple killer'; that he did not hit either Juan or Juanita; that he did nothing to aid or abet Joey; that he did not intend that either Juan or Juanita be killed; that he tried to stop Joey from killing his parents; or that he feels guilty because he failed to prevent the homicides. Any of these possibilities would have bolstered [defendant's] insufficiency of the evidence argument.

The alleged evidence defendant claims would have materially assisted his defense consists of nothing more than self-serving statements that a court could reasonably conclude were either too speculative to assist defendant or would harm, rather than materially assist, the defense. Indeed, this case is similar to *Hallisy*, *supra*, 200 Cal. App. 3d at page 1041, in which the court rejected the defendant's attempt to attack his own credibility by subpoenaing a reporter's unpublished interview notes. Based on this record, and under the more recent *Delaney* threshold test, we find that defendant has failed to make the threshold showing that publication of alleged unpublished interview **[*58]** information possessed by Trihey would have materially assisted the defense and defeated Trihey's claim of immunity under the shield law. [4]

In addition, for the same reasons noted above, we reject defendant's claim that he was denied his right to confront and cross-examine Trihey and to discover and present evidence under the Sixth and Fourteenth Amendments. The record shows the court rejected Trihey's statements as proof that defendant killed the victims for their Social Security checks. Moreover, the court found untrue the special circumstance allegations that the murders of Juan and Juanita Bocanegra were committed during a robbery and found defendant not guilty of the robbery in connection with that

[4] Because we conclude that defendant has failed to meet the threshold showing required by *Delaney*, *supra*, 50 Cal. 3d at pages 808-809, we do not discuss his alternative argument that he has satisfied the *Delaney* balancing factors for determining whether a defendant is entitled to a newsperson's unpublished information. These factors include a consideration of whether the information is confidential or sensitive, the interests sought to be protected by the shield law . . . the importance of the information to the criminal defendant, and, depending on the particular facts, whether there is an alternative source for the unpublished information. (*Id.*, at p. 813.)

crime. Thus, it appears the court afforded little weight to **[***880]** Trihey's testimony, and defendant was not denied his federal constitutional right to a fair trial simply because the court allowed the testimony to be introduced.

(20) In a related argument based on independent state grounds, defendant claims that application of the shield law denied him his right to the complete statements he made to Trihey. Defendant asserts the unpublished statements should have been provided the defense under Evidence Code section 356, allowing him to inquire into the entire conversation with Trihey. Defendant fails to acknowledge, however, that section 356 evidence is subject to the immunity provided under the shield law. (1 Witkin, Cal. Evidence (3d ed. 1986) Circumstantial Evidence, § 319, p. 292, and cases cited.) In addition, defendant fails to show how the unpublished statements he alleged he made to Trihey would have placed Trihey's testimony in its proper context, or that the information sought had some connection with Trihey's testimony. (See *People v. Zapien* (1993) 4 Cal. 4th 929, 959 [17 Cal. Rptr. 2d 122, 846 P.2d 704]; see also *People v. Hamilton* (1989) 48 Cal. 3d 1142, 1174 [259 Cal. Rptr. 701, 774 P.2d 730].)

(21) Finally, we reject defendant's assertion that counsel's failure to cross-examine Trihey before closing argument denied him the effective assistance of counsel under article I, section 15 of the California Constitution, **[**1166]** and the Sixth and Fourteenth Amendments to the federal Constitution. In order to succeed in his claim, defendant must show (1) deficient performance under an objective standard of professional reasonableness and (2) **[*59]** prejudice under a test of reasonable probability of an adverse effect on the outcome. (*People v. Berryman* (1993) 6 Cal. 4th 1048, 1081 [25 Cal. Rptr. 2d 867, 864 P.2d 40] [hereafter *Berryman*]; cf. *People v. Ledesma* (1987) 43 Cal. 3d 171, 215-218 [233 Cal. Rptr. 404, 729 P.2d 839] [discussing state and federal right to effective assistance of counsel].) Defendant does not satisfy either prong of the foregoing test.

As discussed, Toton convinced the court during his closing argument that Trihey's testimony should not be given substantial weight; his decision not to cross-examine Trihey as to the contents of the published material was sound strategy, given the nature of defendant's alleged contradictory statements. Defendant does not establish that cross-examination would have revealed any new information, or that any additional information about the interviews would have influenced the court's judgment. Hence, we cannot find counsel's failure to cross-examination Trihey to be deficient. In any event, given the fact that the court dismissed the robbery charges against defendant, and found not true the robbery-murder special-circumstance allegation, we discern no prejudice to defendant based on counsel's performance. (*Berryman*, *supra*, 6 Cal. 4th at p. 1082.)

6. *Alleged Prosecutorial Misconduct*

(22) Defendant contends that Prosecutor Ryals committed prejudicial misconduct in her guilt phase closing argument. He claims that Ryals's argument that there was no evidence anyone other than Joey Bocanegra and defendant committed the murders was knowingly false. As evidence of the prosecutor's bad faith, defendant cites allegedly contrary statements she made to the court during subsequent pretrial hearings in the prosecution of Reyes. Because the asserted evidence of misconduct

is not within the appellate record or our judicial notice, we do not reach the merits of defendant's claim on appeal. To the extent defendant has a valid claim of prosecutorial misconduct based on events occurring after his trial, and therefore not reflected in the appellate record, his claim must be presented by petition for writ of habeas corpus rather than by appeal. [5]

[*60] **[***881]** 7. *Cumulative Guilt Phase Error*

Defendant contends his conviction should be reversed because of the cumulative effect of the alleged guilt phase errors. He relies on the California Constitution, article I, section 15, and the Sixth and Fourteenth Amendments to the United States Constitution.

Contrary to defendant's contention, however, he has not sustained any of his claims of error. Accordingly, we find no cumulative deficiency in the guilt phase proceedings to support reversal. (*People v. Ashmus* (1991) 54 Cal. 3d 932, 1006 [2 Cal. Rptr. 2d 112, 820 P.2d 214] [hereafter *Ashmus*].)

B. *Penalty Phase*

1. *Constitutionality of the 1978 Death Penalty Law*

Defendant contends that the 1978 death penalty law is unconstitutional under the **[**1167]** United States and California Constitutions because it fails to narrow the class of death-eligible murderers and thus renders the overwhelming majority of intentional first degree murderers death eligible. Defendant cites statistics of all first degree murder convictions in which a defendant was found death eligible, and concludes: The vice of the California scheme is not that any one of the special circumstances taken alone is unconstitutional--each arguably identifies a subclass of all first degree murders more deserving of the death penalty than other members of the class. The vice is that, taken together, the special circumstances cover virtually all first degree murders (and a substantial majority of all murders), and, thus, they perform no narrowing function at all. Principally, defendant relies on Justice Blackman's dissent in *Tuilaepa v. California* (1994) 512 U.S. ___, __[129 L. Ed. 2d 750, 767-774, 114 S. Ct. 2630], in which he stated: By creating nearly 20 such special circumstances, California creates an extraordinarily large death pool. (*Id*. at p. __[129 L. Ed. 2d at pp. 773-774] (dis. opn. of Blackman, J.).)

We have repeatedly considered and rejected this identical claim beginning with our decision in *People v. Rodriguez* (1986) 42 Cal. 3d 730, 770-779 [230 Cal. Rptr. 667, 726 P.2d 113]. (See *People v. Crittenden* (1994) 9 Cal. 4th 83, 154-156 [36 Cal. Rptr. 2d 474, 885 P.2d 887].) Moreover, in *Tuilaepa* v. **[*61]** *California*, *supra*, and in a number of previous cases, the high court has recognized that the proper degree of definition of death-eligibility factors is not susceptible of mathematical

[5] Defendant has filed a motion for judicial notice of (1) the records filed in this court and the California State Bar Court in In re Toton (No. 85-0-15827), (2) the record and exhibits filed in the Court of Appeal in *Reyes v. Superior Court*, (3) the guilty plea and sentencing records filed in the Kern County Superior Court in People v. Reyes (Super. Ct. Kern County, No. 34638-C), and (4) the record of dismissal of charges filed in the Kern County Superior Court in People v. Bocanegra (Super. Ct. Kern County). (Evid. Code, § 452, subd. (d).) We deny the request as to the Reyes records because it would improperly augment the appellate record. We deny the request as to the remaining documents on the ground that reference to them is unnecessary to our discussion of the issues raised by defendant. (*Turner*, *supra*, 8 Cal. 4th at pp. 193-194.)

precision; the court has confirmed that our death penalty law avoids constitutional impediments because it is not unnecessarily vague, it suitably narrows the class of death-eligible persons, and provides for an individualized penalty determination. (*Tuilaepa v. California*, *supra*, 512 U.S. at pp. __-__ [129 L. Ed. at pp. 761-764] and cases cited.) Defendant's argument fails to convince us to revisit the issue. (*Ashmus*, *supra*, 54 Cal. 3d at pp. 1009-1010.)

2. *Adequacy of Court-conducted Voir Dire*

(23) Defendant asserts that the trial court abused its discretion in the jury selection process because its voir dire questioning omitted the July 26, 1988, newspaper article in the Bakersfield Californian that focused on the disbarment proceedings pending against defense counsel Toton. The article also mentioned that Toton had been appointed to represent admitted triple killer Ted Sanchez and that in an unusual move, [Toton] **[***882]** waived a jury trial this month, cutting out a jury-selection process that could have taken months.

Even though cocounsel Frank conducted the penalty phase defense, defendant complains that the court's failure to question the prospective jurors specifically on the contents of the article about Toton prejudiced the jury and made it unable to render a fair and impartial verdict in violation of his right to a fair and impartial jury under the due process and jury trial provisions of the federal and state Constitutions. (U.S. Const., Amends. VI, XIV; Cal. Const. art. I, § 16.) Although defendant mentions the fact that neither defense counsel nor the district attorney questioned the jury about the article, the thrust of defendant's argument is that the trial court did not even begin to cover a subject bearing on the impartiality of the jury, and that the lack of specific inquiry into the effect of any knowledge of Toton's pending disbarment on the potential jurors made it impossible to conclude that [defendant's] penalty jury was fair and impartial. [6]

Defendant's argument is unconvincing. First, it is evident from the record that defendant **[**1168]** failed to preserve his claim of improper voir dire by objecting **[*62]** to the court's questioning during trial. (*People v. Viscotti* (1992) 2 Cal. 4th 1, 48 [5 Cal. Rptr. 2d 495, 825 P.2d 388].) On the merits, our review of the record shows the trial court's voir dire adequately insured an impartial jury, without unnecessarily exposing the jury to the very information defendant found could prejudice his case.

In *People v. Wash* (1993) 6 Cal. 4th 215 [24 Cal. Rptr. 2d 421, 861 P.2d 1107] (hereafter *Wash*) we held that although the trial court has considerable discretion in the voir dire process,

[6] Defendant also asserts, without analysis, that the failure to conduct voir dire on the contents of the article violated former Code of Civil Procedure section 1078. That section was in effect during defendant's trial, but was shortly thereafter repealed by Proposition 115 and Code of Civil Procedure section 223, which adopted the federal practice of court-conducted voir dire, allowing the attorneys to supplement the jury examination only on a showing of good cause. Code of Civil Procedure section 223 also provides that a trial court's exercise of discretion during voir dire shall not be disturbed in the absence of a miscarriage of justice. (Cal. Const, art. VI, § 13.) Former Code of Civil Procedure section 1078, which governs this case, conferred a right of counsel to a reasonable examination of jurors, but imposed on the trial court the duty to examine the prospective jurors to select a fair and impartial jury. Because defendant is complaining that the trial court failed to ensure a fair and impartial jury, the difference in the statutory language between former Code of Civil Procedure section 1078 and Code of Civil Procedure section 223 is inconsequential. To the extent defendant is claiming that the trial judge did not select a fair and impartial penalty phase jury under former Code of Civil Procedure section 1078, his claim is rejected, there being no showing the jury was unfair or biased.

the court must allow counsel to ask questions designed to assist counsel in the exercise of peremptory challenges. (*Id.*, at p. 253; see also *People v. Williams* (1981) 29 Cal. 3d 392, 407 [174 Cal. Rptr. 317, 628 P.2d 869].)

The trial court complied with its obligation under *Wash*, *supra*, 6 Cal. 4th 215, to assist counsel and to ensure a fair and impartial jury by requiring the 201 prospective jurors to fill out a one-page questionnaire asking the panel members whether they had ever heard of the case, and if so, to name their source. (See *People v. Chaney* (1991) 234 Cal. App. 3d 853, 860 [286 Cal. Rptr. 79] [information must be extracted from jurors to assess their impartiality].) Of the jurors eventually selected to serve, eight told the court they had never heard of defendant's case, were not familiar with counsel, and either did not subscribe to or did not read on a consistent basis the Bakersfield Californian. In addition, pursuant to further questioning by the court, four of these jurors indicated they did not believe everything they read in the newspaper.

Two other jurors who acknowledged they read the Bakersfield Californian observed that they had never heard of defendant's case.

Two of the twelve jurors selected had prior knowledge of defendant's case, but their voir dire responses clearly indicated that their exposure to the newspaper articles about defendant's **[***883]** case was limited to an awareness of the general facts and circumstances of the Bocanegra and Tatman murders. Their knowledge of the case did not include any specific information **[*63]** regarding Toton's pending disbarment. Thus, it appears that the trial court acted well within its discretion in proposing the general question of the jurors' knowledge of Toton's pending disbarment without unnecessarily educating the jury about that matter. The trial court's strategy thus avoided informing the jury of Toton's troubles, while assuring defendant a fair and impartial jury. (*Wash*, *supra*, 6 Cal. 4th at p. 254.) Under these facts, we find the trial court did not err in limiting voir dire to general questions concerning pretrial publicity. (See *Mu'Min v. Virginia* (1991) 500 U.S. 415, 428 [114 L. Ed. 2d 493, 507-508, 111 S. Ct. 1899] [findings of trial judge on issue of juror impartiality should be upheld absent manifest error].)

[1169]** 3. *Alleged Prejudicial Effect of Autopsy Photographs*

(24) The trial court admitted into evidence 44 photographs, including 2 photographs of the autopsies of Juan and Juanita Bocanegra depicting the extensive nature of their scalp wounds. (Exhibits Nos. 13 & 14.) The autopsy photographs had been excluded from the guilt phase following a successful motion *in limine* by defendant. The trial court overruled defendant's objection to the admission of the autopsy photographs, however, for the penalty phase. We first review his contention that the trial court erred in admitting the autopsy photographs because they were cumulative, misleading and inflammatory, and their prejudicial effect substantially outweighed their probative value.

In overruling defendant's objection, the court stated: These scalp wounds are absolutely very important that the jury see. And they are not the kind of autopsy pictures--they're bad, I'll say that, all autopsy pictures are bad, but they're not the blood and guts type of thing that you sometimes see in autopsy pictures. And I think the prejudicial effect is far, far, far, and I can't stress it enough, outweighed by the probative value of these scalp wounds.

Defendant contends the trial court committed prejudicial error in admitting exhibits Nos.13 and 14 in violation of his right to a fair trial and reliable penalty determination under the Eighth and Fourteenth Amendments of the federal Constitution. The thrust of his argument is that the photos were not relevant to the penalty determination, were cumulative to the testimony of Dr. Holloway (the forensic pathologist who performed the autopsies on the Bocanegras), and seriously misled the jury as to defendant's culpability in the Bocanegra murders. In sum, the sole purpose of allowing the photographs, defendant asserts, was to improperly shock and horrify the jury.

[*64] Defendant points to the prosecutor's explanation to the jury as to why she believed the autopsy photographs were important evidence and asserts her comment actually exploited the prejudicial effect of the evidence: You will have the pictures available to you. Look at the scalp wounds. You make the decision. But whatever, [Mrs. Bocanegra] would not have been killed but for the help of Teddy Brian Sanchez, and he is just as guilty of the murder as Joey Bocanegra. Defendant claims that because the probative value of the photographs was clearly outweighed by their prejudicial effect, their admission violated his constitutional rights.

The decision whether to admit photographs is within the trial court's discretion and will not be disturbed unless their prejudicial effect substantially outweighs their probative value. (See *People v. Hardy* (1992) 2 Cal. 4th 86, 199 [5 Cal. Rptr. 2d 796, 825 P.2d 781] [hereafter *Hardy*] [admission of photos at penalty phase within trial court discretion unless prejudicial effect outweighs probative value]; *Wharton*, *supra*, 53 Cal. 3d at p. 596 **[***884]** [same].) We have examined exhibits Nos. 13 and 14 and have determined they are not so horrific or shocking that we can conclude the trial court abused its discretion in admitting them. (*Hardy*, *supra*, 2 Cal. 4th at p. 199.) The jury was familiar with the facts of the crime, and the photographs had substantial probative value in demonstrating defendant's culpability as an aider and abettor, and as corroborative of Hernandez's testimony implicating defendant in the crimes. Moreover, the probative value of the photographs was not diminished simply because the scalp wounds alone were not fatal to the victims. The photographs corroborated the testimonial evidence and were relevant to a determination of the appropriateness of the death penalty. (*People v. Raley* (1992) 2 Cal. 4th 870, 914 [8 Cal. Rptr. 2d 678, **[**1170]** 830 P.2d 712], fn. omitted, citing *People v. Benson* (1990) 52 Cal. 3d 754, 786 [276 Cal. Rptr. 827, 802 P.2d 330], and *People v. Thompson* (1990) 50 Cal. 3d 134, 182 [266 Cal. Rptr. 309, 785 P.2d 857] [Defendant's intent to kill or lack thereof was one of the circumstances of the crime.].)

Defendant's claim that there was no dispute as to the circumstances of the murders is not supported by the facts. Defense counsel Frank argued at the penalty phase that defendant should be spared the death penalty if the jury had a lingering doubt about the extent of defendant's participation in the Bocanegra killings.

Nor is defendant assisted by *People v. Love* (1960) 53 Cal. 2d 843, 856-857 [3 Cal. Rptr. 665, 350 P.2d 705], in which we held that the trial court's admission of a photograph showing the victim's face as she was dying, and of a tape recording of her last words as she lay on a hospital table **[*65]** in extreme pain, was prejudicial because it served primarily to inflame the passions of the jurors.

(*Id*., at p. 857). Here, by contrast, the autopsy photographs depicting the Bocanegras' scalp wounds were clearly probative of (i) the manner in which the victims were wounded, (ii) defendant's culpability as an aider and abettor, (iii) the malice and aggravation of the crime, and (iv) the appropriate ultimate penalty. (*People v. Milner* (1988) 45 Cal. 3d 227, 247 [246 Cal. Rptr. 713, 753 P.2d 669]; cf. *Hardy*, *supra*, 2 Cal. 4th at p. 199-200.)

Because we find no error in admitting the autopsy photographs, we need not address defendant's claims that admission of other photographs during the penalty phase (exhibits Nos. 9, 18, 19 & 25, depicting the wounds on the Bocanegras and Tatman) did not render harmless the prejudicial effect of the autopsy photos. Nor do we address defendant's related argument that, assuming we conclude the admission of these photographs undercut the prejudice resulting from the admission of the autopsy photographs, trial counsel was ineffective for failing to object to their admission. Neither argument is persuasive in light of our conclusion that the court did not err in admitting the autopsy photographs at the penalty phase. [7]

4. *Prosecutorial Misconduct*

a. *Improper Argument*

(25a) Defendant alleges several instances in which he claims Ryals committed prejudicial misconduct by: (1) improperly arguing to the jury that defendant was Tatman's actual killer; (2) erroneously asserting in her opening statement that the Tatman murder weapon was a screwdriver, and that the weapon was seized from defendant; (3) suggesting that the jury was sentencing defendant for the Tatman murder when the penalty phase applied only to the Bocanegra murders; (4) **[***885]** presenting false evidence; (5) failing to correct allegedly misleading information regarding the cause of Juan Bocanegra's death; and (6) misstating the evidence of defendant's involvement in the Bocanegra murders.

Defendant failed to object to any of these alleged instances of misconduct, or to seek a curative admonition. He has therefore waived the issues for **[*66]** appeal. (*Hardy*, *supra*, 2 Cal. 4th at p. 171; *People v. Green* (1980) 27 Cal. 3d 1, 34 [164 Cal. Rptr. 1, 609 P.2d 468].) Defendant seeks exception to the waiver rule by asserting that a timely objection would have been futile or could not have cured the harm (27 Cal. 3d at pp. 28, 34). We do not agree. An **[**1171]** objection from defendant could have cured any harm and defendant fails to demonstrate otherwise.

Moreover, any error that did occur was harmless. As we explain in detail below, although the prosecutor may have, at times, pushed the limits of proper advocacy, any misconduct that did occur could not have contributed to the verdict and was thus rendered harmless.

Defendant contends Ryals improperly told the jury that he was Tatman's actual killer, and that Tatman was killed with a screwdriver seized from him. Defendant also asserts that Ryals improperly treated defendant's conviction under section 187 (without special

[7] In an abbreviated argument, defendant contends that the trial court erred when it overruled his objection to the admission of photographs depicting the bloodstains at the Bocanegra residence (exhibits Nos. 32-43, 55-66) on the basis of improper foundation. As the People observe, the trial court properly concluded that the alleged evidentiary deficiencies affected the weight the jury was to give the photographs and not their admissibility.

circumstances) as a capital crime. Her argument, claims defendant, violated the doctrines of collateral estoppel and double jeopardy, and denied him his constitutional rights under both the state and federal Constitutions.

Defendant's first claim, that the prosecutor improperly argued to the jury that he was Tatman's actual killer, was based on the following comments made during the prosecutor's closing argument:

First, Mr. Tatman, an old, sick man, wheelchair bound, living from payday to payday in the Bakersfield Inn, hardly a match for the defendant alone much less for the defendant and his friend, Robert Reyes.

Think of the old man lying in his bed, fearful because there were burglars in his little room at the Bakersfield Inn. Think of how that fear turned to horror as he realized that they weren't just burglars but that they intended to take his life. Imagine how he must have felt when they approached him.

Of course, the defendant told the police that he had no actual part in the murder, that he watched his buddy do it. But then, when you think of that, think that the defendant learned to lie to authorities at an early age, I believe Dr. Wright said the third grade. Remember that he denied to the police also anything or any facts concerning the Bocanegra murders, but then remember what he told Rufus Hernandez.

He told Rufus Hernandez what happened, how the two of them killed Mr. Tatman, not how Robert [Reyes] killed Mr. Tatman or how he killed Mr. **[*67]** Tatman but how they killed Mr. Tatman. Think of that when you are considering what the penalty in this case should be.

The two men could have taken the food. They could have taken the refrigerator. They could have taken everything that was in that room and not touched that old man who weighed less than one hundred pounds. They could have gone into that room, completely cleared it out, even stripped the bed clothes out from under him and never harmed him, never hurt him at all. But they didn't do that. The defendant didn't do that. They chose, for some useless, senseless reason, to commit an act of violence, the ultimate, ultimate act of violence, murder.

In her rebuttal, the prosecutor told the jury that it should not attempt to relitigate the guilt phase facts, but then asked the jury to deliberate over what she had told it: You do not know what evidence was presented in the previous hearing. You are not **[***886]** to relitigate that at this time. You hear[d] the circumstances of the Tatman murder. You know what the defendant told the police because you heard that. But you also know what the defendant told Rufus Hernandez because you heard that. It is up to you to weigh this and to deliberate on that and to determine who exactly struck the fatal blow.

Defendant asserts that the effect of the above argument was to ask the jury to disregard completely the trial court's not true verdict on the robbery murder special circumstance under Count I which implicitly and necessarily rejected the charges that [defendant] was the actual killer in the Tatman **[**1172]** homicide and that he harbored an intent to kill in committing the crime. Defendant claims Ryals's argument sought to elevate a noncapital murder to which defendant was an

accomplice into a capital murder in violation of the guarantee against double jeopardy following acquittal under the Fifth Amendment to the United States Constitution and article I, section 15 of the California Constitution, and the related doctrine of collateral estoppel. (See e.g., *Bunnell*, *supra*, 13 Cal. 3d at pp. 610-602; see also *Ashe v. Swensen* (1970) 397 U.S. 436, 445 [25 L. Ed. 2d 469, 476, 90 S. Ct. 1189] [barring relitigation of ultimate issue of fact determined in prior litigation]; *Lucido v. Superior Court* (1990) 51 Cal. 3d 335, 341 [272 Cal. Rptr. 767, 795 P.2d 1223, 2 A.L.R.5th 995] [applying similar standard in state case].)

In making his argument, defendant points to the court's guilt phase verdict, in which the court found defendant acted as an accomplice (and not the actual killer) in the Tatman murder:

[*68] As to the first count [the Tatman murder], the Court finds defendant guilty of murder and fixes that murder as murder in the first degree based on the felony murder rule.

The Court finds that it is not true that the murder of Woodrow Wilson Tatman was committed while the defendant was engaged in the commission or attempted commission of a felony, to wit: The crime of robbery, within the meaning of the special circumstance section. That does not mean, I hasten to add, that I do not think there was a robbery in progress; that simply means that I find that the defendant was an aider and abettor of the robbery but that the homicide occurred in the commission of that, and therefore it's a first degree felony murder.

The People observe that this verdict appears inconsistent. The confusion over the verdict is highlighted by the fact that early in the guilt phase arguments, the prosecutor appeared to concede (and the court appeared to agree) that defendant could be found guilty only of second degree felony murder in connection with the Tatman killing. Of course, any inconsistency in the verdict was harmless in light of our law recognizing that accomplice status is sufficient to elevate a defendant's complicity in the crime to the robbery-murder special circumstance as long as defendant acted with intent to kill. (*People v. Anderson*, *supra*, 43 Cal. 3d at pp. 1138-1139.)

What is clear from the verdict is the court's finding that defendant aided and abetted the robbery, and that the murder verdict was based on the felony-murder rule. It is less clear, however, whether the court found defendant was or was not the actual killer. If we assume the court found the special circumstance untrue because the prosecution had proved neither that defendant was the actual killer, nor that he had the intent to kill, prosecutorial argument attempting to relitigate the guilt phase as to actual killer status was improper. (*People v. Haskett*, *supra*, 30 Cal. 3d at pp. 864-866 [prosecution at penalty phase must refrain from attacking acquittals or retrying charges on which guilt phase jury could not agree].) To the extent Ryals crossed the line of proper argument, however, any misconduct was not prejudicial to defendant because it is not reasonably possible a result more favorable to the defendant would have occurred. Defendant was convicted of the multiple murders of Juan **[***887]** and Juanita Bocanegra (§ 190.2, subd. (a)(3)), and the jury was aware of defendant's prior violent criminal activity (§ 190.3, factors (b) & (c)). Thus, Ryals's references to defendant's role in the Tatman murder could not have affected the

outcome of the penalty phase. (*People v. Montiel* (1993) 5 Cal. 4th 877, 918 [21 Cal. Rptr. 2d 705, 855 P.2d 1277] [hereafter *Montiel*].)

[*69] (26) Defendant next claims that the prosecutor deliberately misled the jury by her opening statement comment that Tatman was actually murdered by Reyes with a screwdriver that had been stolen from the **[**1173]** Bocanegra residence and later found on defendant's person. (See Bus. & Prof. Code, § 6068, subd. (d) [duty of attorney never to mislead a judge by false statement of fact or law]; *People v. Bell* (1989) 49 Cal. 3d 502, 536-540 [262 Cal. Rptr. 1, 778 P.2d 129] [improper for prosecutor to mislead judge or jury by misstating facts or law].) Defendant asserts the prosecutor's comment contradicted guilt phase evidence indicating that Tatman was mortally wounded by a massive blunt force injury to the left chest, consistent with a heel stomp or blow by a similar object (with a dimension of two to three inches). According to the autopsy report, the screwdriver wounds were superficial stab wounds that did not actually contribute to Tatman's death. Accordingly, defendant contends, the prosecutor's misstatement of the evidence rendered the penalty phase fundamentally unfair (see, e.g., *Darden v. Wainwright* (1986) 477 U.S. 168, 183 [91 L. Ed. 2d 144, 158, 106 S. Ct. 2464] [egregious prosecutorial misconduct violates Fourteenth Amendment]), and unreliable (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 340-341 [86 L. Ed. 2d 231, 246-247, 105 S. Ct. 2633]).

Any inaccurate reference to the screwdriver as the actual murder weapon (or comment that the weapon was found on defendant) could not properly be characterized as prejudicial or so egregious as to deny defendant a fair trial. (*People v. Wrest* (1992) 3 Cal. 4th 1088, 1108 [13 Cal. Rptr. 2d 511, 839 P.2d 1020].) When, as here, the point focuses on the prosecutor's comments to the jury, the question is whether there is a reasonable possibility that the jury construed or applied any of the complained-of remarks in an objectionable manner. (*Berryman*, *supra*, 6 Cal. 4th at p. 1072.)

Here, the jury was told that only nonfatal stab wounds were inflicted upon Tatman. Forensic pathologist Holloway testified that the cause of Tatman's death was massive blunt force injury to his chest. Holloway also stated that some of the injuries sustained by Tatman were multiple superficial stab wounds to the chest none of which would be construed as capable of a cause of death in themselves, and a superficial stab wound to the abdomen which would not itself have been a fatal wound.

In addition, Bakersfield Police Detective Boggs testified that, on March 23, 1987, defendant told him that after he and Reyes had entered Tatman's hotel room, he saw Reyes standing over Tatman in a threatening manner with a screwdriver in his hand, that Reyes freaked out and stabbed Tatman with a screwdriver although defendant never saw the screwdriver enter Tatman's body, and that Reyes possessed the screwdriver at all times.

[*70] Moreover, the jury was consistently admonished by the court that it was to consider only the evidence presented, and that the opening statements of the lawyers were not to be considered evidence. The court admonished the jury that: The important thing to remember is that what lawyers say in a trial, what they say in their argument, what they say in their opening statements, those simply are not evidence. They are just telling you what they expect to prove. [P] You have to decide this

case, however, based on what you hear under oath from the witness stand or based on some documents or pictures that I admit for your consideration. [P] What a lawyer says . . . is not evidence. (See CALJIC No. 1.02.) The court repeated its admonition following closing arguments.

[*888]** Taken in context as an attempt to counter defense counsel's argument that defendant did not participate in the Tatman killing, it is not reasonably possible the prosecutor's alleged inaccurate remarks about the Tatman murder misled the jury. (*Berryman*, *supra*, 6 Cal. 4th at p. 1072.) Moreover, the court's instruction that the lawyers' opening and closing statements were not to be considered evidence by the jury vitiated the misleading effect of any inaccurate remarks. The court's instructions **[**1174]** are determinative in their statement of law, and we presume the jury treated the court's instructions as statements of law, and the prosecutor's comments as words spoken by an advocate in an attempt to persuade. (*People v. Thomas*, *supra*, 2 Cal. 4th at p. 538.) We cannot conclude on this record that the prosecutor's isolated mischaracterization of the evidence in her opening statement misled the jury.

(27) Defendant also asserts that by discussing the circumstances of the Tatman killing during the penalty phase, the prosecutor improperly misled the jury into believing it could sentence defendant to death for the murder of Tatman alone, when the penalty should have been considered only for the Bocanegra crimes, in which the multiple-murder special circumstance was found true.

Defendant's argument is misplaced. The circumstances of the Tatman crime were properly argued as an aggravating factor under section 190.3, factor (a) (circumstances of the crime and the existence of any special circumstances found to be true pursuant to section 190.1). (See *Montiel*, *supra*, 5 Cal. 4th at p. 938, fn. 33 [factor (a) of section 190.3 covers the circumstances of all crimes adjudicated in the capital proceeding].) Moreover, defense counsel reminded the jury of defendant's aider and abettor status in the Tatman murder when he stated: Ted Sanchez did not kill Mr. Tatman nor did he share in Robert Reyes's intent to kill Mr. Tatman. Ted's role in that tragic incident was limited to removing some of Mr. Tatman's property. Hence, we find no prosecutorial error occurred in Ryals's discussion of the circumstances of the Tatman murder at the penalty phase.

[*71] (25b) Defendant's other claims of prosecutorial misconduct to which there was no defense objection are not supported by the record. For example, defendant's contention that the prosecutor allowed Detective Boggs to testify falsely as to who told him--Reyes or defendant--that both men had kicked back and relaxed after the Tatman murder, is simply a disagreement as to the interpretation of the evidence, and in no way indicates that Ryals encouraged or elicited false testimony from Boggs. In addition, the prosecutor did not commit misconduct in failing to correct Dr. Holloway's characterization of the nonfatal scalp wounds to Juan Bocanegra as a contributory cause rather than an other condition of death. The characterization of the scalp wounds as contributing to Juan's death was minimally significant to the jury's assessment of defendant's culpability in the murders. The facts showed that defendant struck disabling blows to the victim's head while Joey was stabbing him. Moreover, any misperceptions of the cause of Juan's death

were corrected by the prosecutor's opening statement that the wounds inflicted by defendant with a metal bar, were not the actual blows that killed the man. They were only a part of what killed the man. The actual blow to the man was the stab wound inflicted by his son while defendant was beating him in the head with an iron pipe.

Finally, defendant's claim that the prosecutor committed misconduct by asserting that the Bocanegras would not have been killed without defendant's assistance is without merit. The evidence supported the view that defendant restrained both victims while Joey Bocanegra stabbed them. The argument came well within the broad discretion of the parties to state their views as to what the evidence shows and what inferences may be drawn therefrom. (*People v. Kelly* (1992) 1 Cal. 4th 495, 540 [3 Cal. Rptr. 2d 677, 822 P.2d 385].)

[*889]** b. *Ineffective Assistance of Counsel*

(28) Defendant complains that counsel's failure to object to the above alleged misconduct amounted to prejudicial ineffective assistance of counsel. This claim lacks merit. (See *People v. Ledesma*, *supra*, 43 Cal. 3d at pp. 215-216.) In his closing argument, cocounsel Frank consistently pointed out the prosecution's inaccurate statements to the jury, reminding it of the evidence presented. Counsel's performance in demonstrating for the jury the **[**1175]** prosecutor's improper argument reveals counsel's attention to detail rather than incompetence. Counsel's careful references during the prosecutor's misstatements demonstrates that defense counsel was aware of the misstatements and, in exercising reasonable professional judgment, chose not to object for tactical reasons. In any event, we find no reasonable probability that defense counsel's failure to object prejudiced defendant's case. (*Ibid.*)

[*72] c. *Cross-examination of Robin Sanchez*

(29) As previously noted, defendant's wife, Robin Sanchez, testified in mitigation that defendant was a nice, trustworthy person who baby-sat her children. On cross-examination of the witness, Ryals asked her whether she was aware of the fact that [defendant has] been violent since he's been in jail? Sanchez replied, no. Defense counsel objected to the question and the trial court admonished the jury to disregard it. Thereafter, Ryals told the court that she had one more rebuttal witness whose testimony would be very, very, short, and the trial was continued a day in order to allow her to locate the witness. When the court reconvened, it granted defendant's request for an offer of proof with regard to the rebuttal witness, in response to which the prosecutor withdrew her proposed presentation of the witness.

Defendant claims that the prosecutor deliberately used her cross-examination to place an insupportable insinuation that defendant was violent while in custody without proof of the alleged conduct in violation of *People v. Bell*, *supra*, 49 Cal. 3d 502, 532 [counsel's deliberate asking of questions calling for inadmissible answers is misconduct].)

We find no error. Defendant's wife was cross-examined by the prosecutor in response to her testimony that defendant was a nice and trustworthy person who babysat her children. It is well established that the prosecution may inquire of a defense . . . witness whether he [or she] has heard of acts or conduct by the defendant inconsistent with the witness's

testimony so long as the People have a good faith belief that the acts or conduct about which they wish to inquire actually took place. (*People v. Siripongs* (1988) 45 Cal. 3d 548, 578 [247 Cal. Rptr. 729, 754 P.2d 1306].) (*People v. Sandoval* (1992) 4 Cal. 4th 155, 188-189 [14 Cal. Rptr. 2d 342, 841 P.2d 862].)

In addition, the court sustained defendant's objection to the testimony, admonishing the jury to disregard it. The jury was also instructed: As to any question to which an objection was sustained, you must not guess as to what the answer might have been or as to the reason for that objection. [P] You must never assume to be true any insinuation suggested by a question which was put to a witness. [P] A question is not evidence and may be considered only as it supplies meaning to the answer which follows it. And you must not consider for any purpose any offer of evidence that was rejected or any evidence that was stricken out by the court. [P] Such matter is to be treated as though you have never heard it. Given the fact that three first degree murder and two prior assault convictions were properly before the jury, any **[*73]** improper information the jury may have received regarding defendant's propensity for violence in jail could not have affected the jury's verdict. (See *Montiel*, *supra*, 5 Cal. 4th at p. 930.) Under these circumstances, there is no reasonable possibility that the jury would have reached a more favorable verdict in the absence of the alleged misconduct. (See *People v. Brown* (1988) 46 Cal. 3d 432, 448-449 [250 Cal. Rptr. **[***890]** 604, 758 P.2d 1135]; see also *Chapman v. California* (1968) 386 U.S. 18 [17 L. Ed. 2d 705, 87 S. Ct. 824].)

d. *Discussion of the Meaning of LWOP Sentence*

(30) During closing argument, Ryals told the jury that it should think of Mr. Tatman, think of Mr. and Mrs. Bocanegra, Juan and Juanita Bocanegra, not because you feel sorry for them, not because of passion, but in **[**1176]** considering the horror those people must have felt on the evening before they died. Then think of the meaning of life without the possibility of parole. It means being alive. It means eating three meals a day. It means watching television. It means having a library, a gymnasium. It means having conjugal visits with your wife. Defense counsel's objection to the argument was sustained, and the jury was admonished to disregard the statement about what life without possibility of parole was like after three meals a day. Defendant contends the above comment improperly swayed the jury to vote in favor of death.

We disagree. Nothing in counsel's argument carried the improper suggestion that the jury should not take seriously its sentencing responsibility. Ryals's brief statement would be interpreted by a reasonable jury as an attempt to contrast victim impact evidence against the penalty the prosecution believed defendant deserved. Such evidence is allowed under both federal and state precedent. (*Payne v. Tennessee* (1991) 501 U.S. 808 [115 L. Ed. 2d 720, 111 S. Ct. 2597]; *People v. Edwards* (1991) 54 Cal. 3d 787, 833-836 [1 Cal. Rptr. 2d 696, 819 P.2d 436] [concluding that the immediate injurious impact of a capital murder may be introduced as a circumstance of the crime under section 190.3,

factor (a)]). We find no basis for reversal in the prosecutor's argument. [8]

[*74] 5. *Court's Reading of Guilt Phase Verdicts*

(31) Prior to penalty phase arguments, at defense counsel Frank's request, the trial court read the information and summarized the guilt verdict, including the special circumstances findings, for the jury. In summarizing the verdict, the court purported to read from the August 3, 1988, minute order which had omitted the verdict as to certain allegations charged in the information. For example, defendant had been charged in the information with the multiple-murder special circumstance (§ 190.2, subd. (a)(3)) with respect to the Tatman and Bocanegra murders. The August 3 order found true the multiple-murder special circumstance with respect to the Bocanegra murders only and did not include the Tatman murder in the special-circumstance disposition. Purporting to read from the August 3 minute order, the court inexplicably included Tatman as part of the section 190.2, subdivision (a)(3) finding when it summarized the verdict to the jury. That finding is not in the record copy of the minute order.

Also during penalty phase argument, Frank explained to the jury the meaning of the felony-murder charges in the Tatman verdict, and discussed defendant's role as an accomplice in the Tatman robbery and murder in an apparent attempt to clarify the court's allegedly inconsistent verdicts finding defendant guilty of the first degree murder and robbery of Tatman, but finding not true the robbery-murder special circumstance. **[***891]** Frank's explanation of the felony-murder verdict was interrupted by Ryals's successful objection. Defendant now complains that the court's erroneous inclusion of the Tatman murder as part of the multiple-murder special-circumstance finding in the Bocanegra murders, and its failure to explain (or allow counsel to adequately explain) its allegedly inconsistent verdict and special-circumstance finding in the Tatman murder verdicts amounted to the use of false or misleading evidence in capital sentencing in violation of defendant's Fourteenth Amendment right to due process, and the Eighth Amendment right to a fair trial. (See *Simmons v. South* **[**1177]** *Carolina* (1994) 512 U.S. 154, __, fn. 5 [129 L. Ed. 2d 133, 143-144, 114 S. Ct. 2187, 2195] [due process requires sentencing jury be informed that defendant is ineligible for parole where defendant's future dangerousness is at issue and state law prohibits defendant's release on parole]; *Townsend v. Burke* (1948) 334 U.S. 736, 740-741 [92 L. Ed. 1690, 1693-1694, 68 S. Ct. 1252] [reliance on dismissed charges not proved in noncapital sentencing denied defendant due process]; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584 [100 L. Ed. 2d 575, 583-584, 108 S. Ct. 1981] [reversing death sentence on Eighth Amendment grounds **[*75]** for counsel's use of prior conviction that had

[8] In a footnote in his brief, defendant observes that before the penalty trial, the trial court granted his request that the jury not be told who was the trier of fact in the guilt phase. Defendant now claims that the prosecutor's two references to a jury as the trier of the guilt phase was deliberate misconduct calculated to mislead the jury. Defense counsel, however, refused a curative instruction, believing that such an admonition would highlight the harm caused by the prosecutor's comments.

Defendant asserts that even though the comments about the trier of fact did not amount to reversible error, they suggest a willingness by the district attorney to overstep the limits of proper argument. Although the prosecutor pushed the limits of proper advocacy by referring to the guilt phase trier of fact as a jury, any misstep made during the course of the penalty trial was harmless.

been reversed]; see also *People v. Melton* (1988) 44 Cal. 3d 713, 748, fn. 12 [244 Cal. Rptr. 867, 750 P.2d 741] [hereafter *Melton*] [robbery-murder special-circumstance finding as to accomplice requires finding of intent to kill].)

We find defendant's arguments unpersuasive. First, counsel did not object to the court's incorrect reading of the multiple-murder special-circumstances verdict. Hence, if any error occurred, it was waived. (*Hardy*, *supra*, 2 Cal. 4th at p. 171.) Moreover, even if counsel had objected, we would find any error the court made in reading incorrectly the multiple-murder special-circumstance findings, or any confusion caused by the court's verdict as to the Tatman charges, could have been rendered harmless by an admonition to the jury.

In addition, Frank's penalty phase argument explained to the jury the meaning of the Tatman verdict: The significance of what [defendant] was and wasn't convicted of, I would submit to you, establishes a lot of facts, number one, that he himself did not kill Woodrow [Wilson] Tatman. You heard the evidence. I think you can infer from the evidence, from the verdicts that it was not Ted Sanchez who killed Mr. Tatman, it was Robert Reyes. [P] I submit to you that you can logically infer from what you've heard that Ted Sanchez did not kill Mr. Tatman nor did he share in Robert Reyes' intent to kill Mr. Tatman. Ted's role in that tragic incident was limited to removing some of Mr. Tatman's property. [P] You heard the evidence. Mr. Tatman was not supposed to even have known that his property had been taken. . . .

Frank next repeated to the jury: Robert Reyes took it upon himself to kill, but Ted had no part in that. Frank then explained the multiple-murder special-circumstance findings and argued the circumstances of the Bocanegra murders as a mitigating factor under section 190.3, factor (a).

Now let's turn to the charges involving the Bocanegras. Teddy was charged in count two of the Information with having killed Mr. Bocanegra and in count three of the Information with having killed Mrs. Bocanegra. Each count carried with it the special circumstance that the murder had been committed during the course of a robbery. Although he was found guilty of the murders of Mr. and Mrs. Bocanegra, the special circumstance that the murders occurred during the course of a robbery were not found true. In addition, he was found not guilty of robbing the Bocanegras as was alleged in count five.

I submit to you that the importance of all this is that you can infer that when Ted--that when Ted went over to the Bocanegra house he did not do **[*76]** so with the intent to rob him. In fact, I would submit that you can infer that when he went over to that house he didn't intend to commit any criminal acts against the Bocanegras, and that it wasn't until after Joey and his father started **[***892]** fighting that Teddy thought about engaging in any criminal activity.

Now, I bring all this to your attention because the law says that you can take into account the circumstances of the crimes when you deliberate on the issue of penalty, and that is provided for in . . . [section 190.3, factor (a)].

Now this factor is general, looked upon as being an aggravating factor, one that doesn't usually contain any mitigating value, but I submit to you that, in this case, if you look

closely at the facts and circumstances of what transpired at the Tatman and Bocanegra residence[s], you will find significant mitigating values there.

Frank thereafter told the jury that it was Reyes, not defendant, who killed Tatman, **[**1178]** and that defendant had no criminal intent when he went over to [the Bocanegras'] house. He also argued that these same facts could be interpreted as mitigating evidence under section 190.3, factor (k). Frank's argument likely clarified for the jury any misperceptions about the verdict that occurred in light of the court's statement of the verdict.

We conclude any error the court made in the court's verdict statement was harmless. Defendant requested the court read the verdict and special circumstance findings, and failed to correct the court or offer clarifying instructions in order to remedy any misperceptions the jury may have had about the verdict. Moreover, counsel's explanation of the verdict to the jury during argument more than clarified any potential confusion the jury may have experienced following the court's explanation. The prosecutor did not mention the erroneous verdict, or capitalize on its inclusion. Defendant was convicted of three counts of first degree murder, including one supportable special-circumstance allegation, as well as two counts of use of a deadly weapon, and one count of robbery. Under these circumstances, there is no reasonable possibility that consideration of the court's potentially confusing reading of the guilt phase verdict could have improperly influenced the jury. (Cf. *People v. Jennings* (1991) 53 Cal. 3d 334, 389-391 [279 Cal. Rptr. 780, 807 P.2d 1009] [any error in court's failure to tailor instruction that the jury consider all evidence, even those charges of which defendant was acquitted, rendered harmless by instructions and other valid charges].)

6. *Alleged Instructional Errors*

Defendant contends several instructional errors occurred at the penalty phase.

[*77] a. *Residual Doubt*

(32) Defendant asserts the trial court violated the state and federal constitutional provisions guaranteeing due process, equal protection, and a fair trial by erroneously rejecting his proffered instruction on residual or lingering doubt. Defendant's proposed instruction asked the jury to consider as a mitigating factor residual or lingering doubt as to Mr. Sanchez's guilt for the crimes of which he has been convicted. Although defendant recognizes that the state and federal Constitutions do not *require* a residual doubt instruction, he asserts the instruction should have been given in this case because it was warranted by the evidence. He relies on section 190.3, factor (f), which gives the judge discretion to instruct the jury on any points of law pertinent to the issue, and case law that holds section 190.3, factor (f) may require a court to give the residual doubt instruction should the evidence warrant it. (*People v. Cox* (1991) 53 Cal. 3d 618, 678, fn. 20 [280 Cal. Rptr. 692, 809 P.2d 351] [hereafter *Cox*] [evidence may require residual doubt instruction]; *People v. Thompson* (1988) 45 Cal. 3d 86, 134 [246 Cal. Rptr. 245, 753 P.2d 37] [court may consider residual doubt of defendant's intent during penalty phase of capital trial]; cf. *People v. Kaurish* (1990) 52 Cal. 3d 648, 705-706 [276 Cal. Rptr. 788, 802 P.2d 278].) Claiming that the evidence was insufficient to find him guilty of the first degree murders of Mr. and Mrs. Bocanegra,

defendant contends residual doubt was a circumstance of the capital crimes that could be considered by the jury under both [section] 190.3, factors (a) and (k).

[*893]** We find no error. It is true, as defendant claims, that the jury's consideration of residual doubt is proper; defendant may assert his possible innocence to the jury as a factor in mitigation under section 190.3, factors (a) and (k). (*People v. Johnson* (1992) 3 Cal. 4th 1183, 1259-1262 [14 Cal. Rptr. 2d 702, 842 P.2d 1]; cf. *People v. Coleman* (1969) 71 Cal. 2d 1159, 1168 [80 Cal. Rptr. 920, 459 P.2d 248].) But there is no *requirement*, under either state or federal law, that the court specifically instruct the jury to consider any residual doubt of defendant's guilt. (*Franklin v. Lynaugh* (1988) 487 U.S. 164, 173-174 [101 L. Ed. 2d 155, 165-166, 108 S. Ct. 2320]; *Cox*, *supra*, 53 Cal. 3d at pp. 677-678; see also *People v. Medina* (1995) 11 Cal. 4th 694 [47 Cal. Rptr. 2d 165, 906 P.2d 2].)

Here, the trial court instructed the jury that it could consider [t]he circumstances of the crime of which defendant was convicted in the present proceeding and the existence **[**1179]** of any special circumstance found to be true (§ 190.3, factor (a)), and any other circumstance which extenuates the gravity of the crime, even though it is not a legal excuse for the crime, and any sympathetic or other aspect of the defendant's character or record that **[*78]** the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial (*id*., factor (k)). These instructions on the scope of mitigating circumstances sufficiently encompassed the concept of residual doubt about defendant's guilt. (*People v. Price* (1991) 1 Cal. 4th 324, 488 [3 Cal. Rptr. 2d 106, 821 P.2d 610] [rejecting defendant's claim that the court erred in failing to specifically instruct on residual doubt when jury was properly instructed under section 190.3, factors (a) and (k)].)

In addition, as we have observed, defense counsel told the jury that the circumstances of the crimes could be viewed as mitigating evidence of defendant's intent to kill. He also emphasized to the jury that section 190.3, factor (k) allows it to consider any aspect of the defendant's character or record that he offers as a basis for a sentence less than death, and asked the jury whether it had some lingering doubts about what [it] would have seen if it had been inside the Bocanegra residence at the time of the murders. In light of the proper instructions given to the jury, and counsel's argument, we conclude the trial court did not err in rejecting defendant's specific instruction on lingering doubt. (*People v. Johnson*, *supra*, 3 Cal. 4th at p.1252.)

b. *Overlap Between Section 190.3 Factors (a), (b), and (c)*

(33) Section 190.3 requires the jury to consider the circumstances of the offense (§ 190.3, factor (a)), the presence of violent criminal activity (*id*., factor (b)), and prior felony convictions (*id*., factor (c)). The jury was instructed in the statutory language. (Former CALJIC No. 8.84.1.) Defendant now claims the court erred by failing to clarify the differences between the above factors, thus allowing the jury to give multiple consideration to the aggravating evidence under all these factors. He also asserts that the instructions erroneously permitted the jury to consider defendant's prior assaults under both factors (b) and (c), and improperly inflated the weight the jury should have given to either prior crime.

We have noted that section 190.3, factor (b), concerns crimes other than those for which defendant is being prosecuted (*Melton*, *supra*, 44 Cal. 3d at p. 763; *People v. Fudge* (1994) 7 Cal. 4th 1075, 1125 [31 Cal. Rptr. 2d 321, 875 P.2d 36] [hereafter *Fudge*]), and we have directed that courts should give clarifying instructions to avoid any confusion that may be caused by the above factors. (*Montiel*, *supra*, 5 Cal 4th at pp. 887, 938; *People v. Miranda* (1987) 44 Cal. 3d 57,106, fn. 26 [241 Cal. Rptr. 594, 744 P.2d 1127].) But we have consistently found that the absence of clarifying instructions is harmless (*Montiel*, *supra*, 5 Cal. 4th at p. 938), and that the standard instructions **[*79]** do not inherently encourage 'double-counting' under section 190.3. (*People v. Pride*, **[***894]** *supra*, 3 Cal. 4th at p. 269; *People v. Bonin* (1988) 46 Cal. 3d 659, 703 [250 Cal. Rptr. 687, 758 P.2d 1217].) Therefore, even if one or more jurors mistakenly consider a particular criminal incident under the wrong factor, there is little risk that a reasonable jury will give a single incident duplicative consideration. (*Montiel*, *supra*, 5 Cal. 4th at p. 939; *Fudge*, *supra*, 7 Cal. 4th at p. 1125.) Moreover, both the prosecutor and defense counsel separately explained the proper use of the evidence under the separate factors. Thus, any potential confusion the jury may have faced in light of the instructions was adequately addressed by both counsel's arguments. Accordingly, given the arguments and the absence of any improperly admitted evidence, we find that the court's failure to clarify the scope of each factor did not affect the outcome of the trial.

c. *Other Claims of Instructional Error*

Defendant raises several other contentions which he acknowledges have been rejected **[**1180]** by this court. He raises the issues to preserve federal review.

(i). *Former CALJIC No. 8.84.1*

Defendant contends the court erred when it rejected his request to delete inapplicable mitigating factors (e) (whether victim participated in crime) and (f) (moral justification for crime) of section 190.3 from its standard statutory instructions, and injected irrelevant considerations into the jury's penalty deliberations, depriving him of his right to a fair and reliable penalty determination under the Eighth and Fourteenth Amendments.

The jury, however, was properly instructed to consider all the factors if applicable and later told to take into account and be guided by the applicable factors. (Former CALJIC No. 8.84.1; *Fudge*, *supra*, 7 Cal. 4th at p. 1126.) As we have in previous cases, we assume the jury properly followed the instruction and concluded that mitigating factors not supported by evidence were simply not applicable. (*Ibid*.)

(ii). *Nonstatutory Aggravating Factors*

Defendant also asserts the trial court erred by failing to instruct the jury not to consider nonstatutory aggravating evidence in determining penalty. We have repeatedly rejected this contention, and defendant has not persuaded us to reconsider our conclusion. (See e.g., *People v. Hawthorne* (1992) 4 Cal. 4th 43, 79-80 [14 Cal. Rptr. 2d 133, 841 P.2d 118] [hereafter **[*80]** *Hawthorne*].) Nor was the trial court required to label various factors as exclusively aggravating or mitigating. (*Montiel*, supra, 5 Cal. 4th at p. 943 [21 Cal. Rptr. 2d 705, 855 P.2d 1277]; *People v. Livaditis* (1992) 2 Cal. 4th 759, 784 [9 Cal. Rptr. 2d 72, 831 P.2d 297].)

(iii). *Limiting Modifiers*

Defendant contends the trial court violated the Eighth Amendment by refusing his requested deletion of the adjectives extreme and substantial in instructions given in the language of section 190.3, factors (d) (whether defendant was under the influence of extreme mental or emotional disturbance at time of offense), and (g) (whether defendant acted under extreme duress or substantial domination of another person). We have rejected this argument in numerous cases, and defendant has failed to persuade us that we should reconsider these decisions. (*Turner*, *supra*, 8 Cal. 4th at pp. 208-209, and cases cited [catchall provision of section 190.3, factor (k) referring to any other circumstance which extenuates the gravity of the crime allows consideration of nonextreme mental or emotional conditions when read in conjunction with instructions on factors (d) and (g)].)

(iv). *Former CALJIC No. 8.84.2*

(34) Defendant contends the trial court violated the federal Constitution by rejecting his instruction that would have required the jury unanimously to find the existence of an aggravating factor before considering it and to find beyond a reasonable doubt that the aggravating factors outweighed the mitigating factors before choosing the penalty of death. Instead, the court instructed the jury pursuant to former CALJIC No. 8.84.2, which informed the jury it must be guided by the applicable factors of aggravating and mitigating circumstances upon which [it] had been **[***895]** instructed. The instruction also emphasized to the jury that the penalty determination did not involve a mere mechanical weighing process, but required an individual assessment of the aggravating and mitigating circumstances (and assignment of whatever moral or sympathetic value it deemed appropriate) in determining the sentence. Defendant claims CALJIC No. 8.84.2 failed to inform the jury it must find that the aggravating factors outweighed the mitigating factors and that, if it found mitigating factors outweighed aggravating factors, it must impose a sentence of life without parole. We have previously rejected these contentions, and defendant has failed to persuade us to reconsider our decisions. (*See Cox*, *supra*, 53 Cal. 3d 618, 692.)

As we have previously recognized, nothing in the federal Constitution requires the jury unanimously to find the existence of an aggravating factor, **[*81]** or to find beyond a reasonable doubt that the People proved each aggravating factor, that the aggravating circumstances outweighed the mitigating ones, or that death is appropriate. (*Hawthorne*, **[**1181]** *supra*, 4 Cal. 4th at p. 79; *People v. Rodriguez*, *supra*, 42 Cal. 3d at pp. 777-779.) Unlike the determination of guilt, the sentencing function is inherently moral and normative, not factual (*Rodriguez*, *supra*, 42 Cal. 3d at p. 779), and thus not susceptible to a burden-of-proof quantification. (*Hawthorne*, *supra*, 4 Cal. 4th at p. 79.)

Nor do we agree with defendant that CALJIC No. 8.84.2 is impermissibly vague or misleading under *Stringer v. Black* (1992) 503 U.S. 222 [117 L. Ed. 2d 367, 112 S. Ct. 1130]. We have held that assuming our statute is subject to the rationale of *Stringer*, [section 190.3,] factors (a) (circumstances of crimes adjudicated in capital guilt proceeding), (b) (other violent criminal activity), and (i) (defendant's age at time of capital crime) withstand vagueness challenges. Each of these factors '[directs] the sentencer's attention to

specific, provable, and commonly understandable facts about the defendant and the capital crime that might bear on his moral culpability. . . .' (*People v. Tuilaepa* (1992) 4 Cal. 4th 569, 595 [15 Cal. Rptr. 2d 382, 842 P.2d 1142]; see also *People v. Noguera* (1992) 4 Cal. 4th 599, 648-649 [15 Cal. Rptr. 2d 400, 842 P.2d 1160]; *People v. Proctor* [1992)] 4 Cal. 4th 499, 550-551 [15 Cal. Rptr. 2d 340, 842 P.2d 1100].) Similar considerations apply to factor (c) (prior felony convictions), and to factors (d) through (k), which further channel the sentencer's discretion by identifying additional [specific and provable facts] about the capital offense and offender which the state properly deems pertinent to the penalty determination. (*Montiel*, *supra*, 5 Cal. 4th at p. 944, fn. omitted.)

Finally, defendant complains about the following portion of the jury instructions: To return a judgment of death, each of you must be persuaded that the aggravating factors are so substantial in comparison with the mitigating factors that it warrants death instead of life in prison without parole. (Former CALJIC No. 8.84.2.) Defendant asserts that the words so substantial are impermissibly vague and lead to an arbitrary penalty verdict. As the People point out, we rejected the identical argument in *People v. Sully* (1991) 53 Cal. 3d 1195, 1244-1245 [283 Cal. Rptr. 144, 812 P.2d 163], in which we observed that the instruction adequately conveyed to the jury that it must be persuaded that the bad evidence is so substantial in comparison with the good evidence, that death is the appropriate penalty. (*Id*., at p. 1244.) Former CALJIC No. 8.84.2 adequately conveyed to the jury the seriousness of its obligation in determining the appropriate penalty, and we find no error in giving the instruction. (*Sully*, *supra*, 53 Cal. 3d at pp. 1244-1245.)

[*82] (v). *Written Findings of Aggravating Factors*

Defendant contends the trial court erred by failing to require the jury to render **[***896]** written findings on the aggravating factors it selected. We have repeatedly held that such findings are not required, and accordingly, find no error. (*Turner*, *supra*, 8 Cal. 4th at p. 209; *Cox*, *supra*, 53 Cal. 3d at p. 692.)

7. *Alleged Davenport Error*

(35) Defendant claims the prosecutor improperly implied that the absence of mitigating evidence under section 190.3, factors (e) and (f) should be considered as aggravating evidence. (See *People v. Davenport* (1985) 41 Cal. 3d 247, 288-290 [221 Cal. Rptr. 794, 710 P.2d 861].) We find no error. The prosecutor simply told the jury that there was no evidence of factor (e), and also argued that she could not recall hearing any factor (f) evidence, but that if the jury heard it the evidence could be considered in mitigation. Moreover, the jury was specifically instructed, pursuant to defendant's request, that the absence of any particular factor in mitigation is not to be treated as any factor in aggravation. It is presumed that the jury followed the court's instruction. (*Turner*, *supra*, 8 Cal. 4th at p. 209.)

8. *Section 190.3, Factor (k)*

(36) Defendant complains that the court erred in rejecting his instructions discussing **[**1182]** his childhood and background, that were required to augment the section 190.3, factor (k) instruction. We disagree. The jury was fully aware that it could consider defendant's childhood in mitigation under factor (k); it was further instructed that this

factor allowed the jury to consider any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death. In addition, the jury was instructed that it was free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors and that [t]o return a judgment of death, each of you must be persuaded that the aggravating evidence and/or circumstances is so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole. These instructions, combined with the arguments of Ryals (informing the jury it could consider as mitigating defendant's background and character) and Frank (telling jury that factor (k) includes any evidence of defendant's character or background that he offers), lead us to conclude that there is no possibility the jury misunderstood its sentencing obligation to consider defendant's background and character in determining the appropriate penalty. (See *People v. Webb* (1993) 6 Cal. 4th 494, 534 [24 Cal. Rptr. 2d 779, 862 P.2d 779] [hereafter *Webb*].) **[*83]**

9. *Proportionality Review*

Defendant complains that the lack of intracase and intercase proportionality review in this case renders the 1978 sentencing scheme under California's death penalty law arbitrary under the Eighth Amendment and in violation of his equal protection rights because such review is afforded to noncapital defendants. We have rejected the argument in numerous cases. (See e.g., *Turner*, *supra*, 8 Cal. 4th at p. 209.)

10. *Section 190.4, Subdivision (e) Motion*

(37) Defendant contends the trial court committed prejudicial error in denying his automatic motion for modification of the death sentence (§ 190.4, subd. (e)) because it failed to consider mitigating evidence of defendant's dysfunctional family and his kindness to his siblings (§ 190.3, factor (k)). We are not persuaded.

After reviewing section 190.3, factors (a)-(i), and concluding that several statutory mitigating factors did not apply to defendant, (the court did note that defendant may have been high on PCP during the murders pursuant to factor (h)), the court asked: Are there other circumstances that mitigate against the aggravation of the [defendant], I think not. Moreover, before denying the modification motion, the court stated that it had considered defendant's motion **[***897]** to reduce penalty and the People's response, both of which referred to defendant's mitigating evidence. Thus, although the court did not specifically mention defendant's mitigating evidence of his family life, the court's statement regarding section 190.3, factor (k) evidence shows it considered all pertinent penalty phase evidence, including testimony about defendant's family life and his behavior toward his siblings, but merely found it unpersuasive. The record is clear that in ruling on the motion for modification, the trial court independently assessed the weight of the evidence under each factor, and stated its reasons for denying defendant's motion. (See *People v. Pinholster* (1992) 1 Cal. 4th 865, 971 [4 Cal. Rptr. 2d 765, 824 P.2d 571].) We conclude on this record that all constitutional and statutory considerations were observed in the court's

ruling. (*Hawthorne*, *supra*, 4 Cal. 4th at p. 80.) [9]

[*84] [1183]** 11. *Cumulative Error*

Defendant claims that in combination, the errors at the penalty phase caused cumulative prejudice warranting a reversal of penalty. After review of the record, we disagree. Any prosecutorial misconduct that did occur did not significantly influence the fairness of defendant's trial or detrimentally affect the jury's determination of the appropriate penalty. (*Ashmus*, *supra*, 54 Cal. 3d at p. 1006.)

12. *Disproportionate Penalty*

(38) Defendant contends his death sentence is disproportionate to his culpability under the Eighth Amendment and article I, section 17 of the California Constitution, which preclude punishment that is disproportionate to a defendant's individual culpability. (*Webb*, *supra*, 6 Cal. 4th at p. 536.) Defendant complains that the constitutional proscription against a disproportionate penalty has been especially violated in this case because his accomplices in the murders received either 25 years to life pursuant to a negotiated plea (Robert Reyes), or had the charges dismissed on insufficient evidence grounds (Joey Bocanegra).

Defendant relies on *People v. Dillon* (1983) 34 Cal. 3d 441, 479 [194 Cal. Rptr. 390, 668 P.2d 697], in which the court reduced a life sentence imposed on a 17-year-old with no prior convictions for a noncapital first degree felony murder to a sentence for second degree murder. But, as we have subsequently stated, *Dillon* does not mandate the type of intracase proportionality review sought by defendant. (*People v. Hill* (1992) 3 Cal. 4th 959, 1013 [13 Cal. Rptr. 2d 475, 839 P.2d 984] [hereafter *Hill*].)

As the People observe, intracase proportionality review is an examination of whether defendant's death sentence is proportionate to his *individual* culpability irrespective of the punishment imposed on others. (*People v. Adcox* (1987) 47 Cal. 3d 207, 274 [253 Cal. Rptr. 55, 763 P.2d 906], italics in original.) The Eighth Amendment to the federal Constitution does not require us to incorporate into our proportionality determination any comparison of defendant's sentence with that of another culpable person, whether charged or uncharged. (*Hill*, *supra*, 3 Cal. 4th at p. 1014; *Pulley v. Harris* (1984) 465 U.S. 37, 53 [79 L. Ed. 2d 29, 42, 104 S. Ct. 871] [upholding California's absence of comparative proportionality review].) **[*85]**

Accordingly, we reject defendant's plea for intracase proportionality. The evidence **[***898]** shows that he committed three brutal first degree murders of innocent and defenseless victims as an accomplice, only thirty-three days after he was released from state prison on parole from an eight-year prison term imposed for two violent assaults. In light of the evidence presented at trial, the

[9] In a footnote in his brief, defendant complains about the court's statement regarding section 190.3, factor (g) (whether or not defendant acted under extreme duress or substantial domination of another) because the court commented on the brutal nature of the Tatman killing, and mentioned that defendant was helped by Joey Bocanegra in killing Joey's parents. Defendant asserts that the court's mistake in summarizing the evidence indicates the court erroneously believed defendant was the main perpetrator of all three murders. We note, however, that the court observed defendant could not receive the death penalty for the Tatman murder, and we are not persuaded that the court's brief reference to Joey Bocanegra revealed any confusion about defendant's role in the Bocanegra murders.

penalty is proportionate to *defendant's* culpability. (3 Cal. 4th at p. 1014.) [10]

III. CONCLUSION

Based on the foregoing, we conclude the judgment should be affirmed in its entirety.

Kennard, J., Arabian, J., Baxter, J., George, J., Werdegar, J., concurred.

MOSK, J.--I concur in the judgment.

I write separately to prevent any misapprehension on the part of the reader as to **[**1184]** the meaning of *People v. Hendricks* (1987) 43 Cal. 3d 584 [238 Cal. Rptr. 66, 737 P.2d 1350], and the vitality of *People v. Wright* (1987) 43 Cal. 3d 487 [233 Cal. Rptr. 69, 729 P.2d 260]. Both *Hendricks* and *Wright* deal with the requirement of *Boykin v. Alabama* (1969) 395 U.S. 238 [23 L. Ed. 2d 274, 89 S. Ct. 1709], and *In re Tahl* (1969) 1 Cal. 3d 122 [81 Cal. Rptr. 577, 460 P.2d 449], that, under specified circumstances, a trial court must obtain from a criminal defendant a personal, on-the-record waiver of certain of his rights under the United States Constitution--namely, his privilege against self-incrimination, his right to a jury trial, and his right to confront adverse witnesses. *Hendricks* expressly holds that those circumstances obtain only when the defendant agrees to a submission procedure . . . by virtue of which he surrenders one or more of the three specified rights. (*People v. Hendricks*, *supra*, 43 Cal. 3d at p. 592.) It impliedly holds **[*86]** that the court must take a waiver only as to the right or rights actually surrendered. To the extent that *Wright*, which was decided earlier, is to the contrary, it is no longer good law.

Appellant's petition for a rehearing was denied February 21, 1996, and the opinion was modified to read as printed. Mosk, J., and Kennard, J., were of the opinion that the petition should be granted.

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[10] The People ask that we take judicial notice of a copy of the amicus curiae brief filed by the California Appellate Project (CAP) in *Maynard v. Cartwright* (1988) 486 U.S. 356 [100 L. Ed. 2d 372, 108 S. Ct. 1853]. Defendant sought notice of the records filed in the Court of Appeal in *People v. Reyes* (F016750, app. pending). The People claim the CAP brief is relevant to defendant's contention that the California death penalty statute does not adequately narrow the field of death eligible murders. They assert the brief represents the opinion of the California death penalty experts to the contrary. As to the *Reyes* records, defendant contends they are relevant to his claims of prosecutorial misconduct and disproportionate penalty, and he observes that the People refer to these records in their brief. We grant the request as to the Californiat Appellate Project brief, but deny the request as to the *Reyes* appellate record for the reasons stated, *ante*, in footnote 5, at pages 59-60.