No. _____

In the
Supreme Court of the United States

RICHARD GALVAN MONTIEL,
Petitioner,

v.

KEVIN CHAPPELL,
Warden of San Quentin State Prison,
Respondent.

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

PETITIONER'S APPENDIX IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

David A. Senior, Esq.*
**counsel of record*
Ann K. Tria, Esq.
McBREEN & SENIOR
1901 Avenue of the Stars, Suite 450
Los Angeles, California 90067
Telephone: (310) 552-5300
dsenior@mcbreensenior.com

Saor E. Stetler, Esq.
P.O. Box 2189
Mill Valley, California 94942
Telephone: (415) 388-8924

Counsel for Petitioner
RICHARD G. MONTIEL

TABLE OF APPENDICES

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RICHARD GALVAN MONTIEL, *Petitioner-Appellant*, v. KEVIN CHAPPELL, Warden, San Quentin State Prison, *Respondent-Appellee.*	No. 15-99000 D.C. No. 1:96-cv-05412-LJO-SAB OPINION

Appeal from the United States District Court
for the Eastern District of California
Lawrence J. O'Neill, District Judge, Presiding

Argued and Submitted April 16, 2021
San Francisco, California

Filed August 5, 2022

Before: William A. Fletcher, Andrew D. Hurwitz, and Michelle T. Friedland, Circuit Judges.

Opinion by Judge Friedland

SUMMARY*

Habeas Corpus/Death Penalty

The panel affirmed the district court's judgment denying Richard Galvan Montiel's habeas corpus petition in which he challenged his California conviction and capital sentence for a 1979 robbery and murder.

The California Supreme Court affirmed Montiel's conviction and sentence on direct appeal and later summarily rejected "on the merits" Montiel's state habeas petition. Montiel argued primarily that he was denied his Sixth Amendment right to effective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984), at his 1986 penalty-phase trial. The district court certified two issues for appeal: first, whether his penalty-phase attorney, Robert Birchfield, rendered ineffective assistance of counsel by failing to present independent expert testimony from a psychopharmacologist that Montiel's intoxication with phencyclidine ("PCP") prevented him from being fully culpable for the crimes; and, second, whether Birchfield rendered ineffective assistance by failing to prepare defense witness Dr. Louis Nuernberger to testify regarding Montiel's mental health. In addition to pressing those certified issues, Montiel argued that Birchfield was ineffective for failing to investigate and challenge the factual foundation for the opinion of prosecution expert Dr. Robert Siegel, and for failing to investigate and present evidence of Montiel's psychosocial and family history to explain why he abused PCP and other drugs.

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

Applying *Browning v. Baker*, 875 F.3d 444 (9th Cir. 2017), the panel expanded the certificate of appealability to include the latter two claims, and considered whether Birchfield's performance, considered as a whole, amounted to ineffective assistance of counsel at the 1986 penalty trial.

Montiel argued that this court should review his *Strickland* claims de novo, because the California Supreme Court's four-sentence denial of his claims "on the merits," without issuing an order to show cause, signifies that the court concluded only that his petition did not state a prima facie case for relief such that there is no "adjudication on the merits" to which this court owes deference under the Antiterrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2254(d). The panel disagreed, citing *Cullen v. Pinholster*, 563 U.S. 170 (2011), in which the Supreme Court afforded AEDPA deference to the California Supreme Court's summary denial of a habeas petition raising a *Strickland* claim—even though the state court had not issued an order to show cause. The panel therefore applied the deferential AEDPA standard, asking whether the denial of Montiel's claims "involved an unreasonable application of" *Strickland*.

The panel assumed, for the sake of argument, that the alleged errors constitute deficient performance under the first prong of *Strickland*. The panel held, however, under AEDPA's highly deferential standard of review, that the California Supreme Court could reasonably have concluded that Montiel's claim fails under the second prong of *Strickland*. The panel wrote that, comparing the mitigation evidence that was offered with what would have been offered but for Birchfield's alleged errors, the state court could reasonably have decided that there was not a substantial likelihood that the jury would have returned a

different sentence if Birchfield had not performed deficiently.

The panel addressed uncertified issues in a memorandum disposition.

COUNSEL

David A. Senior (argued) and Matthew L. Weston, McBreen & Senior, Los Angeles, California; Saor E. Stetler, Mill Valley California; for Petitioner-Appellant.

Julie A. Hokans (argued), Supervising Deputy Attorney General; Sean M. McCoy and Ivan P. Marrs, Deputy Attorneys General; Kenneth N. Sokoler, Supervising Deputy Attorney General; Michael P. Farrell and James William Bilderback II, Senior Assistant Attorneys General; Rob Bonta, Attorney General; Office of the Attorney General, Sacramento, California; for Respondent-Appellee.

OPINION

FRIEDLAND, Circuit Judge:

In 1979, Richard Galvan Montiel was convicted by a California jury of the robbery and murder of Gregorio Ante, as well as the robbery of Eva Mankin. He was sentenced to death in 1986, following a penalty-phase retrial. The California Supreme Court affirmed Montiel's conviction and sentence on direct appeal and later summarily rejected "on the merits" Montiel's state habeas petition. Montiel filed a petition in federal district court for a writ of habeas corpus, which was denied.

Montiel appeals the district court's decision, arguing primarily that he was denied his Sixth Amendment right to effective assistance of counsel at his 1986 penalty-phase trial. The district court certified two issues for appeal: first, whether his penalty-phase attorney, Robert Birchfield, rendered ineffective assistance of counsel by failing to present independent expert testimony from a psychopharmacologist that Montiel's intoxication with phencyclidine ("PCP") prevented him from being fully culpable for the crimes; and, second, whether Birchfield rendered ineffective assistance by failing to prepare defense witness Dr. Louis Nuernberger to testify regarding Montiel's mental health. In addition to pressing those certified issues, Montiel argues that Birchfield was ineffective for failing to investigate and challenge the factual foundation for the opinion of prosecution expert Dr. Robert Siegel, and for failing to investigate and present evidence of Montiel's psychosocial and family history to explain why he abused PCP and other drugs. We expand the certificate of appealability ("COA") to include those issues and therefore consider all arguments Montiel raises concerning whether he received ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984), at his 1986 penalty trial.

We address all four arguments related to Birchfield's performance at the 1986 penalty trial as a single issue of ineffective assistance of counsel, in compliance with *Browning v. Baker*, 875 F.3d 444 (9th Cir. 2017). We address that issue in this opinion. We decline to certify other issues for which Montiel seeks certification. We address those uncertified issues in a memorandum disposition that accompanies this opinion.

We review the California Supreme Court's denial of Montiel's *Strickland* claims under the deferential standard

required by the Antiterrorism and Effective Death Penalty Act ("AEDPA"). We may grant relief only if "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 fairminded disagreement." *Harrington v. Richter*, 562 U.S. 86, 103 (2011). Although there is merit to Montiel's *Strickland* claims, we conclude that the California Supreme Court's ruling denying relief was not so lacking in justification that it meets that demanding standard. We therefore affirm the district court's denial of habeas relief.

I.

A.

At his 1979 trial, Montiel was represented by Eugene Lorenz. The focus of the defense was not to contest that, on January 13, 1979, Montiel had robbed Eva Mankin and killed Gregorio Ante. Rather, the defense's primary argument was that Montiel's intoxication with PCP and alcohol precluded him from forming the specific intent to commit the crimes.

The following facts are consistent with the California Supreme Court's summary in its decision on direct appeal from the 1979 guilt- and penalty-phase trials. *See People v. Montiel (Montiel I)*, 39 Cal. 3d 910, 916–20 (1985).

1. Prosecution's Case

On the morning of January 13, 1979, Montiel was sitting on the stairs outside his house when a neighbor who lived directly across the street, Eva Mankin, drove up to her home. Mankin began unloading grocery bags from her car, placing them on her front porch and setting her purse down next to

them. As she returned to her car to close the doors, she saw Montiel approaching through her front yard accompanied by two small children. Montiel reached the porch before Mankin could enter the house. He told her that he had come over to help her carry the groceries inside. Mankin thanked him, refused, and asked him to leave, but Montiel repeated himself two more times and the final time "lowered his voice" and "said it in such a tone that [she] knew he meant it." Mankin then opened the front door, and Montiel told each child to bring a bag into the house.

After bringing the bags inside, the children left, but Montiel remained, standing about six feet inside the home. Mankin noticed that his eyes were "staring" and "glassy." She asked him several times to leave but received no response, so she took him by the shirt and slowly led him outside. She went back inside the house and locked the door.

Montiel then broke the glass in the door and reached in to unlock it. He re-entered the house as Mankin was calling the police. Montiel demanded her purse, grabbed it, and ran out of the house. The police later found Mankin's purse in her car, missing two checkbooks, three bank books, and eight dollars in cash.

Later that morning, Montiel arrived at the home of Victor Cordova. Victor lived with his wife, Maury Cordova, Maury's sister Lisa Davis, and Lisa's boyfriend, Tom Stinnett, among others.[1] Stinnett was in the front yard when

[1] In *Montiel I*, the California Supreme Court spelled the Cordovas' last name as "Cardova" and spelled Maury's name as "Maruy." *See, e.g.*, 39 Cal. 3d at 917. We use the spellings supplied by Victor Cordova at the 1986 penalty trial and adopted by the California Supreme Court in *People v. Montiel (Montiel II)*, 5 Cal. 4th 877 (1993). *See, e.g.*, *id.* at 899.

Montiel arrived and walked into the house. Although Maury was acquainted with Montiel, Stinnett did not know him and followed him inside. Stinnett noticed that Montiel had a cut on his left arm by the wrist, and he helped Montiel clean and bandage the wound. In the process, he removed a piece of skin from Montiel's arm with a razor blade. According to Stinnett, Montiel told him that he "did a purse snatch and went through a window." Stinnett observed that Montiel seemed "jittery" and "shaky" and appeared to be under the influence of drugs. Montiel gave a checkbook to Maury, asking her to cash some checks and buy him some clothing. Maury refused, so Victor gave Montiel a change of clothes.

Maury noted that Montiel was acting strange that morning. She testified that Montiel entered the house without knocking, which was unusual. She said that he was "more rowdy" than normal, "acted meaner," and was "giving orders," whereas before he had been "polite."

Lisa Davis did not know Montiel but testified that he acted "kind of weird." At one point, Montiel tried to wipe a mole under her eye without explanation, and, later, he grabbed her arm and her purse and told her to get him some beer.[2]

[2] The prosecution's witnesses gave varying responses about Montiel's speech and movements that morning. Mankin noted that "[h]e walked slow" but said that she did not notice slurring in his speech or unevenness in his walk. Stinnett noted that Montiel was "talking fast, half of it was Spanish, half of it was English" but said that he noticed nothing unusual about Montiel's walk or other movements, other than that Montiel appeared "nervous" and "shaky." Maury did not notice anything unusual about Montiel's eyes or the way he walked, and she said that his speech was not slurred. She did, however, note that he appeared to be under the influence of PCP. Victor testified that Montiel

Eventually, Victor Cordova took Montiel by motorcycle to Montiel's brother's house. On the way, Victor's motorcycle broke down. The men dismounted, and Victor pushed the motorcycle toward a nearby gas station. Victor called Maury from a payphone, asking her to pick them up, and began working on the motorcycle. At the same time, Montiel walked up the driveway of a nearby house. About ten minutes later, Montiel returned and told Victor that "he just killed a man," and Victor testified that Montiel "made an expression like he killed him, like, you know, like you do a goat." Montiel told Victor that he had left two beer cans in the man's house and, in a threatening manner, asked Victor to retrieve them. Victor refused, so Montiel left and soon returned carrying a can of beer and a sack.[3]

About fifteen minutes later, Maury Cordova and Tom Stinnett arrived in a pickup truck. Victor and Stinnett loaded the motorcycle into the back of the pickup. Victor rode in the back with the motorcycle, and Montiel rode in the cab with Maury and Stinnett. According to Stinnett, Montiel said that "he cut some man's head off" and that "he was the devil and a ride with him would be on top." When they arrived at the Cordova's house, Victor and Montiel went into

"wasn't making no sense" and "was high tempered," and that Victor "knew he was messed up on PCP." When asked about Montiel's movements, Victor said that he "was walking different" and that "his coordination was off a little." Davis said that "[h]is words were kind of stuttering, and they didn't come out right."

[3] When asked to describe whether Montiel showed signs of PCP intoxication shortly after the murder, Victor described Montiel's actions as "more or less the same" as before but said that "[h]e was talking more clearly."

a bedroom, where Montiel produced over $300 in twenty-dollar bills, as well as some pennies.

Victor told Montiel to leave the house and called a taxi. Montiel "was still flipping out, still talking," saying "[h]e was the devil." When no taxi arrived, Victor drove Montiel to a motel and dropped him off. Later that day, Maury discovered a sack in her bedroom containing Mankin's checkbooks, a large number of pennies, and a 12-inch "butcher knife" that was "covered in blood and had a broken handle."[4] Maury and Stinnett washed off the knife and threw it into a nearby canal. Later that night, Montiel returned to the Cordovas' house to ask about the knife, and Victor and Maury told him not to worry about it.

The next day, the police contacted Victor. When Victor saw Montiel later that day and asked if he knew what he had done, Montiel nodded his head. Subsequently, Montiel told Victor that he was worried he might have left fingerprints on the telephone in the man's house. Soon after, Victor left California to avoid testifying. He was arrested about two months later in Arizona as an accessory after the fact and returned to California to testify in exchange for immunity.

The murder victim was a 78-year-old man named Gregorio Ante. At trial, his relatives testified to the following events. On the morning of the murder, Gregorio's son Henry Ante arrived at his father's house to help with some repairs and to help his daughter, who arrived soon after, move a piano that she was purchasing from Gregorio.

[4] Stinnett also described seeing the paper sack containing "three or four dollars['] worth of pennies, checkbooks, some bank statements, [and an] old rusted[-]up knife." Davis also saw the items and testified that she later rolled up the pennies, counting seven dollars' worth.

Henry's daughter paid Gregorio $200, and Henry saw Gregorio place the money in his left shirt pocket. Henry's daughter drove away with the piano. Gregorio then gave Henry a twenty-dollar bill from the shirt pocket, after looking through his pants pockets and finding only a ten-dollar bill in the left pocket and two one-dollar bills in the right. Henry left, and as he went out the front door, he saw two men on a motorcycle in front of the house.

David Ante, Gregorio's grandson, arrived a short time later and found his grandfather's body on the floor. The body was found in a pool of blood, with the left pocket of Gregorio's pants pulled out. There was $180 in the left pocket of Gregorio's "inside shirt," which he wore underneath another layer, and no other money was found on his person. In his bedroom, the mattress had been moved off the bedframe, and the pennies that Gregorio collected were missing.

The autopsy revealed two superficial wounds on Gregorio's right cheek, two on the side of his neck, one on the lower neck, and one large, deep wound mid-neck, probably caused by at least two separate thrusts. The large wound was about seven inches wide and three inches deep. The cause of death was a hemorrhage with obstruction of the airway.

A few days after Gregorio Ante's death, Montiel was arrested and placed in a cell with an inmate named Michael Palacio. Palacio testified at trial that Montiel admitted to him that he had entered a man's house to use a telephone. When Montiel hung up the telephone, an old man appeared and asked what he was doing. The man sat down in a chair, and Montiel saw money in the man's shirt pocket. Montiel retrieved a knife from the kitchen, cut the man's throat, and, according to Palacio, took approximately $200. In exchange

for Palacio's testimony, the State dismissed a felony charge against him for possession of marijuana while in state prison.[5]

Dr. Ronald Siegel testified at trial as an expert for the prosecution.[6] He was a psychologist and psychopharmacologist who worked with PCP and had published papers about its effect on behavior, and specifically on criminal behavior. Dr. Siegel explained that PCP was a drug that could have "a combination of different effects"—it could act as a stimulant, cause a loss of response to pain, produce an anesthetic reaction in sufficient doses, produce "extreme sensory reactions" like seizures, cause hallucinations, and trigger changes in perceptions, thinking, and mood. Dr. Siegel agreed that the effects of PCP are "extremely individualized." While he acknowledged that it would be helpful to know how much of the drug someone had ingested to assess its effect on that person's behavior, Dr. Siegel explained that "in the field of psychopharmacology, which is my field, the most important thing that we use is the actual behavior of the person as observed or witnessed by the people or themselves."

Dr. Siegel described the difference between PCP intoxication and PCP-induced psychosis. He explained that PCP psychosis refers to a mental state characterized by rapid changes in mood, paranoia, and a preoccupation with death or death-like thoughts, which can include a fixation on

[5] Palacio admitted on cross-examination that he had read accounts of the crime in the newspaper before he approached the deputy sheriff with his offer to testify about Montiel's confession.

[6] The California Supreme Court gave only a brief summary of Dr. Siegel's testimony in *Montiel I*. *See* 39 Cal. 3d at 919. We expand on that summary here.

religious concepts like God or the devil. He testified that people in a state of PCP psychosis might also suffer from paranoid delusions or grandiose delusions (*e.g.*, believing that they are capable of performing, and attempting to perform, "unrealistic feats of strength or other types of powers").

Dr. Siegel reviewed transcripts of the earlier trial testimony of Victor and Maury Cordova, Stinnett, Davis, and Palacio; the police reports containing interviews with the witnesses; the preliminary hearing transcript; and background psychological and counseling reports about Montiel. He also interviewed Maury, Stinnett, and Davis.

Dr. Siegel opined that Montiel's behavior was consistent with a low to moderate level of PCP in the blood but not consistent with PCP-induced psychosis. Dr. Siegel based his opinion on Montiel's behavior at the time of the crimes, which indicated that Montiel was experiencing a state of hyper-excitation characterized by difficulty talking or slurred or stuttering speech, demanding and impulsive behavior, and glassy or dilated eyes. Dr. Siegel noted that most witnesses described Montiel as walking somewhat normally and that no one observed Montiel with two of the "signposts" of a high level of PCP intoxication—a flushed complexion (hypertension) and oscillation of the eyeballs (nystagmus). Dr. Siegel observed that Montiel was able to describe the killing of Gregorio Ante and recalled leaving beer cans in the house, which indicated that any amnesia was not severe, and noted that Montiel retained enough motor coordination to use the telephone and retrieve a large number of pennies without dropping them on the floor. Dr. Siegel further noted that, before the murder, Montiel was responsive to Maury Cordova's directions as she and Stinnett assisted him with the cut on his arm and that, after

the murder, Montiel insisted that he knew what was going on. In Dr. Siegel's view, those statements suggesting Montiel's lucidity further negated a conclusion of PCP psychosis.

Dr. Siegel rejected the idea that Montiel's statements about being the devil indicated that he was in a PCP-induced psychotic state. He noted that Montiel made those statements only after killing Gregorio Ante. According to Dr. Siegel, the timing suggested that the killing might have triggered an association causing Montiel to describe himself as the devil, but there was little to suggest that Montiel believed he was the devil before the killing or that such a hallucination caused him to kill.

Dr. Siegel concluded that although Montiel was under the influence of PCP, his level of intoxication was not sufficient to diminish his capacity to form specific intent or to premeditate. Based on Palacio's testimony, Dr. Siegel testified that Montiel had formed the intent to kill when he saw money in Gregorio Ante's pocket. Finally, he opined that Montiel's flight from the scene and expressions of concern the following day about possible evidence that he had left behind demonstrated his ability to reflect on the nature and consequences of his actions.

2. Defense's Case

Montiel took the stand on his own behalf and testified to the following. Around the time of the events, he had been smoking three to four PCP cigarettes per day. On January 13, 1979, he woke up, bought a six-pack of beer, and smoked a PCP joint. He felt a floating sensation from the PCP. When he saw Eva Mankin arrive at her house, something told him to help her with her groceries, so he ran to her house and carried the bags inside. His memory was spotty, but he

recalled that he put his hand through the glass in her door and did not feel any pain. Mankin yelled and swung her purse at him, and he grabbed it. He walked away from the house and dropped the purse, and when various items fell out, he picked them up and placed the purse in her car. As he jogged away, he noticed checkbooks in his hand and decided to return them later.

Montiel walked to the Cordovas' house with a bloody arm, and as he approached, he saw three people out front, two of whom appeared to be wearing white uniforms. He said to them, "oh, you're waiting for me, huh," and then walked into the house. When Stinnett used the razor to cut the piece of skin off his arm, Montiel felt no pain.

Montiel asked Victor to take him to his brother's house. Before they left, he and Victor smoked a joint of PCP. On the way, they stopped at the liquor store, and Montiel bought two cans of beer. After the motorcycle broke down, Montiel walked to a house to use the telephone, and he remembered that his feet felt heavy. When he reached the door, he knocked but got no answer. He looked in through a window in the front door and saw a man lying in blood. He then returned to Victor and said that he had seen someone with his throat cut, not that he had cut someone's throat.

Montiel said that he relayed the same story to Stinnett, but Montiel testified that he did not remember telling anyone that he was the devil. According to Montiel, when Victor asked him the following day if he recalled what he had done, Montiel nodded "yes" because he assumed that Victor was asking about how he injured his arm. As to Palacio's testimony regarding Montiel's confession in jail, Montiel asserted that he only repeated to Palacio what the public defender had read him from the police report.

Dr. Ronald Linder testified as an expert for the defense.[7] Dr. Linder held a doctorate in education and health science and wrote his doctoral dissertation on drug abuse. He was involved in PCP research and had written numerous articles on PCP toxicity. Before testifying, Dr. Linder interviewed Montiel for two and a half hours and read transcripts of the earlier witnesses' testimony at trial. Montiel described to Dr. Linder his extensive history of drug abuse, which began at a young age.

Dr. Linder noted that many people experience a mind-body separation while using PCP and may feel that they have no control over what they see their body doing, even though their actions are dangerous to themselves or others. He said that the effects of PCP on behavior and mental state fluctuate rapidly and have only an attenuated relationship to the amount of the drug in the bloodstream. Dr. Linder opined that, as a result, Dr. Siegel could not reliably infer from Montiel's behavior at one moment that Montiel had a low, moderate, or high level of PCP intoxication at another moment.

According to Dr. Linder's assessment, Montiel was significantly intoxicated before and during the crimes. He pointed to Montiel's inability to feel pain after putting his hand through a glass window, his aggressive and impulsive behavior, and the killing itself and concluded that Montiel was in a "delusional state." Dr. Linder noted that Montiel's claims to be the devil were similar to other cases where PCP users had committed violent acts and described themselves or the victim as the devil. Dr. Linder discounted the absence of observed signs of hypertension or nystagmus, explaining

[7] The California Supreme Court did not summarize Dr. Linder's testimony in *Montiel I*. *See* 39 Cal. 3d at 919–20. We do so here.

that moderate hypertension might not cause an obviously flushed appearance and that nystagmus might not be noticeable to the untrained observer. In Dr. Linder's opinion, Montiel's level of intoxication would have prevented him from premeditating or weighing the considerations for and against killing.

On cross-examination, Dr. Linder conceded that, if Montiel said that he had stolen a purse and taken checkbooks from it, one could infer from those facts that Montiel had an intent to steal. Dr. Linder clarified, however, that the effects of PCP were so unpredictable that a user could act rationally one minute and irrationally the next. Based on his judgment and knowledge of PCP, Dr. Linder opined that Montiel was not in a state that would "consistently allow him to premeditate." Dr. Linder could assume only that Montiel was intoxicated with PCP but said he doubted that Montiel could have formed an intent to steal.

3. Prosecution's Rebuttal

On rebuttal, prosecution witnesses testified that there was no window in Gregorio Ante's front door and that an observer looking through an adjacent window could not have seen that Gregorio Ante's throat was cut. The public defender testified that he had represented Montiel at his arraignment and acknowledged that he normally would not have supplied a defendant with a police report at the time indicated, and the prosecution's investigator described how Palacio's version of events contained information that was not in the police reports anyway.

4. Verdict, First Penalty Re-trial, and Appeal

The jury convicted Montiel of all counts and found two special circumstances that made Montiel eligible for the

death penalty: that the murder occurred in the commission of a robbery (the felony-murder special circumstance) and that the murder was intentional and carried out for financial gain (the financial-gain special circumstance). The jury hung on the penalty. At a penalty re-trial, a second jury sentenced Montiel to death. On direct appeal, the California Supreme Court set aside the financial-gain special circumstance and reversed the death sentence because of two instructional errors. *See Montiel I*, 39 Cal. 3d at 927–29.

B.

At a second penalty re-trial in 1986, Montiel was represented by Robert Birchfield. The *Strickland* claims certified for appeal in our court concern Birchfield's performance. The following facts are consistent with the California Supreme Court's summary in its decision on direct appeal from the 1986 trial. *See Montiel II*, 5 Cal. 4th 877, 898–904 (1993).

1. Evidence of Gregorio Ante's Murder

Victor Cordova's 1986 testimony was mostly consistent with his 1979 testimony, albeit with some differences.[8] For example, at the 1986 penalty trial, Victor admitted, contrary to what he said in 1979, that he and Montiel had shared a PCP joint between the Mankin robbery and their departure from the Cordovas' house on Victor's motorcycle. While Victor had described Montiel's eyes only as "beady" and "glossy" at the 1979 trial, this time he remembered that "[t]hey were shifting back and forth real funny like" and

[8] Eva Mankin and Henry Ante had died by the time of the 1986 penalty trial, so their 1979 testimony was read to the jury. *See Montiel II*, 5 Cal. 4th at 898 n.2 & 899 n.3. David Ante and Victor Cordova testified live.

"wiggling" "in every direction." Victor echoed his testimony from 1979 that, after the killing, Montiel "said he did it just like you would do a goat," but this time he recalled that Montiel had said the day before that he had recently been "slaughtering sheep[] or cows or something" at a ranch. And in the 1986 trial, Victor testified that, after the killing, Montiel had produced not only twenty-dollar bills but ones and fives as well. On cross-examination, Victor admitted that Montiel had recently asked him to lie on the stand to say that Montiel had smoked more PCP the morning of the crimes than he actually did.

2. Evidence of Montiel's Mental State and Intoxication

Both parties introduced expert evidence about Montiel's mental state and degree of intoxication on the morning of January 13, 1979.

As it had done in the 1979 trial, the State presented expert testimony from Dr. Siegel. He testified that, in addition to the preparation he had conducted for Montiel's first trial, he had since interviewed Montiel "to address the issue of his intoxication at the time of the commission of the offense."[9] In that interview, Dr. Siegel obtained Montiel's account of his history of drug use, his consumption of alcohol and PCP immediately before the crimes, and the crimes themselves. Dr. Siegel described Montiel's account as follows: Montiel started sniffing glue and drinking around age twelve. He sniffed ten to fifteen tubes of glue per day until age seventeen or eighteen. By age nineteen, he would

[9] Although Montiel had refused to speak with Dr. Siegel before his first trial, Dr. Siegel interviewed him in preparation for the first penalty re-trial in 1979 and relied on that interview for the opinions that he offered in the second penalty re-trial in 1986.

drink all day. From age thirteen to his early twenties, Montiel reported heavy use of amphetamines, barbiturates, tranquilizers, cocaine, LSD, and heroin, resulting in addiction, hallucinations, overdoses, blackouts, and amnesia. He started smoking PCP at age twenty-three. By age twenty-nine, Montiel recounted drinking alcohol and smoking two to three joints of PCP daily.

Dr. Siegel reviewed Montiel's psychological reports from 1972 to 1978 and testified that they showed no gross psychopathology but did mention aggression, a potential for violence, false bravado, manipulation, and grandiosity. Montiel admitted during the interview that he had a quick temper and would get violent when he was intoxicated, "when provoked," or "when it's called for." Montiel also admitted that he engaged in verbal arguments and fights when under the influence of alcohol, but he denied getting into serious fights or using weapons.

Through Dr. Siegel, Montiel's version of events and his reported confession to Michael Palacio were relayed to the jury. Dr. Siegel noted that Montiel reported drinking approximately one case of beer and smoking four to five PCP joints every day in January 1979. Montiel also reported that, on the morning in question, he woke up, smoked two PCP joints, and drank eight beers, after drinking alcohol and smoking PCP for most of the previous afternoon and evening. Dr. Siegel narrated the events of January 13 for the jury based on Montiel's account, his interviews with witnesses, and the testimony of Palacio. This version of events included Palacio's testimony that Montiel had confessed to killing Gregorio Ante after seeing money in the man's pocket.

Dr. Siegel opined that at the time of the crimes, there was no question that Montiel was "grossly intoxicated" from

PCP and alcohol. Dr. Siegel acknowledged that PCP has unpredictable effects and that it can reduce impulse control, cause hallucinations and delusions, produce episodic partial amnesia, and exaggerate aggressive or violent tendencies. He further recognized that extended use of PCP can lead to a chronic mental disorder. Nonetheless, Dr. Siegel observed that Montiel appeared capable of goal-directed activity, as demonstrated by his response to certain events, such as being concerned about having left fingerprints on Gregorio Ante's telephone, remembering the beer he left in Ante's house, and searching the house for money. Dr. Siegel noted that Montiel knew he was smoking PCP and drinking alcohol, was aware he killed an old man, described the manner of killing, and identified the salient events accurately. Dr. Siegel concluded that, on the day and at the time of the murder, Montiel was not hallucinating or experiencing PCP-induced psychosis. Dr. Siegel confirmed that his opinion was the same as it had been in 1979: Montiel appeared to be aware of his actions even though he was intoxicated.

The defense presented expert testimony from Dr. Louis Nuernberger, a psychiatrist formerly employed by the California Department of Corrections. Dr. Nuernberger had responsibility for inmate mental health concerns at San Quentin State Prison, and through his prison duties, acquired a familiarity with the drug and criminal histories of the inmates, which often included PCP use. Dr. Nuernberger had evaluated Montiel in 1979 or 1980, when Montiel first arrived on death row, to assess whether Montiel understood the nature of his sentence and the reasons for it. Dr. Nuernberger based his evaluation on an interview with Montiel, a report prepared by a psychologist, and a review of Montiel's prison file.

Dr. Nuernberger concluded that Montiel had a lifelong history of depression that led to his extensive drug abuse. Montiel's progression fit into a pattern that Dr. Nuernberger observed in many inmates at San Quentin—glue-sniffing as a young teenager that progressed to PCP use, caused by depression in childhood. Dr. Nuernberger testified that, as a free man, Montiel engaged in drug abuse and violence, but when institutionalized, Montiel conformed his behavior to the expectations of the prison and was compliant. Dr. Nuernberger testified that Montiel's use of PCP and alcohol likely eroded his faculties of judgment and self-control and that he was likely in a delirious state around the time of the crimes. In Dr. Nuernberger's estimation, Montiel's extended intoxication with PCP and alcohol were "directly responsible for the homicide," and his sanity at the time of the offense was "severely impaired if not totally lacking." Based on Montiel's progression of drug use and the combination of alcohol and PCP he had consumed, Dr. Nuernberger questioned whether Montiel was capable of deliberate action at the time of the offenses.

3. Prosecution's Aggravating Evidence of Montiel's Previous Crimes

The prosecution introduced evidence in aggravation showing that Montiel had previously committed five other violent crimes, two of which resulted in convictions.

- First, law enforcement officers testified that, in 1968, they responded to a call about a fight at the Montiel household. According to the officers, Montiel and his brother Antonio fought after Montiel tried to hit his mother, Hortencia, in the head with a telephone, and Montiel then cut Antonio in the chest with a butcher knife. Montiel's parents testified that

they did not recall the incident and denied statements attributed to them in the police report. Antonio testified that he did not know whether Montiel had cut him.

- Second, another officer testified that, in 1969, Montiel's then-wife, Rachel, reported that Montiel had hit her and had struck her sister in the abdomen while the sister was six months pregnant. Rachel testified, however, that her sister attacked Montiel and that Montiel never retaliated.

- Third, officers testified that, in 1971, they responded to an incident at the Kern County Fair when Montiel wrestled a stuffed animal from an older woman. After he failed to evade arrest, Montiel threatened to kill the officers' wives and children and burn their homes.

- Fourth, two employees of a restaurant testified that, in 1972, Montiel brandished a small handgun or starter pistol, demanded money, fled with thirty dollars, and fired several shots at an employee who followed him outside. Montiel pleaded guilty to second degree robbery, without enhancements for firearm or weapon use.

- Finally, a victim testified that, in 1973, he arrived home and caught Montiel stealing a television from his apartment. Montiel brandished a knife at him. Montiel pleaded guilty to misdemeanor burglary.

Officers testified that it was customary to indicate in the police report whether the suspect appeared to be under the influence of drugs or alcohol, and that none of the reports of those prior crimes referred to any suspicion of intoxication.

4. Montiel's Mitigating Evidence

The defense put on eighteen witnesses in addition to Dr. Nuernberger. The defense's theory was that Montiel had a relatively normal upbringing but became unstable and erratic when he became a heavy PCP user. The defense argued that Montiel's behavior was completely different when he was not under the influence of drugs, as demonstrated by his good conduct and rehabilitation in prison.

Members of Montiel's family testified that his family life was happy and that he was well-behaved and a good student until he started hanging out with the wrong crowd in high school and using drugs and alcohol. These witnesses indicated that Montiel was always respectful and nonviolent toward his parents, that family members visited him and exchanged letters with him while he was incarcerated, and that his family loved him. Rachel testified that, during their marriage, Montiel would sometimes become violent when drinking but said that he was a good father to their children, even after their separation.

Montiel presented evidence of his history of drug abuse. Family members recounted a pattern of substance abuse beginning with glue sniffing in his teenage years and progressing to regular use of alcohol and PCP during adulthood. Regarding the events of January 13, 1979, Montiel's sister Irene testified that he had smoked two PCP joints that morning. Other family members testified that he

had been hallucinating and talking incoherently in the days leading up to the murder.

Montiel presented evidence of his rehabilitation on death row. A prison chaplain testified that Montiel regularly attended voluntary religious services. A prison teacher said Montiel tried to improve his reading, writing, and mathematics skills and had made progress. A guard supervisor testified that Montiel presented no behavioral problems in San Quentin prison. A guard gave similar testimony about Montiel's conduct in the Kern County jail.

Montiel testified on his own behalf. He indicated that he had qualified for privileges on death row based on his good behavior. He confirmed the religious, educational, and artistic interests that he had developed in prison, and one of his paintings was admitted into evidence. Montiel indicated that, over time, he had developed empathy and remorse about Gregorio Ante's murder, saying that he knew "what it feels like to lose a family member." Montiel said that he would give his life to bring the victim back if that were possible.

5. Penalty Verdict

With the parties' agreement, the trial court took judicial notice and advised the jury that the 1979 guilt-phase jury had found two special circumstances in connection with the murder: that the murder was intentional and carried out for financial gain (the financial-gain special circumstance) and that the murder was committed while Montiel was engaged in the commission of a robbery (the felony-murder special circumstance). The trial court did so despite the California Supreme Court's decision in *Montiel I* that the financial-gain special circumstance was inapplicable. *See Montiel II*, 5 Cal.

4th at 925–26. After three days of deliberations and five ballots, the jury sentenced Montiel to death.

C.

After the 1986 penalty trial, Montiel filed a timely notice of appeal. In 1993, the California Supreme Court affirmed his death sentence. *Id.* at 947. The court rejected, among other arguments, Montiel's claim that Birchfield was ineffective for failing to prepare Dr. Nuernberger to testify, finding neither deficient performance nor prejudice. *Id.* at 923–25. In dissent, Justice Mosk concluded that Birchfield rendered ineffective assistance of counsel when he "egregiously failed to prepare his case for life" without parole. *Id.* at 948 (Mosk, J., dissenting).

Montiel filed a state habeas petition in the California Supreme Court. *See People v. Romero*, 8 Cal. 4th 728, 737 (1994) (explaining that California's constitution grants original jurisdiction in habeas corpus to the California Supreme Court). After requesting and receiving an informal response to the petition from the State and a reply from Montiel, the California Supreme Court denied the petition in 1996. The four-sentence order stated: "The motion for judicial notice of the records in the underlying appeals is granted. The petition for writ of habeas corpus is denied. The delay in presentation of claims has been adequately explained. All claims are denied on the merits."[10] *In re*

[10] The order concluded with an unexplained citation to *Harris v. Reed*, 489 U.S. 255, 264 n.10 (1989) (stating that when a state court invokes a state procedural bar as a separate basis for its decision, a federal court may not review the state's alternative holding on the merits of a federal claim). The State does not argue that the California Supreme Court rested its decision on a finding of procedural default, and we discern no reason to conclude that it did.

Montiel, No. S033108, 1996 Cal. LEXIS 1048, at *1 (Cal. Feb. 21, 1996).

In 1997, Montiel filed a 28 U.S.C. § 2254 habeas petition in the United States District Court for the Eastern District of California. The district court denied the petition in 2014. Montiel timely appealed.

II.

We review de novo the district court's denial of Montiel's habeas petition. *Sanders v. Cullen*, 873 F.3d 778, 793 (9th Cir. 2017). Our review is circumscribed, however, by AEDPA.[11] *Lambert v. Blodgett*, 393 F.3d 943, 965 (9th Cir. 2004). AEDPA establishes a highly deferential standard for reviewing claims that a state court has "adjudicated on the merits." 28 U.S.C. § 2254(d). In such cases, a federal court may not grant habeas relief unless the state court's merits adjudication was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," *id.* § 2254(d)(1), or was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," *id.* § 2254(d)(2).

Montiel argues that the California Supreme Court's summary denial of his habeas petition means that his *Strickland* claims were not "adjudicated on the merits," as that phrase is used in § 2254(d). His argument relies on the specifics of California's habeas procedures. Under California law, a habeas petitioner bears the initial burden of

[11] Montiel filed his federal habeas application after April 24, 1996, so AEDPA applies to his case. *Sully v. Ayers*, 725 F.3d 1057, 1067 (9th Cir. 2013).

pleading adequate grounds for relief and must support the factual allegations in his petition with any "reasonably available documentary evidence supporting the claim." *People v. Duvall*, 9 Cal. 4th 464, 474 (1995). "An appellate court receiving such a petition evaluates it by asking whether, assuming the petition's factual allegations are true, the petitioner would be entitled to relief." *Id.* at 474–75. "If no prima facie case for relief is stated, the court will summarily deny the petition. If, however, the court finds the factual allegations, taken as true, establish a prima facie case for relief, the court will issue an [order to show cause]." *Id.* at 475. When an order to show cause issues, "the custodian of the confined person shall file a responsive pleading, called a return, justifying the confinement." *Id.* The petitioner then files a reply, called a traverse. *Id.* at 476–77. If there are disputed factual issues to resolve, the court may order an evidentiary hearing. *Id.* at 478. "Conversely, '[w]here there are no disputed factual questions as to matters outside the trial record, the merits of a habeas corpus petition can be decided without an evidentiary hearing.'" *Id.* (alterations in original) (quoting *People v. Karis*, 46 Cal. 3d 612, 656 (1988)).

Montiel argues that the California Supreme Court's four-sentence denial of his claims "on the merits," without issuing an order to show cause, signifies that the court concluded that his petition did not state a prima facie case for relief. Montiel contends that, because the state court evaluated only whether he had stated a prima facie case, it never reached a decision on the underlying merits of his *Strickland* claims. Accordingly, he argues, there is no "adjudication on the merits" to which we owe AEDPA deference under § 2254(d), and we should review his *Strickland* claims de novo.

We disagree. In *Cullen v. Pinholster*, 563 U.S. 170 (2011), the Supreme Court afforded AEDPA deference to the California Supreme Court's summary denial of a habeas petition raising a *Strickland* claim. *Id.* at 187–88. In that case, as here, the state court denied the petition without issuing an order to show cause.[12] The Supreme Court acknowledged California's procedural rules for state habeas petitioners, *id.* at 188 n.12, but held that "[s]ection 2254(d) applies even where there has been a summary denial," *id.* at 187. The Court then undertook a full merits evaluation of the *Strickland* claim, which included "a thorough review of the state-court record," *id.* at 188; *see also id.* at 189–203, asking whether the California Supreme Court had "unreasonably applied clearly established federal law to [Pinholster's] penalty-phase ineffective-assistance claim on the state-court record." *Id.* at 187.[13]

[12] In *Pinholster*, the California Supreme Court had summarily denied two separate state habeas petitions—one filed in 1993 and the other in 1997. *See* 563 U.S. at 177–78 (referring to both petitions). In ruling on the 1993 petition, the California Supreme Court issued an order to show cause, but then vacated that order as "improvidently issued" and summarily denied the petition "on the substantive ground that it is without merit." *In re Pinholster*, No. S034501, 1995 Cal. LEXIS 4500, at *1 (Cal. July 19, 1995). In ruling on the 1997 petition, the California Supreme Court summarily denied the petition "on the substantive ground that it is without merit" without issuing an order to show cause. *In re Pinholster*, No. S063973, 1997 Cal. LEXIS 6194, at *1 (Cal. Oct. 1, 1997).

[13] Pinholster argued to the Supreme Court that the state court's implicit determination—in summarily denying his petition without issuing an order to show cause—that Pinholster had not even made out a "prima facie" case for relief was contrary to, or an unreasonable application of, clearly established federal law. *See* Brief for Respondent at 52–53, *Pinholster*, 563 U.S. 170 (No. 09-1088), 2010 WL 3738678 ("[T]he California Supreme Court's determination that Pinholster's

We therefore must decide whether the denial of Montiel's claim "involved an unreasonable application of" *Strickland*.[14] *See* 28 U.S.C. § 2254(d)(1). Under that standard, Montiel must show "that 'there was no reasonable basis' for the California Supreme Court's decision." *Pinholster*, 563 U.S. at 188 (quoting *Harrington v. Richter*, 562 U.S. 86, 98 (2011)). In other words, Montiel must show 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 fairminded disagreement."[15] *Richter*, 562 U.S. at 103.

allegations, taken as true, failed even to make out a *prima facie* claim was not only wrong, it was objectively unreasonable. It follows that § 2254(d) does not prohibit a grant of relief on the ground that trial counsel rendered constitutionally ineffective assistance at the penalty phase of Pinholster's capital trial."). Yet, rather than evaluate only whether Pinholster had made out a prima facie case in his state habeas petition, the Supreme Court evaluated the full merits of Pinholster's claims to assess whether the California Supreme Court could reasonably have denied habeas relief. *See Pinholster*, 563 U.S. at 189–203. To the extent that Montiel makes a similar argument to the one Pinholster made, we must reject it. *Pinholster* teaches that we must evaluate Montiel's *Strickland* claims in their entirety to determine whether the California Supreme Court could reasonably reject those claims on the merits.

[14] *Cannedy v. Adams*, 706 F.3d 1148 (9th Cir. 2013), does not support Montiel's position. In *Cannedy*, we treated a summary denial from the California Supreme Court as an "adjudication on the merits" under § 2254(d) and therefore applied AEDPA to our review of the petitioner's *Strickland* claim, evaluating the claim in light of the record before the California Supreme Court. *Id.* at 1155–57, 1162.

[15] To the extent that Montiel also argues that de novo review is warranted because the California Supreme Court failed to hold an evidentiary hearing, we reject the argument. *See Sully*, 725 F.3d at 1067 n.4 (holding that the California Supreme Court "does not fail to render an 'adjudication on the merits,'" as contemplated by § 2254(d), "just because it does not grant an evidentiary hearing"). Montiel has not

When reviewing a summary denial, we "look through" that judgment and apply the deferential standard to the last reasoned state court decision. *See Wilson v. Sellers*, 138 S. Ct. 1188, 1194–95 (2018); *Ylst v. Nunnemaker*, 501 U.S. 797, 803–04 (1991). Where there is no reasoned state court decision addressing a claim, we must consider what arguments or theories could have supported the state court's summary denial, and then ask whether it is possible that fair-minded jurists could conclude that those arguments or theories are consistent with *Strickland*. *Richter*, 562 U.S. at 96, 102.

III.

A.

We begin by addressing the scope of the issues that we will consider. The district court certified two issues for appeal: first, whether Birchfield rendered ineffective assistance of counsel by failing to present independent expert testimony that Montiel's intoxication with PCP prevented him from harboring the mens rea necessary for the crimes;[16] and, second, whether Birchfield rendered

pointed to any disputed factual issues in his state habeas petition that he claims necessitated an evidentiary hearing, so he has not shown any flaw in the fact-finding process or unreasonable determination of the facts.

[16] Although the guilt-phase jury necessarily found, by convicting, that Montiel harbored the necessary mens rea for the crimes, Montiel's mental state was still a relevant consideration for the 1986 penalty-phase jury. Under California law, a defendant is permitted to present evidence to the penalty-phase jury that there is lingering doubt as to his guilt, as a mitigating factor for consideration in sentencing. *See People v. Terry*, 61 Cal. 2d 137, 147 (1964), *overruled on other grounds by People v. Laino*, 32 Cal. 4th 878, 893 (2004). The 1986 penalty-phase jury was also instructed under California's death penalty law, which requires the

ineffective assistance by failing to prepare Dr. Nuernberger to testify regarding Montiel's mental health. Montiel also asks us to expand the COA to include two additional issues related to Birchfield's performance at the 1986 penalty trial: whether Birchfield was ineffective for failing to challenge the factual foundation underlying Dr. Siegel's expert opinion (specifically, Dr. Siegel's reliance on Palacio's testimony about Montiel's confession) and whether Birchfield rendered ineffective assistance by failing to investigate and present evidence of Montiel's psychosocial and family history to explain why he used PCP and other drugs.

We expand the COA to include those issues. In *Browning v. Baker*, we held that a district court errs by limiting a COA to individual ineffective-assistance subclaims corresponding to particular instances of an attorney's conduct within a single trial. 875 F.3d. 444, 471 (9th Cir. 2017). Because the Sixth Amendment right "is a guarantee of effective counsel *in toto*," we must "consider[] counsel's conduct *as a whole* to determine whether it was constitutionally adequate." *Id.* Under *Browning*, therefore, we must consider the additional alleged errors in our analysis. With the COA so expanded, we consider the broader issue whether Birchfield's performance, considered

jury to consider certain enumerated mitigating circumstances in selecting between sentences of death and life without parole. *See* Cal. Penal Code § 190.3. Evidence of Montiel's mental state would have been relevant to several mitigating factors. Most relevant here, "factor (h) mitigation" requires the jury to consider "[w]hether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, or the [e]ffects of intoxication." *Id.* § 190.3(h).

as a whole, amounted to ineffective assistance of counsel at the 1986 penalty trial.

For reasons we explain in a memorandum disposition filed concurrently with this opinion, we decline to expand the COA to include the other issues that Montiel advances in his opening brief.

B.

We now turn to whether Birchfield provided ineffective assistance of counsel at the 1986 penalty trial. To prove a *Strickland* claim, Montiel must show (1) "that counsel's performance was deficient," and (2) "that the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To establish deficient performance, "the petitioner must show that counsel's representation 'fell below an objective standard of reasonableness' under 'all the circumstances.'" *Sully v. Ayers*, 725 F.3d 1057, 1068 (9th Cir. 2013) (quoting *Strickland*, 466 U.S. at 688). "To establish prejudice from counsel's errors during the penalty phase of a capital case, the petitioner must show that '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.* (quoting *Strickland*, 466 U.S. at 695). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Cullen v. Pinholster*, 563 U.S. 170, 189 (2011) (quoting *Strickland*, 466 U.S. at 694). "That requires a 'substantial,' not just 'conceivable,' likelihood of a different result." *Id.* (quoting *Harrington v. Richter*, 562 U.S. 86, 112 (2011)). "If the state court reasonably concluded that [Montiel] failed to establish either prong of the *Strickland* test, then we cannot grant relief." *Cannedy v.*

Adams, 706 F.3d 1148, 1157 (9th Cir. 2013) (footnote omitted).

Montiel alleges that Birchfield's performance at the 1986 penalty trial was deficient because he failed to (1) present independent expert testimony from a psychopharmacologist that PCP prevented Montiel from forming a specific intent to commit robbery or murder; (2) adequately prepare Dr. Nuernberger to testify regarding Montiel's mental health; (3) challenge Dr. Siegel's reliance on Michael Palacio's testimony that Montiel formed the intent to kill Gregorio Ante after seeing money in his shirt pocket; and (4) investigate and present evidence of Montiel's psychosocial and family history.[17] We assume, for the sake of argument, that these alleged errors constitute deficient performance under the first prong of *Strickland*. We hold, however, under AEDPA's highly deferential standard of review, that the California Supreme Court could reasonably have concluded that Montiel's claim fails under the second prong of *Strickland*. Comparing the mitigation evidence that was offered with what would have been offered but for Birchfield's alleged errors, the state court could reasonably have decided that there was not a substantial likelihood that the jury would have returned a different sentence if Birchfield had not performed deficiently. *See Richter*, 562 U.S. at 102 (holding that, when a state court issues a

[17] The State argues that the sub-issue regarding Dr. Siegel's reliance on the Palacio confession is not exhausted because it was not presented to the California Supreme Court and that, in any event, Montiel forfeited the claim by failing to raise the allegations in his federal habeas application. We need not decide whether the claim is unexhausted or forfeited because we conclude below that it fails. *See* 28 U.S.C. § 2254(b)(2) ("An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.").

summary denial of a habeas claim on the merits, a federal habeas court must consider "what arguments or theories . . . could have supported[] the state court's decision").

1.

When a defendant has been convicted of first-degree murder with a special circumstance, California law allows a jury to impose a death sentence if it concludes that "the aggravating circumstances outweigh the mitigating circumstances." Cal. Penal Code § 190.3. The statute enumerates factors that the jury must consider, including the circumstances of the crime; the defendant's involvement in previous criminal activity that involved the use of force or violence; any prior felony convictions; whether the defendant was under the influence of an "extreme mental or emotional disturbance"; and other circumstances that extenuate the gravity of the crime. *Id*. § 190.3(a), (b), (c), (d), (k). Most relevant to this case, those factors also include so-called "factor (h) mitigation": "Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, or the [e]ffects of intoxication." *Id*. § 190.3(h).

In support of his state habeas petition, Montiel submitted mitigating evidence to the California Supreme Court that had not been presented at the 1986 penalty-phase trial. Specifically, he submitted declarations from his siblings Irene and Gilbert Montiel; his mother, Hortencia Montiel; clinical psychologist and psychosocial historian Dr. Gretchen White; clinical neuropsychologist Dr. Dale Watson; and psychiatrist Dr. Ferris Pitts. Below, we summarize the information provided in the declarations,

which we assume could have been introduced at the 1986 penalty-phase trial.

a. Early Life

Dr. White's declaration provided an account of Montiel's childhood. Montiel is from a family of migrant agricultural workers. Neither of his parents was educated past elementary school, and both grew up in poverty, in families with significant histories of alcoholism. His mother, Hortencia, suffered from paranoid delusions and believed strongly in hexes, witchcraft, and the supernatural. His father, Richard, suffered from alcoholism, was rarely home, would disappear for months at a time, and often ended up in jail for alcohol-related crimes. When Richard drank, he was verbally and physically abusive to Hortencia.

Montiel spent much of his early life in the fields where he and his family worked. Hortencia worked in the fields while pregnant with Montiel "until the last minute before [she] gave birth." As a toddler, Montiel would stay in the car or play in the fields while his parents were working. When Montiel was four or five years old, he started working in the fields with Richard from before dawn until the evening. They routinely worked in areas heavily sprayed with pesticides but were given no protective clothing or gloves, even when picking cotton, which left numerous cuts on their hands. Montiel and his siblings frequently returned home covered in pesticides—Montiel's job was "to shake the trees so the fruit fell," which left him "covered with the dust they put on the trees." Montiel also harvested crops in fields adjacent to ones being sprayed and often would enter a field to continue working before the spray had settled; sometimes he worked as a "flagger," standing in the field and signaling to the crop-dusting planes where to begin and end their runs, which also exposed him to the pesticides.

Montiel often came home with irritated eyes, rashes, and headaches. In elementary school, Montiel started the school year late and was taken out of school for several weeks each fall to help pick fruit. He was embarrassed that everyone at school knew that he worked in the fields, and he was teased for being so poor.

Montiel's family lived in extreme poverty. Every summer, they lived in labor camps near the fields, in a tent with a dirt floor and no electricity or running water. When Montiel was almost four years old, the family moved into a one-bedroom house in Bakersfield next door to a cattle yard and slaughterhouse. The stench was overwhelming, and the house was infested with flies. It had no electricity and had running water only from a faucet in the front yard. The family sometimes went several days without food, subsisting on a mixture of flour, sugar, and water. Hortencia eventually received welfare assistance, on which the family depended. Montiel had one older half-sibling and five younger siblings, all but one of whom suffered from serious substance abuse, failed in school, and later spent time in jail or prison.

Montiel's drug abuse started early and progressed to dangerous levels by early adulthood. He began sniffing glue around age ten and used five or six tubes every day. He sniffed glue whenever he did not want to deal with "bad times," as when his father was gone or when the family ran out of money. By the time Montiel was sixteen or seventeen, he was sniffing glue less frequently, but he drank more alcohol and began abusing other drugs, including LSD and various prescription pills sold on the streets. When Montiel was twenty, he was taking about ten prescription pills per day. By 1972, at twenty-three years old, Montiel was injecting heroin four times a day and had been hospitalized three times for drug overdoses. In his late twenties, Montiel

started using PCP. His siblings Gilbert and Irene, both of whom also used drugs heavily, remarked that Montiel acted like a different person on PCP, noting, among other strange behaviors, that PCP would cause him to talk about magic and the supernatural.

Montiel's drug abuse caused him to struggle in school and eventually led to repeated arrests and incarceration. Montiel first went to juvenile hall when he was eleven years old for breaking into school and stealing ice cream and fruit cocktail. He was sent to a juvenile camp at age twelve for sniffing glue. He rarely received good grades and failed 9th and 10th grades before dropping out of school. From 1972 through 1977, during his twenties, Montiel was never out of state custody for more than a sixty-day period.

Montiel never learned to cope with depression or feelings of abandonment. His parents did not model constructive ways of dealing with stressors or difficulties; rather, to deal with psychological pain, Montiel's father turned to alcohol or left the home, and his mother turned to magic and witchcraft. From childhood through early adulthood, Montiel experienced loss and abandonment not only as a result of his father's disappearances and his mother's inability "to provide minimal parenting for [him]," but also due to the deaths of his infant daughter, two of his brothers, and several friends.

b. Mental Health

After his arrest for the 1979 offenses, Montiel was evaluated by several mental health professionals. One psychiatrist observed that Montiel was "chronically depressed and 'mind damaged,' if not brain damaged, by his extensive drug use." The evaluations reflected that Montiel's "serious depression manifested as a cyclical

pattern of poor behavioral control" and that he had "deficits[] in judgment, self-control, and social skills as a consequence of toxic substance abuse, especially glue-sniffing, paint sniffing, and the continued use of PCP."

In 1993, Dr. Watson, the clinical neuropsychologist, evaluated Montiel and opined that he "suffers from cognitive and neuropsychological deficits and probable brain dysfunction," that he "functions at the level of borderline intelligence," and that he "is impaired by significant learning disabilities and very severe attention/concentration deficits (in the mildly retarded range)." Dr. Watson concluded that the onset of these deficits "dates at least from adolescence," based on Montiel's inability to perform at age-appropriate levels in reading and arithmetic. Dr. Watson concluded that Montiel's chronic inhalation of the neurotoxin toluene (found in glue) likely caused diffuse brain damage. Related impairments and neuropsychological deficits resulted in "poor planning skills," being "vulnerable to misinterpreting his environment with consequent manifestations of inappropriate and ill-modulated behavior," and having "difficulty in making judgments that require deliberation and consideration of abstract consequences." These deficits would be further exacerbated by alcohol or drug intoxication.

c. Effects of PCP

Dr. Pitts, the psychiatrist, stated that PCP is a "dissociative anesthetic, which means that it impairs normal cognitive brain function" and causes bizarre and impulsive behaviors, including spontaneous violence. Dr. Pitts opined that when Montiel took Mankin's purse, he was acting on "sheer impulse" because the PCP prevented him from evaluating his behavior or making any moral judgments. Dr. Pitts noted that the fact that Montiel remained close to

Gregorio Ante's house and in plain sight immediately after the killing illustrated Montiel's "lack of cognitive functioning at the time of the homicide." Dr. Pitts also placed greater significance than Dr. Siegel had on Montiel's reported statements, following the murder, that he was the devil. According to Dr. Pitts, those statements strongly suggested that Montiel actually believed himself to be the devil, particularly when viewed in the context of his mother's beliefs in the supernatural and the evidence that Montiel had spoken of being the devil or talking to the devil in the two weeks before the murder. Contrary to Dr. Siegel's opinion, Dr. Pitts believed that Montiel was unable to harbor specific intent to steal or murder or to premeditate because he was in a dissociative animated state and was behaving "at the level of primitive reflex."

2.

To assess prejudice under *Strickland*'s second prong in a capital case, we must "reweigh the evidence in aggravation against the totality of available mitigating evidence." *Pinholster*, 563 U.S. at 198 (quoting *Wiggins v. Smith*, 539 U.S. 510, 534 (2003)). That analysis requires us to "compare the evidence that actually was presented to the jury with the evidence that might have been presented had counsel acted differently." *Clark v. Arnold*, 769 F.3d 711, 728 (9th Cir. 2014) (quoting *Murtishaw v. Woodford*, 255 F.3d 926, 940 (9th Cir. 2001)).

We consider first the new evidence from the declaration of Dr. Pitts regarding Montiel's diminished capacity from the effects of PCP at the time of the crimes. Some of that evidence would have been cumulative of the concessions that Birchfield extracted from Dr. Siegel and the testimony that Birchfield elicited from Dr. Nuernberger. For example, the jury knew from the expert testimony presented at trial

that PCP was a dissociative drug with unpredictable effects that could erode faculties of judgment and self-control. Dr. Siegel acknowledged that chronic use of PCP could cause delusional episodes. Dr. Nuernberger opined that Montiel was likely in a state of "toxic delirium" around the time of the crimes, considered Montiel's intoxication with PCP and alcohol to be "directly responsible for the homicide," and believed that Montiel's sanity at the time of the offense was "severely impaired if not totally lacking." The jury also knew—from the testimony of Montiel, his family members, and Dr. Siegel—that Montiel had consumed a significant amount of PCP in the days leading up to and on the morning of the murder, and that he had been hallucinating and behaving strangely. The primary contribution of the declaration from Dr. Pitts was his bottom-line conclusion that Montiel's use of PCP made him unable to harbor the specific intent for robbery or murder, but given Dr. Siegel's concessions, a reasonable jurist could view that conclusion as a relatively marginal addition to Montiel's case for "factor (h) mitigation."

The new expert testimony must also be viewed in light of the considerable evidence suggesting that Montiel was aware of his actions. As the California Supreme Court observed in rejecting one of Montiel's challenges to his sentence on direct appeal:

> The manner of killing suggested calculation and awareness. It was also clear that [Montiel] had ransacked Gregorio's residence and taken money. Moreover, Victor testified that moments after the crime, [Montiel] described it several times in graphic and coherent terms. Victor also indicated that [Montiel] carried away the

> murder weapon and immediately returned to the house to retrieve other evidence which might link him to the homicide. [Montiel] continued to boast about the killing as he was driven away from the scene. He later asked Victor to lie about the extent of his intoxication.

Montiel II, 5 Cal. 4th at 921. The evidence concerning the Mankin robbery was similarly suggestive: Montiel fled Mankin's home with her stolen purse and apparently had the presence of mind to remove the items of value—a checkbook, several bank books, a knife, and some cash—before discarding the purse. A reasonable jurist could conclude that Dr. Pitts's opinion that Montiel was acting on the level of "primitive reflex" would have been unlikely to sway the jury, considering the circumstantial evidence that Montiel was making decisions that reflected awareness and at least some degree of rationality.

For similar reasons, a reasonable jurist could discount the prejudicial impact of Birchfield's failure to challenge Dr. Siegel's partial reliance, in forming his opinion, on the apparently erroneous testimony of Michael Palacio. In his 1986 penalty-phase trial testimony, Dr. Siegel narrated the events of January 13 as he understood them, based on his interviews with witnesses and his review of the 1979 guilt-phase trial transcripts. At the end of Dr. Siegel's narrative, the prosecution asked whether he had considered Palacio's testimony about Montiel's confession in jail. Dr. Siegel responded affirmatively and stated:

> A: According to testimony from Michael Palacio, Mr. Montiel had entered the house, wanted to use the telephone and

> noticed some money sticking out of this old man's pocket. At that point went into the kitchen to get a knife.
>
> Q: For what purpose?
>
> A: With the intent to kill him, according to Michael Palacio, that he formed the intent to kill him when he saw the old man with the money.

Palacio's version of events was inaccurate—the $180 that Gregorio Ante received from the piano sale and placed in his front shirt pocket was recovered on his body, suggesting that Montiel did not form the intent to kill Ante after deciding to steal that money. Montiel now contends that Palacio's false testimony formed the predicate for Dr. Siegel's conclusion that Montiel was capable of "goal-directed activity," and that Birchfield's failure to object or to effectively cross-examine Dr. Siegel prejudiced Montiel's defense.

The California Supreme Court rejected a similar argument on direct appeal, noting that, even without Palacio's testimony, there was a wealth of circumstantial evidence that Montiel knew what he was doing. *Montiel II*, 5 Cal. 4th at 921. Indeed, Palacio's testimony was only one of several factors that led Dr. Siegel to conclude that Montiel had the capacity to understand the nature of his conduct—other factors included, for example, Montiel's concern that he had left behind evidence connecting him to the crime and his search of the house for money.

Besides, Birchfield did take steps to undermine the narrative offered by Dr. Siegel, prompting the prosecution to present an alternative theory of the robbery-murder.

Specifically, Birchfield presented testimony from an investigator with the Kern County Sheriff's Office, who clarified for the jury that $180 was found on Ante's body, in a front T-shirt pocket that was concealed by an outer layer. On cross-examination, the prosecution showed the jury a close-up photograph of Ante's pants pockets—which, according to Ante's son Henry, had contained $12 in bills of small denominations on the morning of the murder—and the investigator confirmed that those pants pockets were found empty when investigators arrived at the scene. A reasonable jurist could conclude, therefore, that the jury was aware of the flaw in the narrative offered by Palacio and repeated by Dr. Siegel—but that the jury nonetheless concluded that Montiel had intentionally killed Ante in the process of robbing him of the money in his pants pockets, even if not for the money in his shirt pocket.

That leaves Montiel's psychosocial history and mental health evidence. Some of this evidence would have been cumulative. For example, the jury already knew that Montiel started sniffing glue at a young age before turning to heavier drugs. In addition, Dr. Nuernberger had offered the opinion, albeit without much substantiating detail, that Montiel's drug use stemmed from a deep-seated, lifelong depression and had described Montiel's compliant behavior in the controlled, drug-free prison environment.

Still, much of the psychosocial history was new, and that history presented a starkly different narrative than the story of a relatively normal childhood that Birchfield presented to the jury. A complete picture of Montiel's childhood would have helped the jury understand that Montiel's behavior as an adult was not, as the prosecution put it, "a conscious choice for his life, for violence, greed, and drug use." Rather, the jury would have understood that Montiel's

criminal behavior was rooted in early traumatic experiences and the impoverished conditions of his upbringing.[18] The new mental health evidence also offered a non-cumulative and more robust assessment of Montiel's cognitive and neuropsychological deficits, which the jury could have considered in mitigation. *See Boyde v. California*, 494 U.S. 370, 382 (1990) ("[E]vidence about [a] defendant's background and character is relevant [at sentencing] because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." (emphasis omitted) (quoting *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989), *abrogated on other grounds by Atkins v. Virginia*, 536 U.S. 304, 320 (2002))).

We assume that Birchfield's failure to present to the jury this more sympathetic picture of Montiel's childhood suffering constituted deficient performance. But we cannot say that the California Supreme Court would have been unreasonable in holding that the error did not prejudice the defense sufficiently to undermine confidence in the outcome of the penalty-phase trial. The prosecution's case in aggravation was relatively strong, showing that Montiel had engaged in a prior pattern of violence, with one incident resulting in a felony conviction. The jury was also aware of the gruesome nature of the murder and was instructed that

[18] In support of his state habeas petition and this appeal, Montiel provided a declaration from Dr. Thomas Milby about the medical effects of pesticide exposure. Montiel does not dispute that he failed to present this declaration to the district court, and his arguments on appeal do not appear to rely on the declaration. We therefore do not consider it.

the 1979 guilt-phase jury had found felony-murder and financial-gain special circumstances.[19]

Montiel relies on *Rompilla v. Beard*, 545 U.S. 374 (2005), *Wiggins v. Smith*, 539 U.S. 510 (2003), and *Bean v. Calderon*, 163 F.3d 1073 (9th Cir. 1998), but we are not persuaded by his comparisons. In all three of those cases, the court was not bound to apply AEDPA deference in its prejudice analysis and thus conducted its inquiry de novo before granting habeas relief. *Rompilla*, 545 U.S. at 390; *Wiggins*, 539 U.S. at 534; *Bean*, 163 F.3d at 1077. The issue before us is not whether we would have reached a different conclusion in this case on de novo review, but rather whether we can reach such a conclusion under AEDPA's standard of review. "Even if *we* would grant federal habeas relief upon de novo review, § 2254(d) precludes such relief if there are 'arguments that would otherwise justify the state court's result.'" *Sully*, 725 F.3d at 1067 (quoting *Richter*, 562 U.S. at 102). For the reasons above, we conclude that such arguments exist here.

[19] As previously noted, the California Supreme Court had set aside the financial-gain special circumstance on direct appeal before reversing Montiel's death sentence from the first penalty re-trial on other grounds. *Montiel I*, 39 Cal. 3d 910, 927–29 (1985). Notwithstanding that decision, the trial court, with the parties' consent, improperly instructed the 1986 penalty-phase jury that the guilt-phase jury had found the financial-gain special circumstance. *See Montiel II*, 5 Cal. 4th at 925–26. The California Supreme Court addressed the prejudicial impact of the error in *Montiel II*, concluding that the mistake did not undermine confidence in the judgment. *Id.* at 925–26 & 926 n.20. The court explained that nothing in its previous decision striking the financial-gain special circumstance "precluded this penalty jury from learning that its predecessor found an intentional killing." *Id.* The California Supreme Court's conclusion that the error probably had a minimal impact on the prosecution's case in aggravation was reasonable.

Montiel also cites *Porter v. McCollum*, 558 U.S. 30 (2009) (per curiam), in which the Supreme Court found prejudice under AEDPA's deferential standard. But that case is distinguishable. In *Porter*, the prosecution's case for aggravation consisted only of the circumstances surrounding the crimes themselves—Porter had no other criminal history. The defense put on virtually no case for mitigation: "The judge and jury at Porter's original sentencing heard almost nothing that would humanize Porter or allow them to accurately gauge his moral culpability." *Id.* at 41. A proper investigation would have uncovered evidence that Porter was a decorated war hero who suffered from PTSD as a result of his combat experience, that Porter's childhood included a history of physical abuse, and that Porter suffered from neurological deficits that impaired his ability to conform his conduct to the law. *Id.* at 33–37. Here, by contrast, the prosecution's case for aggravation was substantial, and, notwithstanding the alleged errors made by Birchfield, the jury did hear substantial mitigation presentation, including testimony from nineteen witnesses.

In short, weighing the aggravating circumstances against the totality of the mitigating evidence—and applying, as we must, AEDPA's very deferential standard of review—we hold that a reasonable jurist could conclude that Montiel failed to establish prejudice from Birchfield's errors.

IV.

For the foregoing reasons, we conclude that the California Supreme Court's summary denial of Montiel's ineffective assistance of counsel claims was not an unreasonable application of *Strickland*. We therefore **AFFIRM** the judgment of the district court denying Montiel's application for a writ of habeas corpus.

NOT FOR PUBLICATION

FILED

AUG 5 2022

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD GALVAN MONTIEL, Petitioner-Appellant, v. KEVIN CHAPPELL, Warden, San Quentin State Prison, Respondent-Appellee.	No. 15-99000 D.C. No. 1:96-cv-05412-LJO-SAB MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
Lawrence J. O'Neill, District Judge, Presiding

Argued and Submitted April 16, 2021
San Francisco, California

Before: W. FLETCHER, HURWITZ, and FRIEDLAND, Circuit Judges.

Richard Galvan Montiel appeals from the district court's denial of his application for a writ of habeas corpus, in which Montiel challenges his convictions and capital sentence for the 1979 robbery and murder of Gregorio Ante. In his habeas application, Montiel argues that he received ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984), at both

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

his 1979 guilt-phase and 1986 penalty-phase trials. The district court issued a certificate of appealability ("COA") for certain claims related to his 1986 penalty-phase trial, and we address those claims (and others related to the penalty-phase trial) in an opinion filed concurrently with this memorandum disposition. For the reasons we explain here, we decline to expand the COA to include the other uncertified claims and issues that Montiel advances in his opening brief.

A petitioner seeking a COA "must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; *or* that the questions are adequate to deserve encouragement to proceed further." *Lambright v. Stewart*, 220 F.3d 1022, 1025 (9th Cir. 2000) (brackets and emphasis in original) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983), *codified by statute as recognized by Slack v. McDaniel*, 529 U.S. 473, 483 (2000)). Montiel's uncertified claims do not meet this standard.[1]

1. Montiel urges us to consider whether his penalty-phase attorney provided ineffective assistance of counsel by failing to file a state habeas petition challenging his 1979 convictions before the 1986 penalty trial. We decline to expand the COA to include this claim. As an initial matter, there is no right to effective assistance of counsel in postconviction proceedings. *See Davila v. Davis*,

[1] For the reasons given in the concurrently filed opinion, our review is governed by the highly deferential standard of the Antiterrorism and Effective Death Penalty Act ("AEDPA"). *See* 28 U.S.C. § 2254(d).

137 S. Ct. 2058, 2062 (2017) ("[A] prisoner does not have a constitutional right to counsel in state postconviction proceedings."). Thus, Montiel could not have been deprived of such a right by his attorney's failure to file a state habeas petition before the 1986 penalty trial. Moreover, Montiel cannot show prejudice from the failure to file a state habeas petition before his 1986 penalty trial, because after that trial, he was able to file a petition raising claims about his 1979 guilt-phase counsel's performance that the California Supreme Court considered and denied on the merits. We also reject Montiel's argument that, because his penalty-phase attorney's failure to file a habeas petition was a result of a conflict-of-interest, under *Cuyler v. Sullivan*, 446 U.S. 335 (1980), we must presume prejudice.[2]

2. Montiel also urges us to consider whether his guilt-phase counsel provided ineffective assistance at his 1979 trial by failing to investigate and present evidence that Montiel's gross intoxication with phencyclidine ("PCP") prevented him from harboring the mens rea necessary for robbery and murder. *Strickland*

[2] Montiel argues that we must presume prejudice under *Cuyler*, 446 U.S. at 349–50, because his attorney had previously represented his guilt-phase lawyer in two unrelated cases. We disagree. The Supreme Court has limited the *Cuyler* presumption of prejudice in conflict-of-interest cases to conflicts arising from joint or concurrent representation. *See Mickens v. Taylor*, 535 U.S. 162, 175-76 (2002). "We have held that a state court's rejection of a conflict claim not stemming from concurrent representation is neither contrary to, nor an unreasonable application of, established federal law as determined by the United States Supreme Court." *Rowland v. Chappell*, 876 F.3d 1174, 1192 (9th Cir. 2017). Here, there is no evidence that Montiel's penalty-phase attorney was representing his guilt-phase attorney at the time he allegedly should have filed the state habeas petition..

requires that a court "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." 466 U.S. at 689. Although we do not deny that aspects of guilt-phase counsel's performance are troubling, the California Supreme Court could reasonably have concluded that counsel's performance did not fall below *Strickland*'s standard of care.

Montiel's guilt-phase attorney did present a mental state defense and offered expert testimony in support of it. He first attempted to hire forensic psychologist and PCP expert Dr. Steven Lerner to review the possible effects that PCP had on Montiel's behavior on the day of the crimes. Dr. Lerner was not available and recommended that counsel contact Dr. Linder, who testified on Montiel's behalf. Dr. Linder held a doctorate in education and health science, had been involved in PCP research activities, and served as the director of a program to develop guidelines and training for medical and law-enforcement professionals on the recognition and management of acute and chronic PCP intoxication. At trial, the court and the parties agreed that there were almost no qualified experts on the psychopharmacological effects of PCP. The decision to hire Dr. Linder appears justified in light of Dr. Lerner's recommendation, Dr. Linder's reasonable qualifications, and the dearth of other available experts. *Turner v. Calderon*, 281 F.3d 851, 875–76 (9th Cir. 2002) ("The choice of what type of expert to use is one

of trial strategy and deserves 'a heavy measure of deference.'" (quoting *Strickland*, 466 U.S. at 691)).

Moreover, the guilt-phase attorney's direct examination of Dr. Linder was not obviously deficient. In a declaration submitted with Montiel's state habeas petition, Dr. Linder explained that Montiel's attorney had failed to provide him with California's criminal jury instructions for the relevant offenses or explain to him the meaning of legal concepts, like specific intent, pertinent to Montiel's mental state. To be sure, counsel's failure in this regard is troubling, but Montiel has not provided authority that the failure to provide legal standards to a mental health expert in preparation for testifying was deficient performance for a capital guilt-phase lawyer in 1979. And, in any event, Dr. Linder did provide opinions that undercut the prosecution expert's conclusions about Montiel's mental state. Although his testimony could have been more definitive, Dr. Linder offered the opinion that Montiel was in a "delusional state" at the time of the crimes; rebutted the prosecution expert's assertions that Montiel showed no signs of PCP-induced psychosis; and noted that PCP's effects were highly unpredictable, such that one seemingly rational act was not strong circumstantial evidence that a user was acting rationally just a short time later.

We therefore cannot say that the California Supreme Court's denial of the claim involved an unreasonable application of clearly established Supreme Court

precedent. *See* 28 U.S.C. § 2254(d)(1). We do not think this issue warrants more searching analysis, and we therefore decline to expand the COA to include the claim.[3]

3. Finally, Montiel also attempts to raise a claim under *Atkins v. Virginia*, 536 U.S. 304 (2002), that his intellectual disability precludes his execution, and a claim under *Napue v. Illinois*, 360 U.S. 264 (1959), that the prosecution knowingly presented false testimony from Palacio. The State argues, and Montiel does not dispute, that those issues were not presented to the California Supreme Court and are therefore not exhausted. We agree, and we decline to expand the COA to includes those claims. *See* 28 U.S.C. § 2254(b)(1)(A).

[3] We therefore need not address Montiel's arguments that guilt-phase counsel was ineffective for failing to prepare a different psychiatrist, Dr. Paul Cutting, who evaluated Montiel before trial. And, in any event, Montiel did not present Dr. Cutting's declaration to the California Supreme Court, so we may not consider it here. *See Cullen v. Pinholster*, 563 U.S. 170, 181 (2011).

FILED

OCT 13 2022

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD GALVAN MONTIEL, Petitioner-Appellant, v. KEVIN CHAPPELL, Warden, San Quentin State Prison, Respondent-Appellee.	No. 15-99000 D.C. No. 1:96-cv-05412-LJO-SAB Eastern District of California, Fresno ORDER

Before: W. FLETCHER, HURWITZ, and FRIEDLAND, Circuit Judges.

The panel has unanimously voted to deny Petitioner-Appellant's petition for panel rehearing. Judge Friedland has voted to deny the petition for rehearing en banc, and Judge Fletcher and Judge Hurwitz so recommend. The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petitions for panel rehearing and rehearing en banc are DENIED.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

RICHARD GALVAN MONTIEL,

Petitioner,

v.

KEVIN CHAPPELL, as Warden of San Quentin State Prison,

Respondent.

Case No. 1:96-cv-05412-LJO-SAB

DEATH PENALTY CASE

MEMORANDUM AND ORDER (1) DENYING PETITION FOR WRIT OF HABEAS CORPUS, and (2) ISSUING CERTIFICATE OF APPEALABILITY FOR CLAIMS 24 AND 25 [DOC.NO. 83]

ORDER DENYING MOTION FOR EVIDENTIARY HEARING [DOC. NO. 180]

ORDER TERMINATING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT [DOC. NO. 165]

CLERK TO ENTER JUDGMENT

Petitioner Richard Galvan Montiel ("Petitioner" or "Montiel") is a state prisoner proceeding with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. He is represented by Gary M. Sirbu, Esq., of the Law Office of Gary M. Sirbu, Joseph Schlesinger, Esq., and George Allen Couture, Esq., of the Office of the Federal Defender, and Terence John Cassidy, Esq., of Porter Scott, APC. Respondent Kevin Chappell is the Warden of San Quentin

State Prison ("Respondent" or "Warden"). He is represented by Julie Anne Hokaus, Esq., and Ward Allen Campbell, Esq., of the Office of the California Attorney General.

I.

BACKGROUND

A. Procedural Background

In May 1979, Montiel was convicted of the robbery and burglary of Eva Mankin and the robbery and murder of Gregorio Ante. Both crimes occurred on January 13, 1979. Two special circumstances of "in the course of a robbery" and "for financial gain" were found true, and the special circumstance of "heinous, atrocious and cruel" was found untrue. The jury could not unanimously decide on the appropriate penalty.

In September 1979, a second jury was impaneled to consider the penalty, and Montiel was sentenced to death on November 20, 1979. On direct appeal the California Supreme Court affirmed the guilty verdict and the robbery special circumstance finding, but set aside the financial gain special circumstance and reversed the penalty. People v. Montiel, 39 Cal. 3d 910 (1985) ("Montiel I"). No petition for habeas corpus was filed with the state court at the time of the first direct appeal.

Montiel's penalty was reversed because a Briggs instruction about the governor's commutation power was given without qualification, and a sympathy instruction was given without curative instructions to allow the consideration of mitigating factors. Montiel I, 39 Cal. 3d at 928 (citing People v. Ramos, 37 Cal. 3d 136, 159 (1984) and People v. Easley, 34 Cal. 3d 858, 875 (1983)). Also, the testimony of Dr. Ronald Siegel predicting future violence was viewed as unreliable, but was not a basis for reversal since Montiel failed to object and reversal was required on other grounds. Montiel I, 39 Cal. 3d at 929 (citing People v. Murtishaw, 29 Cal. 3d 733, 767, 775 (1981)).

On November 10, 1986, after retrial, Montiel was again sentenced to death. The sentence was affirmed by the California Supreme Court. People v. Montiel, 5 Cal. 4th 877 (1993) ("Montiel II"). On June 30, 1994, Montiel's petition for certiorari was denied by the United

States Supreme Court. On February 21, 1996, Montiel's state habeas petition, filed June 1, 1993, was found to be timely and was summarily denied on the merits.

On April 23, 1997, Montiel filed his initial federal petition for writ of habeas corpus. On October 2, 1997, Montiel filed an amended petition. On October 27, 2000, Montiel filed a motion for an evidentiary hearing seeking to present evidence on all but one of the claims in his federal petition. The Warden filed a motion for summary judgment concurrently with the opposing points and authorities. In his opposition to Montiel's request for evidentiary hearing filed on December 15, 2000, the Warden admits that the motion for summary judgment was not accompanied by a stipulated statement of facts as required, and requests the motion for summary judgment be dismissed without prejudice. Doc. 182, at n.1.

B. Factual Background

1. Robbery and Burglary of Eva Mankin

On January 13, 1979, Montiel was living at his parents' home in Bakersfield. 79A RT Vol. I:22.[1] A neighbor, Eva Mankin, returned home that morning and saw Montiel (whom she did not know at the time) sitting on the steps of the house across the street. Id. at 5-6. She had transferred her grocery bags and purse to her porch when she saw Montiel approach, accompanied by two small children. Id. at 7. Montiel said they would help her carry in her groceries. Id. at 9. She declined, but he insisted, so she unlocked the door, allowing Montiel and each of the children to carry a bag into the house. Id. at 9-10. She was afraid, and thought something was wrong because his eyes were "staring" and "glassy." Id. at 10. The children emerged, but Montiel stayed inside. Id. at 11. Feigning calm, Mrs. Mankin thanked Montiel and

[1] The lodged State Record contains the following transcripts: (1) Clerk's transcripts from the guilt and first penalty trial in April and May, 1979, numbered Vol. I through Vol. III; (2) Reporter's transcripts from the guilt and first penalty trial, numbered Vol. I through Vol. III, as well as two volumes that are not numbered; (3) Reporter's transcripts from the second penalty trial in September, October and November of 1979, numbered Vol. I through Vol. IV, as well as one volume that is not numbered; (4) Clerk's transcripts from the third penalty trial in 1986, numbered Vol. I, as well as five volumes that are not numbered; and (5) Reporter's transcripts from the third penalty trial, numbered Vol. I through Vol. VIII.

Since there are duplicate volumes with the same number (for example, there are three Reporter's Transcript numbered Volume I), the following numbering will be used to differentiate between similarly numbered volumes: The records from guilt and first penalty trial in the spring of 1979 will be designated "79A RT Vol. I," the records from the second penalty trial in the fall of 1979 will be "79B RT Vol. I," and the records from the third penalty trial from 1986 will be "A86 RT Vol. I." The volumes which are not numbered will be designated by the date of the proceeding.

quietly told him he had to leave. Id. She led him out of the house and locked the door behind him. Id. at 12.

Montiel began breaking the glass window in the door. 79A RT Vol. I:12. Mrs. Mankin called the operator and told her to summon the police. Id. at 13. By then, Montiel had reached in, unlocked the door and was entering the house. Id. Montiel demanded her purse, and Mrs. Mankin responded that she had called the police. Id. at 14. Montiel grabbed her purse and fled, leaving behind her wallet, which had fallen on the floor. Id. Mrs. Mankin recovered her purse from the seat of her car, but her checkbook, several bank books, her husband's pocketknife, and some cash were missing. Id. at 15. Mrs. Mankin identified Montiel from some photographs the police showed her, and in a later lineup. Id. at 17-19.

2. Robbery and Murder of Gregorio Ante

Victor Cordova, a PCP user and dealer, 86 RT Vol. VI:395, testified that Montiel arrived at his home the morning of January 13, 1979. 79A RT Vol. I:135. Also present at Victor's house when Montiel arrived were Victor's wife (Maruy), their children, Maruy's mother and sister (Kathy and Lisa Davis), Lisa's boyfriend (Tom Sinnett), and Tom's brothers (Dennis and Michael). Id. at 44, 97, 122, 212 and 217. Montiel's hands and arms were scratched and cut, and his shirt was bloody when he arrived at Victor's house. Id. at 47-49, 98-100, 135-36. Victor cut off a piece of dangling flesh from a deep wound on Montiel's left arm, but Montiel registered no pain. Id. at 49; 86 RT Vol. VI:403. Montiel said he was injured when he jumped through a window and "did a purse snatch." 79A RT Vol. I:91, 136. After his wound was dressed, Victor gave Montiel a clean shirt. Id. at 100, 140-41. Victor, Maruy, Lisa and Tom all testified about Montiel's unusual appearance, behavior and speech, with Victor, Maruy and Tom concluding he was "loaded" or high on PCP. Id. at 49-50, 67-69, 119-20, 134-35. Montiel continued his bizarre behavior and speech, making advances to Kathy Davis, trying to wipe a mole off Lisa Davis's face, challenging Victor by saying "deck me out," grabbing Lisa's purse, and arguing with some guys across the street. 86 RT Vol. VI:406-08; 79A RT Vol. I:220-21, 135, 102.

Unwilling to deal with Montiel's intoxicated state, Victor decided to take Montiel to his brother's house on Victor's motorcycle. 79A RT Vol. I:141-42. Before they left, Victor shared

a PCP cigarette with Montiel. 86 RT, Vol. VI:401-02. See also Montiel I, at 919 (Montiel testified on his own behalf at trial, stating he smoked a PCP joint around 9 am the morning of the murder, and shared another one with Victor before leaving Victor's house.) On the way the motorcycle's chain came off the sprocket. 79A RT Vol. I:55, 143-44; 86 RT Vol. VI:451. Victor pushed the motorcycle to a nearby gas station and called his wife, while Montiel walked toward a nearby house. 79A RT Vol. I:144-46. A few minutes later, Montiel returned and announced he had just killed a man "like you do a goat." Id. at 146, 159. The victim, 78-year-old Gregorio Ante, was killed in his home by a deep slash wound to the throat, which severed the carotid artery and blocked his breathing passage. 79A RT Vol. I:232-33, 272-74. Montiel told Victor he left two beer cans in the victim's house and wanted Victor to go get them. Id. at 148. When Victor refused, Montiel walked to the house and returned holding a can of beer and carrying a sack. Id. at 148-49.

Earlier on the day of the murder, Ante had received $200 in cash from his granddaughter and her husband for the sale of a piano. Id. at 248, 268. He placed this money in the pocket of his T-shirt, under another shirt. Id. at 248. He gave his son Henry $20 from that money for parts to repair his faucet, since he did not think $12, which he had in his pants pockets, was enough. Id. at 249. As Henry left to purchase the parts, he saw two men with a motorcycle in front of the house. Id. at 250.

Soon after, Ante's grandson David Ante, who was to help with repairing the faucet, telephoned Ante and received no response. 79A RT Vol. I:233. David drove the 5-10 minutes to the house and found Ante's body. Id. at 233-34. He ran down the street to summon help from the fire station. Id. at 234. The firemen who responded to David's call found Ante lying on the floor in a large pool of blood, with his left pants pocket pulled out. 79A RT Vol. II:260-61. They attempted CPR on Ante and secured the crime scene. Id. at 261, 263. Sara Galacia, Ante's daughter, testified that when she was allowed in the house after the murder, she noticed the master bedroom had been disturbed as the mattress was down and coins, which Ante was in the habit of saving, were missing. Id. at 256-59.

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3. Post-Crime Events

Tom Sinnett drove Maruy and a friend, Marlene Gallegos, in Tom's brother's pickup to get Victor and Montiel. 79A RT Vol. I:54, 57, 104-05. When they arrived, Montiel said he "cut some man's head off." Id. at 56, 105. On the ride back to Victor's house, Montiel repeated the statement, and said he was the devil. Id. at 57, 106. After they arrived, Victor asked Montiel what had happened, and in response, Montiel removed a sack from his pants, which contained coins, some cash, and a knife. 86 RT Vol. VI:434-38. After viewing the sack, Victor told Montiel to leave and Montiel agreed to do so, but instead went and squatted in a corner of the living room, telling Maruy not to mention the name "Jesus Christ" to him as he was the devil. Id. at 439-40, 467.

Although the testimonies of the witnesses at the 1979 and the 1986 trials vary to some degree, it is uncontradicted that after the murder a sack or bag containing pennies, currency, and a knife was at Victor's house. 79A RT Vol. I:59-60, 114-15, 86 RT Vol. VI:436-37. Tom and Maruy said the bag also contained checkbooks, and Lisa said she saw the bag on Maruy's bed with the checkbooks, pennies, and knife. 79A RT Vol. I:59, 115, 222-23. Although estimates of the length of the knife vary, each of the witnesses described it as appearing bloody. 79A RT Vol. I:59 (rusted-up), 115 (covered in blood), 86 RT Vol. VI:437-38 (red-stained). Both Tom and Victor claim to have disposed of the knife by throwing it in a canal. 79A RT Vol. I:60, 115-16 (Maruy said she and Tom threw it away), 86 RT Vol. VI:438. The other items in the sack were put in a dresser drawer and Tom stated they were later given to the police. 79A RT Vol. I:60, 116-17.

Both Victor and Maruy testified that Montiel had quite a bit of cash after the murder, but made no mention of what happened to the money. 79A RT Vol. I:106 (quite a few twenties, over $300), 151 (guesses 18-19 $20 bills), 86 RT Vol. VI:437 (a few bills, ones, fives and twenties).

Victor, Maruy and their kids drove Montiel and Marlene to a motel, picking up Montiel's sister Irene on the way. 79A RT, Vol. 1:110, 154, 86 RT Vol. VI:442 (Victor only recalls driving Montiel and Marlene to the motel). Victor registered for a room under his name, then

left Montiel, Marlene, and Irene at the motel. 79A RT Vol. I:111-12, 153-54, 86 RT Vol. VI:442-43. Victor and his family went on to a family birthday party. Id. at 113, 154, 86 RT Vol. VI:443 (Victor says he dropped his family off and went back home).

Victor said that Montiel asked about the knife when he saw him later, and Victor told him not to worry about it, but that the cops were looking for him. 79A RT Vol. I:156-57. Victor stated he saw Montiel at the home of a mutual acquaintance and asked if Montiel knew what he did, to which Montiel nodded. 79ART Vol. I:158. Victor advised Montiel to flee to Mexico. 86 RT Vol. VI:444-45. Victor also said Montiel told him a couple of times he was worried about having left fingerprints on the phone. 79A RT Vol. I:158.

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Montiel testified about his history of drug abuse, and his alcohol and drug use immediately before the crimes. 79A RT Vol. II:384-85, 395-96, 407-09. He also testified that his statement to Victor and the others was that he observed a man with his throat cut when he looked through a window while trying to phone for help. Id. at 397. He further stated that when Victor asked if he knew what he had done, he thought Victor was referring to the wound on his arm. Id. at 428.

II.

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).

As an initial matter, the Court must determine whether the provisions of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") apply to this case. Generally, AEDPA does not apply to cases pending in federal court on April 24, 1996--AEDPA's effective date.

Woodford v. Garceau, 538 U.S. 202, 204 (2003).

In this case, Montiel filed a request for appointment of counsel and a request for a stay of execution on April 22, 1996. (ECF No. 1.) However, Montiel's federal petition which presented his claims for relief was filed after AEDPA's effective date.

"[A]n application filed after AEDPA's effective date should be reviewed under AEDPA, even if other filings by that same applicant-such as, for example, a request for the appointment of counsel or a motion for a stay of execution-were presented to a federal court prior to AEDPA's effective date." Woodford v. Garceau, 538 U.S. at 207. Since Montiel's petition seeking adjudication on the merits of his claims was filed after AEDPA's effective date, AEDPA applies to this case pursuant to Garceau, despite the fact that Montiel filed a request for appointment of counsel and a request for stay of execution two days prior to AEDPA's effective date.

III.

LEGAL STANDARDS

Two issues are raised with respect to Montiel's claims. First, the Court must determine whether Montiel is entitled to an evidentiary hearing with respect to the claim. Second, if no evidentiary hearing is warranted, the Court must adjudicate the merits of the claim.

A. Legal Standards for Evidentiary Hearings

"A habeas petitioner is entitled to an evidentiary hearing if: (1) the *allegations* in his petition would, if proved, entitle him to relief, and (2) the state court trier of fact has not, after a full and fair hearing, reliably found the relevant facts." Phillips v. Woodford, 267 F.3d 966, 973 (9th Cir. 2001)(emphasis in original). "The standard governing such requests establishes a reasonably low threshold for habeas petitioners to meet." Id.

Entitlement to an evidentiary hearing is limited further under 28 U.S.C. § 2254(e)(2), which states:

> (2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that--
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> (A) the claim relies on--
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> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

With respect to diligence, "[u]nder the opening clause of § 2254(e)(2), a failure to develop the factual basis of a claim is not established unless there is lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel." Williams v. Taylor, 529 U.S. 420, 432 (2000). "Diligence for purposes of the opening clause depends upon whether the prisoner made a reasonable attempt, in light of the information available at the time, to investigate and pursue claims in state court." Id. at 435.

An evidentiary hearing is not required where there is no dispute regarding the facts, where the state court has reliably found the relevant facts, or where the claim presents a purely legal question. Hendricks v. Vasquez, 974 F.2d 1099, 1103 (9th Cir. 1992). An evidentiary hearing also is not required for claims based on conclusory allegations, or for claims refuted by or can be resolved by reference to the state record. Pinholster, 131 S. Ct. at 1399; Landrigan, 550 U.S. at 474; Campbell v. Wood, 18 F.3d 662, 679 (9th Cir. 1994).

B. Legal Standards for Federal Habeas Review of State Court Convictions

Federal habeas review of state court convictions is governed by 28 U.S.C. § 2254, which states, in pertinent part:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in violation of the Constitution or laws or treaties of the United States.
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> (d) 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--
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> (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.

"[A] state court decision is 'contrary to [the United States Supreme Court's] clearly established precedent if the state court applies a rule that contradicts the governing law set forth in [Supreme Court] cases' or 'if the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme Court] and nevertheless arrives at a result different from [Supreme Court] precedent.'" Lockyer v. Andrade, 538 U.S. 63, 74 (2003). A state court decision is an unreasonable application of Supreme Court precedent "'if the state court identifies the correct governing legal principle ... but unreasonably applies that principle to the facts of the prisoner's case.'" Id. at 75. A state court decision is based on an unreasonable determination of the facts if "the state court was not merely wrong, but actually unreasonable," as demonstrated by clear and convincing evidence. Taylor v. Maddox, 366 F.3d 992, 999 (9th Cir. 2004).

The petitioner carries the burden of proof of demonstrating that Section 2254(d)(1) or (d)(2) applies. Cullen v. Pinholster, 131 S. Ct. 1388, 1398 (2011). Review under Section 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits. Id. Moreover, Section 2254 sets a standard that is "difficult to meet," "highly deferential," and "demands that state-court decisions be given the benefit of the doubt." Id. (internal quotations and citations omitted) "[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 fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the Supreme Court]." Harrington v. Richter, 131 S. Ct. 770, 786 (2011). "[E]ven a strong case for relief does not mean the state court's contrary conclusion was unreasonable." Id. "[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 fairminded disagreement." Id. at 786-87.

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IV.

DISCUSSION

A. Ineffective Assistance of Counsel Claims

Montiel contends that habeas relief is warranted due to ineffective assistance of counsel. Claims 9-12, 14-16, 17(b), 18-20, 22-30, 32 are premised upon the issue of ineffective assistance of counsel.

"'[T]he right to counsel is the right to the effective assistance of counsel.'" Strickland v. Washington, 466 U.S. 668, 686 (1984) (quoting McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970)). "Counsel ... can ... deprive a defendant of the right to effective assistance, simply by failing to render 'adequate legal assistance.'" Id. (quoting Cuyler v. Sullivan, 446 U.S. 335, 344 (1980)). In Strickland, the Supreme Court articulated the legal standard governing claims based upon ineffective assistance of counsel:

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id. at 687.

"To establish deficient performance, a person challenging a conviction must show that counsel's representation fell below an objective standard of reasonableness." Premo v. Moore, 131 S. Ct. 733, 739 (2011) (internal quotations and citations omitted). "A court considering a claim of ineffective assistance must apply a strong presumption that counsel's representation was within the wide range of reasonable professional assistance." Id. (internal quotations and citations omitted). "With respect to prejudice, a challenger must demonstrate a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. (internal quotations and citations omitted).

"Surmounting *Strickland's* high bar is never an easy task." Premo, 131 S. Ct. at 739

(internal quotations and citations omitted). "Even under *de novo* review, the standard for judging counsel's representation is a most deferential one." Id. (internal quotations omitted). "The question is whether an attorney's representation amounted to incompetence under prevailing professional norms, not whether it deviated from best practices or most common custom." Id. (internal quotations and citations omitted). "Establishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is all the more difficult.... When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland's* deferential standard." Id. (internal quotations and citations omitted).

1. Claims 9 and 10

In Claims 9 and 10, Montiel contends that counsel did not provide reasonably competent psychiatric assistance and did not present competent expert testimony regarding diminished capacity.

Montiel alleges his mental state was a critical issue during his guilt and penalty trials, as he was under the influence of PCP at the time of the homicide. While at Victor's house prior to the homicide, Montiel's behavior was so bizarre and erratic that Victor wanted to take Montiel to his brother's house. Montiel observes that before he left Victor's house, he ingested more PCP. The People's expert, Dr. Siegel, opined that despite this fact, Montiel was still able to premeditate and to maturely and meaningfully reflect on the consequences of his acts. Dr. Siegel further testified Montiel formed the intent to kill and appreciated the criminality of his conduct because he fled the scene and later worried about the knife. Dr. Siegel dismissed the evidence that Montiel was "flipping out" and saying he was the devil, asserting such action was not delusionary but an unconscious value judgment triggered by the killing.

Dr. Cutting was appointed to advise trial counsel Eugene Lorenz ("Lorenz") about mental state issues. Montiel alleges Dr. Cutting's focus was to determine whether he was legally insane, and so he only obtained a list of the code charges and did not speak with Lorenz prior to his interview with Montiel. Montiel asserts Dr. Cutting did not know that his PCP use was a critical factor or that he was charged with a capital offense. Montiel contends Lorenz did not provide

Dr. Cutting with any reports or documents, even though Lorenz knew it was not the practice of appointed physicians to review police reports or documents, nor did Lorenz advise Dr. Cutting about the nature of the case or about Montiel's PCP use. Dr. Cutting told Lorenz that in rendering his opinion, he did not consider whether Montiel was under the influence of any drug, nor considered the use of PCP and its affects.

Lorenz attempted to enter a change of plea to not guilty by reason of insanity (NGI) on the third day of trial, after testimony by Maruy and Victor Cordova indicated Montiel was under the influence of PCP at the time of the homicide. The court, after hearing testimony from Dr. Cutting, denied the motion as untimely, noting there was no evidence of insanity and that evidence of intoxication was presented at the preliminary hearing. 79A RT Vol. I:209-10. Lorenz suggested he had not sufficiently prepared for this case, but the trial judge strongly disagreed with Lorenz's statement. Id. at 185.

After the court refused to allow Montiel to enter an NGI plea, Lorenz was permitted to retain an expert on diminished capacity.[2] Lorenz sought the assistance of Dr. Lerner, a psychologist with PCP expertise, but Dr. Lerner was unavailable and referred Lorenz to his associate, Dr. Linder. Dr. Linder was not a mental health professional, but held a doctorate in education. Lorenz instructed Dr. Linder to explore whether Montiel was under the influence of, or intoxicated by, PCP at the time of the homicide. Montiel alleges Lorenz did not supply Dr. Linder with any legal definitions of the pending charges, explain any standards for application of legal definitions, nor disclose the questions he planned to ask.

Montiel asserts because Dr. Linder was unfamiliar with the relevant legal principles, he testified Montiel had an intent to steal when he took Ms. Mankin's purse, even though Dr. Linder believed that Montiel's intoxication prevented the cognitive process needed to form such intent. Declaration of Dr. Linder, Ex. 10:2-3. Similarly, Dr. Linder testified he could not say whether Montiel could have formed the intent to steal from Mr. Ante, when he did not understand the distinction between the legal concepts of intent to take and intent to steal. Id., at 3-4. The

[2] Montiel's trial occurred before the 1982 abolishment of the diminished capacity defense.

prosecutor prejudicially capitalized on Dr. Linder's testimony, and argued Dr. Linder's opinion did not carry as much weight as Dr. Siegel's testimony. The trial judge, in denying the motion for a new trial, stated that he questioned Dr. Linder's qualifications and that his testimony was unpersuasive.

Montiel contends competent psychiatric assistance would have revealed he was suffering from cerebral dysfunction caused by PCP use and was dissociated from normal cognitive functioning. Montiel asserts he was incapable of exercising moral judgment, or premeditating or deliberating, and rather was acting spontaneously, reflexively and without appreciation for the consequences of his actions. Montiel argues his diminished mental state was manifested by his physical symptoms: incoherent and nonsensical speech, communication through hand gestures, no reaction or awareness of pain, and no cognitive functioning at the time of the homicide. Declaration of Dr. Ferris Pitts, Ex. 18:7-9. Montiel contends testimony similar to the declaration of Dr. Pitts would have refuted the incriminating significance Dr. Siegel placed on Montiel's reported concern about the fingerprints on the beer can and the whereabouts of the knife, and would have led the jury to conclude that Montiel did not and could not reason.

Montiel asserts reasonable investigation would have revealed evidence from family members and others of Montiel's intoxication and erratic behavior in the weeks prior to, and the morning before, the homicide. This information, combined with the facts showing Montiel was raised in a family preoccupied by beliefs in evil spirits and hexes, would have lent credibility that Montiel's statement immediately after the homicide, that he was the devil, was a delusion, not an "afterthought" as described by Dr. Siegel. Montiel argues it was standard practice in 1979 for Kern County practitioners to use psychosocial histories in cases with potential drug or alcohol use, and Lorenz failed to prepare a psychosocial history for Montiel. See Declaration of Timothy Lemucchi, Esq., Exhibit 29 to Amended Petition, and Supplemental Declaration of Timothy Lemucchi, filed in support of Montiel's 2004 Supplemental Brief.

Montiel argues that diminished capacity was the central issue of his guilt trial and of his mitigation defense at the penalty retrial, and observes his crime and his guilt trial occurred before the 1983 Carlos decision which required a finding of intent to kill as an element of the felony-

murder special circumstance. See Carlos v. Superior Court, 35 Cal. 3d 131, 153-54 (1983), overruled by People v. Anderson, 43 Cal. 3d 1104, 1147 (1987) (holding intent to kill is only required to be shown for an aider or abettor, not an actual killer).[3] Montiel asserts Lorenz's failure to investigate and present a mental state defense based on Montiel's organic brain damage, neuropsychological defects, and brain dysfunction, which were exacerbated by his PCP use, was unreasonable and deficient performance which prejudiced Montiel's chance of obtaining a more favorable verdict and sentence.

Montiel asserts Lorenz's failure to provide background information is not excused by the fact that Dr. Linder did not request it, distinguishing Hendricks v. Calderon, 70 F.3d 1032 (9th Cir. 1995) (holding trial counsel has no duty to present social history information to consulting mental health professionals unless requested). Dr. Linder was not a mental health professional, he was retained when the trial was already underway, and he was only instructed to explore whether Montiel was under the influence of PCP, or suffering from PCP intoxication, at the time of the murder. Montiel argues that, more importantly, Lorenz's failure to provide Dr. Linder with the applicable definitions of murder and robbery caused him to admit Montiel had intent to steal from Mrs. Mankin and to have no opinion about whether Montiel could have formed an intent to steal from Mr. Ante, which paved the way for a first-degree felony murder conviction and a true finding on the robbery-murder special circumstance. Dr. Linder declares that had he known the definitions of the mental state elements, he would not have given these answers, and also would not have conceded that Montiel could premeditate and deliberate at the time of the murder. See Exhibit 10.

Montiel argues these investigative failures were highly prejudicial, that the psychosocial history evidence would have undercut Dr. Siegel's interpretation of Montiel's statements, provided factual support for Dr. Linder's theme that PCP causes a dissociative state, supported the conclusion that Montiel believed he was the devil, and made it reasonably probable for the jury to find Montiel was incapable of premeditation and deliberation. Montiel asserts Lorenz's

[3] Montiel's penalty retrial occurred in 1986, during the 1983 through 1987 "Carlos window."

failure to investigate was compounded by the mistake in retaining Dr. Linder, which lead to his testimony and created systemic error as Dr. Linder's concessions left Montiel's defense in a state of collapse. Montiel contends the implicit conclusion by the California Supreme Court that Lorenz's actions were not prejudicial is an unreasonable application of the holding of Strickland v. Washington, 466 U.S. 668 (1984), that the right to counsel means an effective assistance of counsel. Montiel urges this claim satisfies section 2254(d)(1) and entitles him to an evidentiary hearing.

Montiel points to the following evidence in support of this claim that was presented to the state court: testimony from Maruy and Victor Cordova and Tom Stinnett about the actual extent of Montiel's diminished capacity[4]; testimony from Montiel's parents, Hortensia and Richard Sr., regarding Montiel's erratic drug-induced behavior[5]; the testimony of Montiel's habeas experts, Ferris Pitts, M.D. (psychiatrist)[6], Gretchen White, Ph.D. (psycho-social historian)[7], and Dale G. Watson, Ph.D. (neuro-psychologist)[8],that evidence supporting a finding of diminished capacity and organic brain damage was available in 1979.

Montiel proposes to present the following evidence in support of this claim at an evidentiary hearing which was not presented to the state court: testimony by trial counsel Lorenz stating he had no strategic reason for using Dr. Linder, or for failing to investigate lay witnesses, and that he knew an expert with an M.D. or Ph.D. should be employed[9]; Montiel's own

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[4] This evidence was available to Lorenz through transcripts of police interviews with these witnesses, and was presented in their testimony at trial, both of which revealed their observations of Montiel's mental state at the time of the crime.

[5] Both of these witnesses testified to this at the 1986 penalty retrial.

[6] Dr. Pitts concluded, based on the review of records, transcripts, and reports, that PCP intoxication rendered Montiel incapable of forming the intent to rob either Mankin or Ante, and unable to premeditate and deliberate or form the intent to kill/malice aforethought. See Ex. 18 in support of petition.

[7] See discussion of Dr. White's psycho-social history (Ex. 8 in support of petition) in Claim 29, supra.

[8] Dr. Watson concluded, based on tests and review of records and reports, that Montiel suffers from cognitive and neuropsychological deficits and probable brain dysfunction consistent with solvent abuse. These impairments compromise Montiel's ability to hold and process information, understand cause and effect, and engage in tasks that require logical, systematic thinking. The severity and effects of these impairments would be exacerbated by drug or alcohol intoxication. Dr. Watson states that the tests he employed in rendering his opinion were in widespread use prior to 1979. See Ex. 11 in support of federal petition.

[9] Lorenz has not submitted any declaration in Montiel's post-conviction proceedings.

testimony that he refused to speak to Dr. Cutting because he had no identification and he was leery of him, and that he was not in Mexican Mafia[10]; testimony from Dr. Cutting that he did not know of the capital charges against Montiel or that PCP intoxication was a critical issue, and that no information was provided to him regarding the elements of the crime[11]; testimony from Dr. Linder that he was unfamiliar with legal definitions and that he lacked the qualifications to render an expert opinion on the effects of PCP[12]; and testimony from a Strickland expert stating that investigation of lay witnesses and presentation of competent experts was standard practice in 1979.[13]

The Warden argues it is unlikely a psychological history would have been admissible at Montiel's guilt trial, even if offered in support of a diminished capacity defense. The Warden observes Montiel is not claiming Lorenz failed to raise a diminished capacity defense, as there is no dispute such a defense was presented, only that Lorenz should have done a better job at investigating and presenting this defense. The Warden asserts Montiel should not be allowed to blame Lorenz or his retained experts about the development of a diminished capacity defense since Montiel refused to assist the doctors in their examinations.

The Warden contends Lorenz could have made a tactical decision to obtain evidence of

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[10] Although Montiel testified at each stage of his trial, his testimony did not include the subjects proposed to be presented for this or for any other claim.

[11] Dr. Cutting's November 10, 1980 declaration (Ex. 2 in support of Points and Authorities), which was presented on state habeas, supports the last assertion, stating he has no record of, and does not recall, receiving any reports or documents from Lorenz prior to his April, 1979 examination of Montiel, and does not believe that he had any information about the case or charges against Montiel or about his history, other than statements Montiel made during the exam.

[12] Dr. Linder submitted a declaration (Ex. 10 in support of the petition), which was presented on state habeas, supports the first assertion, stating he was unfamiliar with and was not provided applicable legal definitions, especially regarding intent and premeditation and deliberation, that Lorenz did not inform him about the questions he planned to ask at trial, and that if he had been provided this information, it would have changed some of his testimony. Dr. Linder does not admit he lacked the qualifications to render an expert opinion on the effects of PCP.

[13] Two declarations were submitted by Timothy J. Lemucchi, Esq., as a potential Strickland expert, dated September 24, 1997 and July 27, 2004, neither of which were presented on state habeas. The declarations state that at the time of Montiel's trials, it was common practice in Kern County capital cases, especially those involving drug or alcohol use, to use psychosocial histories and to retain mental health experts. Mr. Lemucchi states a social history like the one prepared by Dr. White (Ex. 8 in support of petition), documenting a history of alcohol or substance abuse, would be relevant to a defense of diminished capacity.

PCP use from Dr. Linder and by cross-examining Dr. Siegel, the prosecution's witness, thus increasing Montiel's chances of the jury believing his diminished capacity defense. The Warden argues such a tactic also avoided mentioning Montiel's background, which included ties to a violent prison gang.

The Warden disputes the opinion of Dr. Pitts offered in support of Montiel's petition.[14] The Warden contends the record contradicts Dr. Pitt's opinion that Montiel was acting on impulse when he broke into Eva Mankin's home and stole her purse, and that the effect of PCP did not permit Montiel to evaluate his behavior or make any moral judgments. The Warden notes Montiel did not simply take the purse, but demanded Mrs. Mankin give it to him, and that he took only certain valuable items from the purse before leaving it in Mrs. Mankin's front yard. The Warden also disagrees with Dr. Pitts' opinion that Montiel was incapable of forming the intent to rob, to premeditate and deliberate, or to kill despite certain actions by Montiel, including obtaining a knife from Mr. Ante's kitchen and realizing a beer can left at the scene would incriminate him. The Warden observes Dr. Cutting testified that the fact Montiel was under the influence of PCP at the time of the murder would not have affected his opinion that Montiel did not suffer from a mental disease or defect.

The Warden states there is no disagreement Montiel was under the influence of PCP at the time of the murder, but asserts the issue is whether he was capable of sufficient rational thought to form the requisite mental state for each offense. The Warden argues even if the jury had heard the theories advanced by Dr. Pitts, that Montiel was acting due to "sheer impulse" or "primitive reflex action," there was little chance of overcoming the significant evidence showing Montiel knew and understood the nature and consequences of his actions.

The Warden asserts Montiel is not entitled to challenge the competency of psychiatric assistance he received, as there is no constitutional right to competent assistance of mental health

[14] The Warden observes Dr. Pitts' license in California was suspended in 1997, and argues the accusations that he engaged in unprofessional conduct by excessively prescribing or administering drugs or treatment to more than one patient casts doubt upon the weight due his professional opinion. See Montiel's Ex. 6 to Reply. Dr. Pitts surrendered his medical license on March 20, 1997, contesting the charges but agreeing to retire and not fight the charges. Dr. Pitts' declaration is from 1993 and was presented to the California State Supreme Court in support of Montiel's state habeas petition.

professionals. Even assuming a right to competent psychiatric assistance, the Warden argues Montiel cannot demonstrate incompetent assistance in his case as he was examined by two medical experts, one of whom testified for the defense.

Montiel replies the Warden has not produced any evidence to substantiate the argument that using Dr. Linder was the result of strategic considerations, and that the evidence instead shows the choice was made out of desperation, not strategy. Montiel asserts evidence of his purported membership in the Mexican Mafia would not have been admitted during the guilt trial, so avoidance of that evidence does not support counsel's decision to use Dr. Linder or to rely on the prosecution's expert, Dr. Siegel. Further, Montiel contends no evidence supports the Warden's assertion that counsel's decision to rely on the cross-examination of Dr. Siegel was legitimate case strategy, and further argues it was not reasonable as Dr. Siegel had strong opinions adverse to Montiel.

Montiel disputes that he bears some responsibility for Lorenz's failure to develop a diminished capacity defense due to his reluctance to discuss the facts of the case with Dr. Cutting, as Dr. Cutting failed to show any identification when he came to see him. Montiel also asserts that Lorenz failed to inform Dr. Cutting about the pending capital charge or about the testimony of numerous witnesses that Montiel was under the influence of PCP at the time of the crime. Montiel argues Dr. Cutting's testimony in effect rendered him a prosecution witness, and since he was a general psychiatrist and not a neuropsychologist, he was not competent to form an opinion on organic impairment, particularly in the absence of testing.

Montiel disagrees with the Warden's assertion that Lorenz vigorously presented a diminished capacity defense and offered expert testimony to support it. Montiel contends Lorenz only presented two lay witnesses, himself and Dr. Linder, both of whose testimony was undermined, when additional testimony was necessary to cast doubt on the conclusions of the prosecution's witness, Dr. Siegel, and was readily available had Lorenz properly investigated. Montiel asserts this failure, combined with the concessions by Dr. Linder's testimony, left the jury free to make findings on both first degree murder and a felony murder special circumstance and left the expert testimony without the supporting evidence necessary to counter the

prosecution's witness. Montiel argues Dr. Linder was not a mental health professional and was not competent to offer an opinion.

Montiel replies to the Warden's attack on the declaration of Dr. Pitts, asserting that although it is true Dr. Pitts' medical license has been revoked, this occurred after the declaration was made in support of this case and it had nothing to do with the issue of PCP. Montiel asserts Dr. Pitts' knowledge and experience regarding PCP remains valid despite the revocation of his license, as the allegations which led to his voluntarily surrendering his medical license have no relation to PCP. Montiel requests that should Dr. Pitts' qualifications be negatively impacted by the status of his medical license, he be provided the opportunity to consult with another expert and provide supplemental declarations and briefing. Montiel disputes the Warden's assertion that failure to present evidence from a qualified PCP expert at trial was not prejudicial, asserting instead that such evidence was absolutely critical to whether his capacity to harbor the requisite mental state was diminished by the effects of PCP.

The Warden observes much of the evidence Montiel presents in support of this claim was not presented to the state court, but urges if the evidence is properly before this Court, it does not fundamentally alter the nature of Montiel's claim, so the state court's adjudication of the claim is entitled to deference under § 2254(d)(1). The Warden contends the state court's determination does not involve an unreasonable application of Strickland. The Warden argues the evidence shows Montiel formed the intent to steal from both Ms. Mankin and Mr. Ante, and also formed the intent to kill Mr. Ante, and that his use of PCP, or evidence of a purported organic brain disorder did not preclude his forming the intent to steal and kill.

This claim was presented to the state court in Montiel's state habeas petition (Claim VIII), was found timely and summarily denied on the merits February 21, 1996.[15] On direct appeal, the California Supreme Court denied Montiel's claim that the trial court improperly refused to allow his change of plea to not guilty by reason of insanity, finding the trial court did not abuse its discretion in ruling the attempted plea change was untimely as it was made after the

[15] The entire text of the summary denial states: "The motion for judicial notice of the records in the underlying appeals is granted. The petition for writ of habeas corpus is denied. The delay in presentation of claims has been adequately explained. All claims are denied on the merits. (See Harris v. Reed (1989) 489 U.S. 255, 264, Fn. 10.)"

trial had started. The California Supreme Court also found that none of the evidence upon which the plea change was based was new since similar testimony had been presented at the preliminary hearing and that no showing of legal insanity had been made. The state court found there was no ineffective assistance of counsel for failing to advance the NGI plea at an earlier stage, as nothing in the record before them on direct appeal indicated Montiel was legally insane at the time of the offense. Montiel I, 39 Cal. 3d at p. 923.

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). The trial court's factual finding that there was no evidence Montiel was insane is entitled to a presumption of correctness. Montiel bears the burden to rebut that presumption by clear and convincing evidence.

In Ake, the Supreme Court determined that "when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in the evaluation, preparation, and presentation of the defense." Id., 470 U.S. at 83. Contrary to Ake, the trial court rejected Montiel's assertion of insanity. Despite this factual finding, the trial court granted Lorenz's request to appoint a psychiatrist to examine Montiel prior to the trial, and further granted an expert on the effects of PCP when the NGI plea was denied.

There is no evidence Montiel's access to psychiatric assistance was limited by the state or that the funding provided was insufficient. Montiel's claim that Dr. Cutting was incompetent for not knowing of the capital charges or that PCP intoxication was a critical issue, and the claim that Dr. Linder was incompetent for failing to obtain legal definitions and that he lacked the qualifications to render an expert opinion on the effects of PCP, are both foreclosed by Harris v. Vasquez, 949 F.2d 1497, 1517-18 (9th Cir. 1990). Harris addressed the same claim raised here, and refused to expand Ake to encompass a "battle of experts." Id. (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." Harris, 949 F.2d at 1518.

In accordance with Harris, this court refuses to engage in a battle of psychiatric experts and "place federal courts in a psycho-legal quagmire resulting in the total abuse of the habeas process." Id. at 1518. Despite Montiel's failure to justify the entry of a plea of not guilty by reason of insanity, the trial court appointed two mental health experts to assist the defense. No Ake due process violation occurred.

When a state court's decision is unaccompanied by an explanation, a petitioner still has the burden to show there was no reasonable basis for the state court's denial of relief. Richter, 131 S. Ct. at 784. A state court decision must be granted deference and latitude beyond that involved in evaluating a Strickland claim. Id. at 785. When § 2254(d) applies, the question is not whether counsel's actions were reasonable, but whether there is any reasonable argument that counsel satisfied Strickland's deferential standard. Richter, 131 S. Ct. at 788.

This claim asserts Lorenz failed to investigate and present a mental state defense based on Montiel's organic brain damage, neuropsychological defects and brain dysfunction, which were exacerbated by his PCP use, and that the failure to adequately prepare for a diminished capacity defense resulted in two main errors: (1) the failure to sufficiently prepare Dr. Cutting with reports or documents, or advice about the nature of the case or evidence of Montiel's PCP use, and the failure to obtain an opinion on diminished capacity and intoxication, and (2) the failure to hire a qualified expert (instead of Dr. Linder) to give an opinion on PCP intoxication, or alternatively, the failure to adequately prepare Dr. Linder to testify. Montiel asserts these errors prejudiced him because sufficient preparation by Lorenz would have revealed evidence of his diminished capacity and organic brain damage.

Montiel has failed to show the asserted failures of Lorenz to investigate and present a mental state defense based on Montiel's organic brain damage, neuropsychological defects and brain dysfunction, which were exacerbated by his PCP use, and to adequately prepare a diminished capacity defense, raise a reasonable probability the result of the proceeding would have been different. Even had Lorenz presented testimony that Montiel was incapable of forming the intent to steal or kill, or to premeditate and deliberate, that evidence would have

been largely duplicative of evidence already before the jury and would have been unlikely to have overcome the significant evidence, such as Montiel's demand for Mrs. Mankin's purse and only taking valuable items from it before leaving it in her front yard, and obtaining a knife from Mr. Ante's kitchen and realizing a beer can he left at the scene would incriminate him, which show Montiel knew and understood the nature and consequences of his actions.

Montiel has failed to rebut the state's finding that there was no evidence he was insane, and the Court finds no due process violation under Ake. Further, Montiel has not shown prejudice from Lorenz's alleged failures to investigate and present a more complete mental defense. Claims 9 and 10 are denied an evidentiary hearing and denied on the merits.

2. Claim 11

In Claim 11, Montiel contends that counsel did not present evidence of Dr. Siegel's alleged previous perjury.

During the guilt phase of the 1979 trial, Dr. Siegel, responding to defense cross-examination, denied providing the prosecutor with a tentative conclusion regarding premeditation and diminished capacity prior to May 2, 1979, adding, "and I told you so on the phone." Lorenz responded, "Oh, I see, just before you hung up, right? I indicated to you that I had some information that you had been somewhat less than truthful in some other cases." The prosecutor objected, the judge sustained the objection and admonished the jury to disregard the question. 79A RT Vol. II:497.

During the second penalty trial in 1979, the prosecution sought to establish that despite a court order Montiel refused to speak with Dr. Siegel. Lorenz objected to revealing Montiel's refusal to speak with Dr. Siegel to the jury as Lorenz had advised Montiel not to talk to Dr. Siegel. Lorenz stated he gave Montiel that advice because after Dr. Siegel was hired, the prosecutor gave Lorenz information on Dr. Siegel's tentative opinion, and when Dr. Siegel contacted Lorenz about interviewing Montiel, they "did not have a particularly friendly conversation at that time due to some investigation that I had found out about Dr. Siegel in other cases." 79B RT Vol. III:89-90. Lorenz told Dr. Siegel that since he already had given his opinion, he would not allow him to speak to Montiel. Id. The prosecutor asked for a new court

order allowing Dr. Siegel to interview Montiel. Id. at 90. When the judge overruled his objection, Lorenz stated he would allow Montiel to talk with Dr. Siegel. Id. at 94-95.

Montiel alleges these two statements by Lorenz imply he possessed evidence of prior perjury by Dr. Siegel which would have cast doubt on Dr. Siegel's truthfulness in general and in particular regarding his assessment of Montiel's ability to form intent, which was central to his felony-murder conviction. Montiel asserts Lorenz was ineffective for failing to investigate and present this evidence. Alternatively, if Lorenz did not have evidence of perjury by Dr. Siegel, his raising the issue and not following through damaged his credibility with the jury, resulting in prejudice to Montiel.

Montiel argues the California Supreme Court's implicit conclusion that he received effective assistance of counsel was an unreasonable application of established United States Supreme Court precedent. Montiel asserts Lorenz was obligated to act as a zealous advocate in his defense, and credible evidence that Dr. Siegel had lied under oath would have diminished, if not destroyed, Dr. Siegel's credibility and would have reasonably caused the jury to conclude, contrary to Dr. Siegel's testimony, that Montiel was unable to form intent. Lorenz's failure to present this evidence to the jury fell below the level of reasonable representation and was without any reasonable or tactical basis.

Montiel proposes to present the following evidence in support of this claim at an evidentiary hearing which was not presented to the state court: testimony by trial counsel Lorenz detailing the information he possessed of Dr. Siegel's previous dishonesty and that he had no tactical reason not to present this evidence; or alternatively, if such evidence did not exist, an admission that he engaged in a fabricated attack on Dr. Siegel; testimony by a Strickland expert that counsel has an obligation to present any impeachment evidence and an opinion of the cumulative impact of Lorenz's deficient representation; and testimony by a jury dynamics expert regarding the prejudicial impact on Lorenz's veracity of his failure to impeach Dr. Siegel, which resulted in a negative perception of Montiel and prejudiced the jury's decision.[16]

[16] None of the exhibits submitted in support of the petition presents the admissions, opinions or conclusions Montiel proposes to offer as evidence in this claim.

The Warden asserts that Montiel has had twenty years to produce evidence of this claim, or even to present a declaration by Lorenz that Dr. Siegel had previously testified untruthfully. The Warden contends that until it is shown that such an incident occurred, Lorenz's decision not to pursue this information cannot be ineffective.

Montiel argues in rebuttal the issue is appropriately raised by the allegations alone, which are presumed true, so the question is whether they are sufficient as a matter of law to state a claim. Montiel asserts the allegations and the trial record are enough to prove ineffective assistance of counsel. Montiel contends Lorenz's inflammatory remark about Dr. Siegel's lack of honesty was properly stricken by the trial court as it was based on hearsay, but since Lorenz did not introduce any evidence on this issue, the only conclusion the jury could draw was that Lorenz lacked integrity, which tainted his advocacy from that point on. Montiel argues it was incumbent upon Lorenz to introduce such evidence once he leveled his attack. Conversely, if Lorenz did not have such evidence, Montiel contends his attack was completely irresponsible, and even if not sufficient for prejudice on its own, would contribute to the cumulative error claim.

The Warden responds Lorenz did attempt to impeach Dr. Siegel, but the cross-examination was limited by the trial court after the prosecutor objected. The Warden argues the claim that Lorenz was ineffective is without merit, and the California Supreme Court's rejection was a reasonable application of Strickland.

This claim was presented to the state court in Montiel's state habeas petition at claim VIII therein, and was summarily denied on the merits.

Montiel must show both deficient performance and actual prejudice resulting from the deficiency to prevail on a claim of ineffective assistance of counsel. Montiel has presented no evidence to support the implication that Dr. Siegel previously testified untruthfully. Even assuming Lorenz rendered deficient performance in questioning Dr. Siegel's veracity in front of the jury (who made only one statement at the guilt trial; his other statement was at the 1979 penalty trial which was reversed), the statements were brief and lack a sufficient connection to the ultimate outcome, so there is no prejudice sufficient to undermine the jury's verdict.

Montiel has failed to show that Lorenz's remarks to Dr. Siegel prejudiced the trial. Claim 11 is denied an evidentiary hearing and is denied on the merits.

3. Claim 12

In Claim 12, Montiel contends that counsel did not present evidence regarding the invalidity of Dr. Siegel's test.

Montiel asserts Lorenz was ineffective for failing to impeach Dr. Siegel's credibility by presenting evidence that a test (the Experiential World Inventory or EWI) Dr. Siegel wished to administer was invalid and not accepted in the field of psychology. Dr. Siegel stated the EWI was designed to assess the effects of drugs on personality function and included several "lying fixed scales." Montiel contends that readily available evidence indicates the EWI is not a generally accepted clinical or research tool for the evaluation of drugs on personality functioning, and that it was developed by persons associated with the "orthomolecular psychiatry" school, a group not considered credible by psychiatrists or psychologists in the United States.

Montiel argues Lorenz's complete failure to challenge the introduction, validity, and reliability of the EWI deprived him of his constitutional rights. Montiel contends an adequate investigation would have revealed evidence of either the test's unreliability, or its creation by a non-credible school of practitioners, which would have cast doubt on Dr. Siegel's credibility as an expert witness and rendered his findings as to Montiel suspect. Montiel further asserts Lorenz should have objected to Dr. Siegel's reference about Montiel refusing to submit to the EWI, which falsely and prejudicially suggested Montiel was afraid of testing because he had something to hide.

Montiel proposes to present the following evidence in support of this claim at an evidentiary hearing: testimony by Lorenz that he did not consult an independent expert regarding the validity of the EWI and had no tactical reason for failing to challenge its validity; testimony by a Strickland expert that counsel needs to investigate and challenge the validity of tests relied on by prosecution experts; testimony of a psychiatric test designer and/or evaluator stating the

EWI is not generally accepted as credible or reliable[17]; and testimony by a jury dynamics expert regarding the likely impact of Dr. Siegel's testimony regarding Montiel's refusal to take a psychiatric test which would have shown his propensity to lie. Other than the declaration by Dr. Pitts, no evidence in support of this claim at an evidentiary hearing was presented to the state court.

The Warden contends Lorenz brought out the questions about the EWI's validity and acceptance in the psychological community at trial through the testimony of Dr. Linder. The Warden observes the testimony from Dr. Siegel was at the second penalty trial in 1979, which was reversed, so trial counsel's failure to challenge this test is irrelevant.

Montiel disputes that Lorenz's failure is irrelevant since this claim concerns the guilt proceeding, not the penalty trial that was reversed. Montiel argues that even if this claim is not prejudicial standing alone, it is a factor in accumulation of the deprivation of effective legal representation he suffered at trial.

The Warden argues the state court's rejection of this claim does not involve an unreasonable application of Strickland, since it is not reasonably probable the outcome of the guilt trial would have been different even if Lorenz had presented evidence about the alleged invalidity of the EWI. The Warden contends it is not reasonably probable the jury would have concluded, contrary to Dr. Siegel's opinion, that Montiel's intoxication was sufficient to diminish his capacity for the intent to kill and premeditate. Further, the Warden observes Dr. Siegel did not base his opinion on the EWI, so it is not reasonably probable the jury would have rejected his opinion solely on the basis of a dispute about the validity of a test that was not given to Montiel.

This claim was presented to the state court in Montiel's habeas petition at claim VIII therein, which the California Supreme Court summarily denied on the merits. Montiel argues the

[17] An October 1, 1990 declaration from Stephen Pittel, Ph.D., an expert on the effects of drug use that was submitted in support of a state habeas petition by David Murtishaw states the EWI is not generally credible or reliable. In December 1990, Dr. Pittel was arrested for cocaine use while on a lunch break during a trial where he was testifying as an expert. See People v. Tillis, 18 Cal. 4th 284, 288 (1998). Other than Dr. Pittel's declaration, no exhibits submitted in support of Montiel's petition present the admissions, opinions or conclusions Montiel proposes to offer as evidence in this claim.

California Supreme Court's implicit conclusion that he received effective assistance of counsel was an unreasonable determination of the facts and a misapplication of established United States Supreme Court precedent.

Montiel must show both deficient performance and actual prejudice resulting from the deficiency to prevail on a claim of ineffective assistance of counsel. Dr. Siegel testified at the guilt phase trial, both as part of the prosecution's case and in rebuttal after the presentation of the defense case, which included Montiel's testimony about his mental state.

Dr. Siegel testified that Montiel said his attorney had advised him not to talk with Dr. Siegel and shortly after that their discussion ended. 79A RT II:491. Immediately after this testimony, the prosecutor asked, "Now, are there certain tests which you can give which would indicate whether or not a person in this situation is truthfully relating the events of the day in question on which the crime is charged?" Dr. Siegel answered, "There are no absolute tests but there are many tests which give us an indication of malingering, the degree to which a patient will lie or fake results." Dr. Siegel then discussed the tests, including the MMPI and EWI. 79A RT II:491-92. Dr. Siegel did not specifically tie Montiel's refusal to talk to him to evasion of such a test in order to cast doubt on Montiel's story. In fact, Dr. Siegel testified that Montiel's stated lack of recall was not necessarily volitional. Id., at 495. The prosecutor made no mention of the EWI in closing argument to the jury. 79A RT III:507-26, 539-44.

It is not reasonably probable that had Lorenz challenged the EWI, a test Montiel did not even take, the jury would have been prompted to conclude that Montiel's intoxication diminished his capacity to harbor intent to kill and to premeditate. Even assuming Lorenz's failure to investigate the background of the EWI and to challenge the testimony about it was deficient performance, the questioning about the test was brief and Dr. Siegel did not opine that Montiel was malingering. Montiel has not shown prejudice sufficient to undermine confidence in the outcome. Claim 12 is denied an evidentiary hearing and is denied on the merits.

4. Claim 14

In Claim 14, Montiel contends that counsel unreasonably presented a prejudicial alibi defense.

Montiel asserts Lorenz was ineffective for unreasonably and prejudicially presenting an alibi defense at guilt. Montiel took the stand and testified that after Victor's motorcycle broke down, he walked to a house and knocked twice. After receiving no answer, Montiel looked through the front door and saw someone lying on the floor with blood. He immediately returned to the gas station. In rebuttal, a photo was admitted into evidence showing Mr. Ante's front door was solid wood, and two of Mr. Ante's sons testified there was a window to the left of the door through which they could see him lying on the floor but were not able to see that his throat had been slit. Montiel contends reasonably competent counsel would have viewed the scene, or at least the prosecution's crime scene photographs, and concluded Montiel's account was inconsistent with the physical conditions. Montiel asserts Lorenz's failure prevented him from making a knowing and intelligent waiver of his right against self-incrimination. Montiel argues that although it was his decision to testify, the advice of counsel about the strategic implications of his testimony was crucial to an effective waiver of a constitutional right. Johnson v. Baldwin, 114 F.3d 835, 838-40 (9th Cir. 1997) (holding counsel ineffective for failing to investigate validity of defendant's proposed alibi testimony).

Montiel contends his testimony supports a finding of prejudice under Strickland because he denied entering Mr. Ante's home, while admitting he told Victor and Maruy he had seen someone with their throat cut. Similarly, Montiel denied grabbing Mrs. Mankin's purse, but also admitted taking her checkbook and bankbooks. Montiel asserts this implausible alibi testimony both angered the jury and undermined his diminished capacity defense. Montiel could not provide an explanation of why he did not go home to treat his bleeding arm after leaving Mrs. Mankin's house, which allowed the jury to conclude that even though he was under the influence of PCP, he was still rational enough to distance himself from Mrs. Mankin's house, which was across the street from his home, in order to avoid detection.

Montiel proposes to present the following evidence in support of this claim at an evidentiary hearing: testimony by trial counsel Lorenz that he was unprepared to represent Montiel, never viewed the scene or photos despite Montiel asking about the door window and did not advise Montiel regarding diminished capacity versus alibi, or the injurious effects of

asserting an alibi defense; his own testimony that Lorenz did not advise him regarding diminished capacity and alibi, or the injurious effects of presenting an alibi defense, and that he asked Lorenz to check the crime scene to verify there was a window in the door;[18] testimony by a Strickland expert that counsel should not have put Montiel on the stand when presenting either a diminished capacity or alibi defense, and that counsel had an obligation to educate Montiel regarding his testimony and the incongruence between diminished capacity and alibi;[19] and testimony by a jury dynamics expert regarding the adverse effect of an alibi defense on the jury's ability to evaluate diminished capacity. Other than Birchfield's declaration opining that Lorenz's failure to view the crime scene was ineffective, no evidence was presented in support of this claim at an evidentiary hearing in state court.

The Warden disagrees with Montiel that Lorenz presented an alibi defense, rather asserting Lorenz presented a diminished capacity defense, but allowed Montiel to testify about his recollections of the events surrounding the murder. The Warden argues the decision to call a defendant to testify "is a classic example of a strategic trial judgment." United States v. Chavez-Marquez, 66 F.3d 259, 263 (10th Cir. 1995). The Warden observes Montiel, in his testimony, did not claim to be absolutely certain that the window he looked through was in the door, which actually served to support his claim of PCP intoxication.

The Warden asserts Montiel's declaration, which supports this claim, was not presented to the state court and should not now be relied upon, as Montiel has not demonstrated he was not at fault in failing to develop that evidence in state court or that § 2254(e)(2)'s conditions are satisfied. If, however, Montiel's declaration is found to be properly before the Court, the Warden argues that deference is due the state court decision. The Warden contends the state court's rejection of this claim did not involve an unreasonable application of Strickland, as Montiel's inability to recall the exact location of the window supported the claim that his mental state was compromised due to PCP intoxication, which was consistent with the defense theory,

[18] Montiel's declaration, dated August 16, 2000, only asserts the last of these allegations.

[19] Birchfield's declaration, dated May 28, 1993, asserts Lorenz's presentation of both an alibi and diminished capacity, and failure to view the crime scene to verify the alibi defense, was ineffective assistance of counsel. See Ex. 17, ¶¶ 14-16.

supported by Dr. Linder's testimony, that Montiel was "disassociated" by PCP at the time he killed Mr. Ante. The Warden alleges even if Lorenz did perform inadequately, it is not reasonably probable the jury would have accepted Montiel's diminished capacity defense merely because Montiel admitted to unintentionally killing Mr. Ante, since the evidence was considerable that Montiel formed the intent to steal from both Mrs. Mankin and Mr. Ante, as was the evidence that he formed the intent to kill Mr. Ante and premeditated and meaningfully reflected on the consequences of his actions.

Montiel replies counsel had a duty to educate him about the evidence and available defenses, that Lorenz should have advised him the alibi and diminished capacity defenses were inconsistent, that there was overwhelming evidence supporting the fact he had killed Mr. Ante, and that if he insisted on his alibi, he was best advised not to testify. Montiel claims his impeachment on such a basic point – the impossibility of his seeing what he claimed – indicates no such discussion occurred, and counsel admitted at trial he had not had sufficient time to prepare. Montiel argues that had an alibi defense not been presented, and had trial counsel retained a competent psychiatrist or psychologist with expertise regarding PCP to challenge Dr. Siegel, it is reasonably probable the jury would have accepted the diminished capacity defense.

This claim was presented to the state court in Montiel's state habeas petition at claim VIII. The California Supreme Court summarily denied it on the merits.

Montiel must show both deficient performance and actual prejudice resulting from the deficiency to prevail on a claim of ineffective assistance of counsel. Despite Lorenz's alleged failure to investigate the alibi defense, Montiel was not forced to commit perjury. "[T]there is no right whatever-constitutional or otherwise-for a defendant to use false evidence." Nix v. Whiteside, 475 U.S. 157, 173 (1986). Montiel could have chosen either not to testify or to testify truthfully. United States v. Day, 285 F.3d 1167, 1171-72 (9th Cir. 2002). The trial was not rendered unfair or unreliable by the jury considering Montiel's perjury, so he cannot show prejudice sufficient to undermine confidence in the outcome. Claim 14 is denied an evidentiary hearing and is denied on the merits.

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5. Claim 15

In Claim 15, Montiel contends that counsel allowed a prejudicial admission of an invalid prior conviction.

Prior to the beginning of voir dire, Lorenz told the court he had advised Montiel to admit a prior conviction of robbery of a Foster's Freeze in 1972. The court minutes from the prior conviction in June 28, 1972, do not indicate whether Montiel was advised that by pleading guilty he was waiving his rights to a jury trial, to confrontation and against self-incrimination, and no reporter's transcript of the proceeding exists. Montiel asserts he has no recollection of being advised that he was waiving his constitutional rights. Montiel was addicted to narcotics at the time, and had been promised that if he changed his plea, the criminal proceedings would be suspended and he would receive treatment. Montiel states he was unaware he had waived his right to a jury trial. The prior conviction was used to enhance his sentence in 1979 and was admitted in aggravation at his penalty retrial in 1986.

Montiel argues that Lorenz's failure to object to the admission of the prior conviction resulted in prejudice and was ineffective, and that the finding of the California Supreme Court to the contrary was an unreasonable application of Strickland. Montiel asserts Lorenz failed to properly investigate the prior conviction to determine whether Montiel's waiver of rights was knowing and intelligent. Montiel argues that when he entered the guilty plea in 1972, he believed it was only a conditional waiver of his right to trial, and that if he was not accepted in the California Rehabilitation Center (CRC) for treatment, or if he was accepted but later excluded from the program, he would be entitled to a trial upon return to court. However, Montiel makes no further allegation about this claim: he does not state whether he was not accepted for treatment or if he was accepted but later excluded from the program.[20]

Montiel proposes to present the following evidence in support of this claim at an evidentiary hearing which was not presented to the state court: testimony by trial counsel Lorenz stating he failed to interview Montiel regarding his 1972 conviction, that if he had he would have

[20] Montiel's declaration does state that he was incarcerated at the CRC in 1972. Ex. 1 to the Reply to the Warden's Opposing Points and Authorities.

filed a motion to strike based on an invalid waiver of the right to a jury, and that he had no tactical reason for failing to do so; testimony by a Strickland expert that it is standard practice to interview a client regarding the validity of a waiver of jury on a prior conviction and to file a motion to strike; and testimony by a jury dynamics expert regarding the prejudicial impact of the 1972 prior conviction by depicting Montiel as a recidivist.

The Warden asserts there is no evidence Lorenz failed to review the transcript from Montiel's 1972 conviction, that prior convictions carry a strong presumption they comply with the requirements of the constitution, and that Montiel has failed to show he was prejudiced by the lack of challenge to the validity of his prior conviction. The Warden argues even if the conviction had been ruled invalid, the conduct underlying the conviction still could have been presented to the jury in aggravation. The Warden concludes the state court's summary rejection of this claim is a reasonable application of Strickland.

Montiel responds Lorenz could have challenged his prior conviction by presenting evidence that Montiel was unaware he was relinquishing his right to a jury trial, and Lorenz's failure to do so differed from the standard practice in Kern County at the time. Montiel contends the record does not contradict his allegation that he believed his right to a jury trial continued to exist during the period he was at CRC, and that he is entitled to attack the judgment under California law. People v. Bowen, 22 Cal. App. 3d 267, 286 (1971). Montiel argues that even if the underlying facts were admissible, prejudice would still be present because the double counting of factors based on the same evidence artificially inflated the misconduct.

Montiel must show both deficient performance and actual prejudice resulting from the deficiency to prevail on a claim of ineffective assistance of counsel. Montiel alleges the ineffectiveness of Lorenz's recommendation to admit to the prior 1972 robbery conviction prejudiced his guilt conviction, his 1979 sentence and his 1986 sentence. The claim that Lorenz was ineffective at penalty is moot as the 1979 death sentence was reversed by the California Supreme Court on direct appeal. Montiel I, 39 Cal.3d at 928-929. Review of the trial transcript does not reveal any mention by the prosecutor at the guilt phase of the prior conviction, either during the cross-examination of Montiel or during opening or closing arguments, so no prejudice

occurred as the jury was not made aware of Montiel's admission of the prior conviction. There also is no prejudice from Montiel's admission of the prior conviction at the 1986 penalty retrial, as evidence of prior convictions is a proper category in aggravation, the Certified Public Document of the conviction was admitted into evidence instead of Montiel's admission, and the prosecutor additionally presented testimony from two witnesses of the 1972 robbery.

Montiel has presented no showing of prejudice, i.e., that had Lorenz filed a motion to strike the 1972 conviction it would have been granted and excluded from admission into evidence. Further, the record suggests a tactical reason for the admission, as Lorenz urged, and the trial judge ordered, that the admitted prior conviction was not admissible for impeachment of Montiel's proposed testimony, and that it would not be read to the jury. See 79A RT Vol. VIII:1-6.

Montiel has not shown that Lorenz's failure to move to strike the 1972 conviction undermines confidence in the outcome. Claim 15 is denied an evidentiary hearing and is denied on the merits.

6. Claim 16

In Claim 16, Montiel contends that counsel admitted misleading evidence of other crimes.

Montiel asserts Lorenz was ineffective for failing to object to, or move to exclude, evidence from Detective Floyd that Montiel was arrested for armed robbery and burglary three days after the murder, on January 16, 1979. Lorenz made no attempt to clarify if the warrant related to the Ante homicide. Montiel contends the introduction of evidence suggesting he committed other crimes showed a propensity to commit the burglary for which he was on trial and provided an unfair and prejudicial basis for his conviction of capital murder.

Montiel asserts he was prejudiced by the introduction of this evidence, as well as other past criminal conduct offered by the prosecution solely to prove his disposition to violence and criminal conduct. Montiel argues this type of propensity-based inference is precisely that which California Evidence Code § 1101(a) was intended to exclude. Montiel contends the failure of Lorenz to object, move to strike or exclude, move for a mistrial, or even attempt to clarify,

prejudicially affected the outcome of his trial.

Montiel proposes to present the following evidence in support of this claim at an evidentiary hearing which was not presented to the state court: testimony by trial counsel Lorenz that he had no tactical reason for failing to object to or move to strike the misleading testimony; and testimony by a jury dynamics expert regarding the prejudicial impact of the misleading testimony.

The Warden disputes this claim, asserting the questioning of Detective Floyd started with a question about his contact with Montiel in this case, so the testimony about the arrest was made against that backdrop. The Warden argues there was no realistic or reasonable possibility the jury misunderstood Detective Floyd's testimony, so Lorenz's failure to object was not ineffective. The Warden asserts that even if the jury did misunderstand Detective Floyd's testimony, it is not reasonably probable they would have accepted Montiel's diminished capacity defense in the absence of that testimony. The Warden argues there was considerable evidence of Montiel's intent to steal and to kill, as well as that he premeditated and meaningfully reflected on the consequences of his actions.

Montiel replies the testimony by Detective Floyd referred to a warrant for armed robbery, while the evidence from the Mankin case indicated Montiel was not armed, and did not refer to the Ante murder, so the logical inference is that this warrant was for a separate crime. Montiel does not contend the outcome of the guilt trial would have differed based on this single error, but contends there is a significant probability the result of the guilt trial would have been different when this error is considered in conjunction with the numerous other acts and omissions by Lorenz.

Montiel must show both deficient performance and actual prejudice resulting from the deficiency to prevail on a claim of ineffective assistance of counsel.

The transcript from Montiel's guilt trial supports the Warden's argument. Detective Floyd's testimony stating he served a warrant for armed robbery was given in response to questioning about the circumstances of this case. 79A Vol.II:374-376. Even assuming Lorenz performed deficiently in not objecting, prejudice cannot be shown. It is not reasonably likely the

jury was confused by this testimony and inferred the warrant was for a separate crime from the Mankin robbery or the Ante murder.

Montiel has not shown that Lorenz's failure to object to Detective Floyd's testimony undermines confidence in the outcome. Claim 16 is denied an evidentiary hearing and is denied on the merits.

7. Claim 17(b)

In Claim 17(b), Montiel contends that counsel was ineffective due to a conflict in interest.

Montiel asserts Lorenz's wife, Debra, intended to write a book about the case, and that Lorenz facilitated communications between them and had Montiel sign a literary agreement. Montiel contends evidence of the actual conflict of interest by Lorenz is shown by the extensive violations of his constitutional rights during his guilt trial, all of which formed a pervasive pattern of unfairness, resulting in a fundamentally unfair trial and exacerbating the prejudice of each individual error.

Montiel proposes to present the following evidence in support of this claim at an evidentiary hearing which was not presented to the state court: testimony by Lorenz that he actively represented the conflicting interests of Montiel and his wife which interfered with the effectiveness of his representation, and he did not consult with Montiel or obtain a waiver of the conflict; and testimony by Debra Lorenz regarding the existence of the literary agreement between her and Montiel. Montiel also seeks discovery of the literary agreement.

The Warden admits that, although this claim was not presented to the state court, the exhaustion requirement was waived, and that de novo review under pre-AEDPA law is warranted since deference under 29 U.S.C. § 2254(d)(1) is not applicable. The Warden asserts that no literary agreement has been produced, there is no sworn statement from either Lorenz or his wife, and there is no book or manuscript. In short, the Warden observes the only item offered to support this conflict of interest claim is the March 26, 1980 letter, which does not refer to a book or literary agreement, but mentions that Mrs. Lorenz "would like to work on the writing project" that "[Montiel] and she discussed." The Warden contends a similar issue was addressed by the Ninth Circuit in Bonin v. Calderon, 59 F.3d 815, 825 (9th Cir. 1995), which held the test

for determining an actual conflict of interest from Cuyler v. Sullivan, 446 U.S. 335 (1980), also applies to conflicts of interest generated by an attorney's acquisition of publication rights relating to his client's trial. The Warden observes Bonin noted "[t]he fact that an attorney undertakes the representation of a client because of a desire to profit does not by itself create the type of direct 'actual' conflict of interest required by Cuyler." Bonin, 59 F.3d at 826. The Warden argues there is nothing in the present record which rises to the level of factual support for a claim that Mr. Lorenz had an actual conflict of interest.

Montiel agrees in reply that success on this claim requires proof that Lorenz, personally or as his wife's representative, entered into a literary rights contract with Montiel, but contends that dismissal of this claim is premature as discovery in these proceedings was indicated to be unavailable until after briefing of the petition was complete. Montiel argues his proffered evidence is sufficient to state a cognizable claim requiring an evidentiary hearing.

Where a conflict of interest results in the denial of effective assistance of counsel, prejudice need not be shown to obtain relief. Cuyler v. Sullivan, 446 U.S. at 349. However, until it is shown that counsel "actively represented conflicting interests," the constitutional predicate for the claim is not established. Id. Further, "the possibility of a conflict is insufficient . . . a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance." Id.

There is no indication of any adverse effect on Lorenz's performance caused by an actual conflict of interest, as no deficient performance by Lorenz has been shown. See Burt v. Titlow, 571 U.S. __, 134 S. Ct. 10, 18 (2013) (counsel's possible violation of rules of professional conduct by accepting publication rights as partial payment is not per se ineffective, prejudice still must be shown). The test under Cuyler is a compound one, requiring both that counsel have conflicting interests, and that an actual conflict adversely affected counsel's performance. Montiel's request for discovery on this issue is moot as even if a literary agreement could be discovered, no adverse effect on Lorenz's performance has been shown.

Montiel has not shown that Lorenz's performance was deficient. Claim 17(b) is denied an evidentiary hearing and is denied on the merits.

8. Claim 18

In Claim 18, Montiel contends that his counsel failed to challenge his guilt conviction prior to the penalty retrial.

Montiel asserts trial counsel at his 1986 penalty retrial, Robert Birchfield ("Birchfield"), was ineffective for failing to challenge his guilt conviction prior to the penalty retrial. Montiel contends a review of the 1979 transcripts should have apprised Birchfield that Montiel was denied effective assistance of counsel (i.e., Lorenz's failure to present percipient and expert witnesses on Montiel's mental state, failure to ensure a representative jury under Wheeler[21], and failure to litigate intent to kill as an element of the felony-murder special circumstance), and that he was denied a fair trial as alleged in Claims 8 through 14,[22] which should have prompted Birchfield to file a habeas petition presenting these claims to the state court.

Montiel argues Birchfield's failure to pursue habeas relief meets the presumed prejudice standard of United States v. Chronic, 466 U.S. 648 (1984), because Birchfield failed to subject Montiel's case to "meaningful adversarial testing," id. at 659, and completely failed to preserve Montiel's interests. Gerlaugh v. Stewart, 129 F.3d 1027, 1033 (9th Cir. 1997). Montiel contends Birchfield failed to file a habeas petition on his guilt claims despite the fact that a majority of the California Supreme Court signed a concurring opinion inviting Montiel to seek habeas relief. Montiel I, 39 Cal. 3d at 930.

Montiel proposes to present the following evidence in support of this claim at an evidentiary hearing: testimony by Birchfield that he had no tactical reason for failing to file a habeas petition challenging Montiel's conviction prior to the retrial, that he erroneously believed he was precluded from filing a habeas petition because of a mistaken interpretation of Montiel I, that he did not recognize obvious ineffectiveness claims from the guilt trial; also that he was

[21] People v. Wheeler, 22 Cal. 3d 258, 276-277 (1978), is the state corollary to Batson v. Kentucky, 476 U.S. 79, 89 (1986), finding the exercise of peremptory challenges to eliminate prospective jurors because of their race unconstitutional. The claim that Montiel's jury was not representative due to the removal of persons opposed to the death penalty was rejected on direct appeal. Montiel I, 39 Cal.3d at 920.

[22] Claims 8 and 13: Prosecutorial Misconduct - Inadmissible Confession and Suppression of Exculpatory Evidence; Claim 9: Denial of Competent Psychiatric Assistance; Claims 10, 11, 12 and 14: Ineffective Assistance of Counsel - Failure to Present Testimony of Diminished Capacity, Failure to Present Evidence of Dr. Siegel's Alleged Perjury, Failure to Present Evidence of Invalidity of Dr. Siegel's Test, and Presenting Prejudicial Alibi Defense.

disbarred and convicted on three counts of felony forgery; and the testimony of a Strickland expert that it was standard practice to review transcripts for meritorious claims to raise on habeas and that counsel should have known of the IAC claims. Birchfield's declaration (Ex. 18) does not make any of the proffered admissions, but does state that he did not realize habeas relief was available prior to the penalty retrial, and that he researched regarding the possibility of filing a writ to stay the retrial proceedings, on the basis mentioned in the direct appeal opinion, but decided not to file one. The claim relating to disbarment and the Strickland expert opinion were not presented on state habeas.

The Warden argues it is inconsistent for Montiel to now claim Birchfield had a duty to seek habeas relief prior to the penalty retrial when the state habeas petition filed after the penalty retrial alleges it was timely because Birchfield did not have a duty to file a habeas petition earlier. The Warden contends Montiel could not have suffered prejudice from Birchfield's failure to seek relief on claims that have now been abandoned. The Warden further argues Birchfield cannot be faulted to failing to pursue these claims when there is no evidence he was aware of them prior to the penalty retrial. The Warden asserts Montiel's new evidence relating to Birchfield's convictions is not relevant to Birchfield's competence while he represented Montiel.

The Warden contends the claim that Lorenz's failure to present testimony regarding Montiel's inability to harbor the requisite mental state for murder and robbery lacks merit. The Warden observes Montiel offers no support of the claim that a Wheeler challenge would have been valid. Lastly, the Warden asserts Birchfield's failure to seek habeas relief under Carlos was the result of a tactical decision based on a belief that such a petition would not succeed on the merits, and Montiel has no identified the evidence Birchfield could have, or should have, presented.

Montiel replies that Birchfield's forgery convictions and disbarment, coming so soon after the penalty retrial, undercut the presumption in favor of professional judgment from Strickland, and require an assessment of counsel's actions based on the evidence submitted, without according any presumption in favor of the reasonableness of counsel's exercise of

judgment. Montiel argues the assessment of Birchfield's performance must consider his credibility, particularly as it relates to his competence at trial.

Montiel contends in light of Justice Kaus' concurrence in Montiel I, Birchfield should have filed a habeas petition before the penalty retrial. 39 Cal. 3d at 929-30 ("In this case, however, there is no indication in the record that defendant failed to contest the intent-to-kill issue because of his mistaken belief that the robbery-murder special circumstance would trigger a penalty trial in any event. If defendant has evidence which he withheld because he was misled on the significance of the intent-to-kill issue, he may, of course, seek to present it in a habeas corpus proceeding."). Montiel asserts that Birchfield believed counsel Lorenz's trial strategy was "incoherent," that there was evidence Lorenz had not presented at the guilt phase (such as, testimony by Montiel's sister that he used drugs prior to the crimes and by his mother that he experienced delusions and hallucinations in the weeks before the crimes), that Dr. Linder was an ineffective expert witness, that Lorenz failed to litigate the Carlos issue, and that Lorenz should not have raised an alibi defense.

Montiel argues that had Birchfield filed a habeas petition with the state, as invited to do by the concurring opinion from his direct appeal, Montiel would have benefitted from the Carlos opinion since it had not at that time been overruled. Prior to being overruled, Carlos was applied retroactively to cases under the 1978 death penalty statute which were not yet final. People v. Garcia, 36 Cal. 3d 539, 547-50 (1984). Montiel asserts the California Supreme Court's denial of this claim on direct review in Montiel II constitutes an unreasonable application of Strickland and Cronic, since the facts demonstrate that competent counsel would have collaterally attacked his guilt conviction.

Carlos imposed a requirement that jury instructions include the element of intent to kill in felony-murder cases. People v. Carlos, 35 Cal. 3d 131, 135 (Dec. 12, 1983), overruled by People v. Anderson, 43 Cal. 3d 1104, 1115 (Oct. 13, 1987). The jury at Montiel's guilt trial found true the special circumstance that the murder of Ante was intentional and carried out for financial gain, and that the robbery of Ante was committed with intent to inflict great bodily injury. 1979 RT Vol. III:584-85; 1797 CT Vol. II:344-45. In light of this finding by the jury, the state court

resolved the underlying claim for Carlos error against Montiel. Montiel I, 39 Cal.3d at 925-927. The concurrence of Justice Kaus invited Montiel to present on habeas any withheld evidence on the intent-to-kill issue. Id. at 929-30. No new evidence pertaining to Montiel's intent to kill has been presented.

Montiel's habeas claims, which were presented to the state court following his penalty retrial, were found to be timely and were denied on the merits by the California Supreme Court, so there is no prejudice from Birchfield's failure to file a habeas petition prior to the penalty retrial. The claim asserting ineffective assistance of counsel based on Birchfield's resignation from the bar was not presented to the state court on habeas. Montiel's penalty retrial took place from October 20 to November 10, 1986. The dates of the forgeries were almost three years later, May 31, July 3, and July 7, 1989. Birchfield tendered his resignation from the California State Bar Association with charges pending on May 23, 1990.[23] Montiel cannot show prejudice from this claim as the forgery events occurred years after Montiel's penalty retrial and they were unrelated to Birchfield's representation of Montiel.

Montiel has not shown prejudice from the failure of Birchfield to file a state habeas petition prior to his penalty retrial, nor any prejudice from the events related to Birchfield's disbarment. Claim 18 is denied an evidentiary hearing and is denied on the merits.

9. Claim 19

In Claim 19, Montiel contends that he was prejudiced by the de facto withdrawal of co-counsel.

Montiel asserts he was unfairly prejudiced by the de facto withdrawal of Ms. Fuller, which resulted in his being effectively left without representation at his penalty retrial. Montiel asserts Ms. Fuller breached her duty as his attorney by failing to inform him about her knowledge of the looming inadequacy of Birchfield. Montiel asserts the cumulative effect of these errors resulted in a breakdown of the adversarial process and violation of his constitutional rights. Montiel argues that on the second day of jury selection, co-counsel Peggy Fuller held an

[23] See www.calbar.ca.gov/fal/MemberSearch/QuickSerach?FreeText=Robert%20Birchfield.

ex parte meeting with the trial judge Ferguson in his chambers, where Montiel asserts she expressed her concern that Montiel was not being adequately represented, that a withdrawn Marsden motion previously filed by Montiel had merit, and that she did not want to be associated with the case because she could not ensure adequate representation. Montiel contends Judge Ferguson advised Ms. Fuller she could resolve her concerns by not attending courtroom proceedings but remaining available for research and motion work. Neither Birchfield nor Montiel were informed of the ex parte meeting, nor was Montiel told of the facts that would have reasonably apprised him that Birchfield was not prepared for trial. Montiel alleges Ms. Fuller falsely informed Birchfield she had schedule conflicts that prevented her attendance in the courtroom. Montiel contends Ms. Fuller's withdrawal and Birchfield's lack of preparation resulted in a total breakdown in his representation and the adversarial process.

Montiel contends the state court's settlement hearing, held in April of 1990, was not full and fair, did not develop the material facts, is not supported by the record, did not adequately address the issue regarding Ms. Fuller's de facto withdrawal, and did not resolve the merits of the factual dispute. Montiel contested both the accuracy of the corrected record on appeal, and an agreed statement of facts regarding the ex parte communication. The California Supreme Court found the factual resolution was supported by substantial evidence and that it constituted a binding appellate record. Montiel II, 5 Cal.4th at 906 n.6. The California Supreme Court denied this claim on the merits, holding the record disclosed no "fundamental" breakdown among Montiel, Birchfield or Ms. Fuller, and the division of attorney responsibility did not adversely affect the defense, relying in part on ate factual resolution made after the settlement hearing. Montiel II, 5 Cal. 4th at 906. Further, the state court rejected Montiel's assertion that he had a constitutional "right" to have both counsel present during trial. Id. at n.5.

Montiel contends the factual resolution of this issue was objectively unreasonable in light of the testimony presented at the settlement hearing. Further, Montiel contends the lack of notice of the ex parte hearing between Judge Ferguson and Ms. Fuller so grossly violated his procedural due process rights that the subsequent findings at the settlement hearing cannot be deemed a reasonable determination of the facts. Montiel contends the California Supreme Court's

conclusion in Montiel II is unreliable as it is based on the unreasonable determination of the facts made in the settlement hearing. Montiel asserts the deprivation of Ms. Fuller is a structural defect under Arizona v. Fulminante, 499 U.S. 279, 310 (1991), because California provides for the appointment of two counsel in capital cases and the trial court, in appointing Ms. Fuller, had determined her services were necessary to ensure effective representation.

Montiel proposes to present the following evidence in support of this claim at an evidentiary hearing: testimony by Ms. Fuller that Montiel had concerns about Birchfield's preparation, that she suggested Montiel file a Marsden motion (which he filed but later withdrew), that she became increasingly concerned about Birchfield's failure to prepare because on the first day of trial he did not know which witnesses he might call, had not interviewed some witnesses, and did not seem to know what his defense would be, that Birchfield had not furnished her the transcript from the first trial so she could prepare a writ challenging the conviction, that she was aware Birchfield made false representations to Montiel about the amount of preparation that had been completed, that she had good reason to believe Birchfield's representation was ineffective, that despite her beliefs she did not counsel Montiel to resubmit the Marsden motion but had an ex parte communication with the judge regarding Birchfield's handling of the case and her ethical concerns, that Judge Ferguson suggested she remain outside the courtroom and only conduct legal research which she did, that she did not inform Birchfield or Montiel about the ex parte communication or her concerns, that she falsely told Birchfield scheduling conflicts prevented her attendance in court, that she was not present in court after her meeting with the judge, and that she had no tactical reason for not informing Montiel of her observations or concerns, see Exhibit 9, declaration of Ms. Fuller; testimony by a Strickland expert that Ms. Fuller had an obligation to inform Montiel and the court of Birchfield's ineffectiveness and that she should have advised Montiel to refile a Marsden motion (not presented on state habeas); and testimony by Birchfield that he obtained Montiel's consent to Ms. Fuller's absence from courtroom based on her misrepresentation and requested Ms. Fuller's participation in voir dire as he did not want to rely solely on his own judgment. Exhibit 18, declaration of Birchfield. Both declarations of Ms. Fuller and of Birchfield were presented to the

state court in support of Montiel's state habeas petition, but no declaration from a proposed Strickland expert was submitted to the state court or in this proceeding.

The Warden asserts the 1990 state court hearing received testimony from Ms. Fuller nearly identical to her declaration submitted in support of Montiel's petition, as well as heard testimony from Judge Ferguson. The Warden argues that at the settlement hearing, Judge Ferguson denied Ms. Fuller had voiced concern about Birchfield's representation, stating it was "absurd" to say she was making some kind of motion to have Birchfield disqualified. The Warden concludes it was within the settlement hearing judge's province to weigh the credibility of the witnesses at the settlement hearing, and to decide to omit from the settled statement a finding that Ms. Fuller had indicated her belief Birchfield's representation was ineffective. The Warden asserts this Court does not have license to determine the credibility of witnesses whose demeanor was observed by the state court.

The Warden contends the resolution by the California Supreme Court, based on the 1990 hearing, rejected the notion that there was a fundamental breakdown between Montiel, Birchfield, and Ms. Fuller, and that there was nothing in Ms. Fuller's complaint that would trigger a sua sponte obligation for the trial judge to make a further inquiry into Birchfield's representation of Montiel. Montiel II, 5 Cal. 4th at 906. The Warden argues that to the extent Montiel asserts the state court hearing failed to adequately address whether Ms. Fuller was ineffective in failing to alert the trial court to Birchfield's inadequate representation or whether her actions amounted to a de facto withdrawal, Montiel has not demonstrated cause for failing to develop these facts and actual prejudice, or alternatively established that failure to consider these claims will result in a fundamental miscarriage of justice.

Montiel replies any finding by the state court as to whether there was a de facto withdrawal by Ms. Fuller is a mixed question of law and fact not subject to a presumption of correctness and should be reviewed de novo. Fulminate, 499 U.S. at 286. Montiel asserts the Warden has failed to properly preserve the benefit of the presumption of correctness by not identifying the finding to which deference is sought and not establishing the prerequisites for the presumption of correctness, specifically: to identify the issue in question; to establish the issue is

one of pure fact; and to provide proof of that factual determination. 28 U.S.C. § 2254(d).

Montiel also argues the Settled Statement of Facts is not entitled to a presumption of correctness as the merits of the factual dispute were not resolved. Montiel asserts the Settled Statement fails to address the fact that an ex parte communication took place and was not disclosed. Montiel contends the Settled Statement is misleading since it states the judge recited the essence of the conversation on the record, when the record reveals Birchfield stated what Ms. Fuller's role would be and the court agreed without any mention of the ex parte communication or Ms. Fuller's concerns about Birchfield's handling of the case or her desire to withdraw as counsel of record.

Montiel asserts the foundation for this claim is that neither he nor Birchfield had any reason to know of the facts regarding the ex parte communication. Montiel argues Judge Ferguson's failure to disclose the ex parte communication at trial, combined with his admission at the state hearing that he could not specifically recall the details of the ex parte communication, contributed to the inadequacy of the Settled Statement. Montiel asserts for these reasons the Settled Statement is not entitled to a presumption of correctness, and since the facts were not adequately developed, he is entitled to an evidentiary hearing on this issue.

Montiel asserts even if the presumption of correctness is found to be preserved, it must fail because he was not afforded an adequate, full and fair hearing. In particular, Montiel asserts the trial court did not allow the exclusion of witnesses as required by proper motion, restricted the hearing to the in-chambers conversation and did not allow his counsel to develop background information, permitted the Warden's counsel broad latitude in questioning the witness, refused to make a finding that Montiel was not informed of the in camera meeting, and did not permit inquiry into issues which would corroborate Ms. Fuller's alleged concerns about Birchfield's preparedness or the merits of a Marsden motion.

Montiel contends the Settled Statement fails to adequately reflect the record regarding several facts: Ms. Fuller's discussion with the trial judge about whether she should withdraw from the case; her concern about the prior Marsden motion filed by Montiel; her concern about the general manner in which Birchfield was handling the case; and her attempt to resolve her

ethical concerns about Montiel's representation by Judge Ferguson's suggestion that she be absent from the courtroom. Montiel argues Ms. Fuller's declaration, Exhibit 9 to the Petition, and testimony to be presented at an evidentiary hearing, amount to convincing evidence in rebuttal of the presumption of correctness, and that reliance on the Settled Statement to assess the nature of Ms. Fuller's abandoned representation would result in a fundamental miscarriage of justice.

Montiel also alleges he was denied due process by the failure of Judge Ferguson to further inquire into the merits of a Marsden motion or into the extent of Birchfield's preparedness to proceed with the penalty re-trial. This was further complicated by the failure to disclose the ex parte communication and Ms. Fuller's concerns about Birchfield's representation of Montiel. Montiel argues that had the trial judge disclosed the nature of the ex parte communication, it would have, at the least, given him the opportunity to renew his Marsden motion. Ideally, Montiel contends Judge Ferguson should have initiated an inquiry into the appropriateness of the Marsden motion so that Birchfield's preparedness would have been disclosed.

Montiel further argues that once the Settled Statement is set aside and additional evidence of the ex parte communication considered, there will be support for the claim that he was denied the right to equal protection by not having two counsel representing him in the courtroom during his capital retrial. Montiel asserts the withdrawal by Ms. Fuller created a structural error – the deprivation of state-guaranteed co-counsel in a capital proceeding – which creates a presumption of prejudice under Strickland. Lastly, Montiel alleges cause exists to develop additional facts due to the extreme limitations on the scope of the state hearing, and that Ms. Fuller's withdrawal caused a fundamental miscarriage of justice.

The judge at the 1990 settlement hearing, on which the Settled Statement was based, limited evidence to the issue of the ex parte discussion between Ms. Fuller and Judge Ferguson. Due to this limitation, Ms. Fuller's testimony at the hearing was similarly limited to the ex parte discussion. The portions of Ms. Fuller's 1993 declaration addressing the ex parte meeting with Judge Ferguson are substantially the same as her testimony at the 1990 hearing and her 1988

declaration. The California Supreme Court resolved the factual issue underlying this claim on direct appeal, finding the record did not support a constitutional "conflict" nor indicate the division of attorney responsibility had any adverse effect on the defense. Montiel II, 5 Cal.4th at 906.

Although the scope of the 1990 settlement hearing was limited to the issue of the ex parte discussion between Ms. Fuller and Judge Ferguson, it was a full and fair hearing. Montiel was provided the opportunity, and took advantage of that opportunity, to make the same arguments presented in his federal petition to the settlement hearing judge. Even assuming the trial court's appointment of Ms. Fuller involved a finding that two counsel were necessary to Montiel's representation, there is no requirement that both counsel be present in court. The refusal by the settlement hearing judge to make a finding that Montiel was not informed about the ex parte discussion or to inquire into issues which might have corroborated any of Ms. Fuller's alleged concerns about Birchfield's preparedness or the merits of a Marsden motion, was not unreasonable as those issues were outside the scope of the ex parte discussion. The settlement hearing judge heard the testimony of both Ms. Fuller and Judge Ferguson and weighed their credibility. The resulting Settled Statement is reasonable.

Montiel has made no showing that he was prejudiced by Ms. Fuller's role outside the courtroom, that a Marsden motion made after the start of trial would have been granted, or that Birchfield's representation of Montiel at the penalty retrial was deficient. Claim 19 is denied an evidentiary hearing and is denied on the merits.

10. Claim 20

In Claim 20, Montiel contends that Birchfield had a conflict of interest that interfered with his ability to adequately represent Montiel.

Montiel asserts Birchfield had a conflict of interest because he represented Lorenz on a drunk driving charge, which representation interfered with Birchfield's duty to explore the effectiveness of Lorenz's representation of Montiel at the guilt trial. Montiel argues Birchfield had a long-standing attorney-client relationship with Lorenz in both criminal and civil matters predating Birchfield's appointment to represent Montiel. Montiel contends Birchfield did not

obtain a waiver nor explain the existence of a potential conflict to him. Montiel maintains that his case was assigned for trial one week after the complaint was filed against Lorenz, and at that time Birchfield advised the court he was in the process of determining whether to appeal due to the potential incompetence of Lorenz during the guilt phase of Montiel's trial.

Montiel proposes to present the following evidence in support of this claim at an evidentiary hearing which was not presented to the state court: testimony by Birchfield that he made decisions, including failing to provide transcripts to Fuller, to avoid challenging Lorenz's competence, that he was concerned for Lorenz's reputation and failed to present a habeas petition in order to avoid embarrassing Lorenz, that he did not explain the conflict from concurrent representation or how it could interfere to Montiel or obtain a waiver from Montiel[24]; and testimony from a Strickland expert that it was standard practice to represent clients without any potential conflict and that Birchfield should have informed Montiel of the nature of the conflict, how it could interfere, and obtained a waiver.

The Warden contends this claim should be procedurally barred since Montiel did not raise it at trial or on appeal. Even if the claim is considered, the Warden asserts Montiel cannot show an actual conflict of interest as there is no evidence Birchfield's judgment was undermined. The Warden observes that Birchfield first appeared as counsel for Lorenz on November 21, 1986, after the jury's return of the death verdict on November 10. When Lorenz's case went to trial in March, 1987, Birchfield did not present an affirmative defense, instead submitting the case as a court trial on the police and toxicology reports. Further, as demonstrated in Claim 18, the Warden contends that Birchfield contemplated filing a habeas petition on Montiel's behalf, but reasonably decided not to do so. The Warden disputes Montiel's claim that, due to the alleged conflict, Birchfield failed to call Lorenz as a witness to say that Montiel's family members were not called to testify at the guilt trial, as this testimony could have been obtained from the family members and was elicited from his mother. More importantly, the Warden

[24] A declaration by Birchfield, filed in support of the state habeas petition, says he told Montiel about his representation of Lorenz, but did not obtain a waiver as he did not perceive that it was a conflict. Birchfield's declaration states that he did view Lorenz's representation of Montiel as ineffective and does not indicate that he took any actions in order to protect Lorenz from that charge. Birchfield implies that he did not file a habeas petition or other writ based on research he conducted. See Ex. 17.

asserts the impeachment of Montiel's family members on this minor point would have no conceivable effect on the verdict. The Warden asserts the California Supreme Court correctly determined Birchfield did not have a conflict of interest, and that decision was not contrary to United State Supreme Court precedent.

Montiel replies he could not have been expected to object to the concurrent representation of Lorenz since the burden was on Birchfield to educate his client and obtain informed consent. Montiel asserts Birchfield's claim that he did not perceive a conflict is not credible because he knew, or should have known, that he was not free to injure the professional reputation of a client and that withholding a collateral attack on Montiel's guilt conviction based on Lorenz's ineffective representation would be at Montiel's expense. Montiel further replies this claim was properly raised on state habeas since it was not part of the trial record.

Montiel replies he did suffer adverse effects from the conflicting representation, since Birchfield did not seek extraordinary relief, and failed to provide Ms. Fuller with transcripts of the guilt trial even though he had asked her to prepare a habeas petition challenging the felony-murder special circumstance. Montiel contends Birchfield's explanation that he did not prepare a petition because he did not know what type of relief to seek should be rejected based on Ms. Fuller's recollection that Birchfield asked her to prepare a petition and because Birchfield's felony convictions involve deceit. Montiel asserts Birchfield's true motivation was to protect Lorenz's reputation, which was already under attack for ineffective representation on another case. Montiel argues that not calling Lorenz to testify about his failure to interview Montiel's family members and call them to testify regarding his delusions, hallucinations, and use of PCP shortly before the murder, left their testimony at the penalty retrial without sufficient credibility.

As stated above, Montiel need not show prejudice to obtain relief when a conflict of interest results in the denial of effective assistance of counsel, but must establish active representation of conflicting interests which actually resulted in an adverse effect on his lawyer's performance. Cuyler v. Sullivan, 446 U.S. at 349.

Montel presented this claim in his state habeas petition filed June 1, 1993, after his penalty retrial, which also included claims stemming from his guilt phase trial. The California

Supreme Court found any delay in presenting Montiel's claims was adequately explained and summarily denied all the claims on the merits.

Lorenz's arrest occurred October 5, 1986, and the complaint against him was filed October 9. Exhibit 7, in support of federal petition. The jury returned its verdict against Montiel November 10, 1986. Birchfield made his first appearance representing Lorenz on the drunk driving charge November 21, 1986. Id. There is no indication that Birchfield's actions in Montiel's cases were motivated by a desire to protect Lorenz's reputation, or that Birchfield's representation of Lorenz led to any actual conflict at Montiel's trial.

Montiel has made no showing that he was prejudiced by the failure of Birchfield to file a state habeas petition challenging the felony-murder special circumstance prior to the penalty retrial, that Birchfield's representation of Lorenz impacted his representation of Montiel, or that Birchfield's representation of Montiel at the penalty retrial was deficient. Claim 20 is denied an evidentiary hearing and is denied on the merits.

11. Claim 22

In Claim 22, Montiel contends that counsel should have challenged Juror Binns during voir dire.

During voir dire, Juror Patricia Binns, in response to whether she had heard or had any feelings about drugs and/or PCP, said "I'm adamant that if you make the choice to use them, then you are totally responsible for that choice you made." 86 RT Vol. IV:551. Montiel contends Birchfield unreasonably failed to clarify this statement, to question Binns about her response, or to seek that she be excused for cause, and he did not exercise a peremptory challenge of Binns when numerous challenges remained available. Montiel asserts a critical factor of his mitigation case was whether PCP intoxication impaired his ability to appreciate the criminality of his conduct, or conform his conduct to the requirements of the law. Montiel argues Birchfield's failure to question or challenge Binns about her feelings of PCP use was ineffective assistance, which was prejudicial per se. See Davis v. Georgia, 429 U.S. 122, 123 (1976) (establishing a "per se rule" requiring vacating a death sentence where a single juror with conscientious scruples against the death penalty was erroneously excluded, since assuming other

jurors shared the same attitude as the excluded panelist was not harmless error).

Montiel asserts Binns' answer was a strong statement of conditional bias: if the evidence proved he had used drugs during the commission of the murder, he would be held totally responsible for his actions and his drug use would not mitigate either the severity of the crime or the punishment, even though the law provided for both. Montiel argues the inclusion of Binns on the jury was the functional equivalent under Davis of impaneling a juror who would automatically impose a death sentence, regardless of what evidence was presented in mitigation. Montiel asserts Birchfield's ineffectiveness was compounded by the lack of co-counsel's participation in the voir dire.

Montiel proposes to present the following evidence in support of this claim at an evidentiary hearing which was not presented to the state court: testimony by Birchfield that he had no tactical reason for failing to use a peremptory challenge to dismiss Juror Binns, or alternatively for not questioning her regarding her attitude toward drug users in order to establish cause for her excusal[25]; testimony from a Strickland expert that it was standard practice to use a peremptory challenge or alternatively to develop reasons to excuse for cause when a potential juror is biased against a type of conduct engaged in by the defendant; and testimony by a jury dynamics expert that Juror Binns' bias against drug users, as well as the force of her answers, could have had a strong influence on other jurors.

The Warden claims the use of peremptory challenges is inherently subjective and intuitive, and rarely meets Strickland's standard of unreasonableness. The Warden asserts the record does not disclose any manifest incompetence in the retention of Juror Binns.

Montiel replies that issues relating to the competency of counsel's representation are mixed questions of law and fact and subject to de novo review. Montiel argues the issue is whether Birchfield used reasonable judgment in failing to exercise a challenge for cause or a peremptory challenge against Juror Binns, so the finding by the California Supreme Court is not dispositive. Montiel asserts that since Juror Binns was not examined about her response, it is

[25] Birchfield's declaration does not make these admissions.

impossible to speculate whether she could be fair.

Montiel observes the Warden failed to address his contention that a biased juror creates structural error, but instead cited cases for the proposition that it is speculative whether a different juror would have rendered a more favorable verdict. Montiel argues the cases cited by the Warden are distinguishable from the facts in this case. In Clark v. Collins, 19 F.3d 959, 965 (5th Cir. 1994), the petitioner had not alleged prejudice from the challenged conduct. In Singleton v. Lockhart, 871 F.2d 1395 (8th Cir. 1989), counsel's conduct was determined, after an evidentiary hearing, to be based on tactics. In United States v. Taylor, 832 F.2d 1187 (10th Cir. 1987), the petitioner did not introduce any facts suggesting bias of any jurors. People v. Freeman, 8 Cal. 4th 450 (1992), found the record failed to establish a reasonable probability that a different jury would have been more favorably disposed to the defendant, which Montiel argues is in conflict with the holding of Dyer v. Calderon, 151 F.3d 970 (9th Cir. 1998), that leaving a biased juror on the panel constitutes structural error. In People v. Fauber, 2 Cal. 4th 792, 846 n.17 (1992), the issue was counsel's failure to conduct voir dire on a specified issue. Montiel asserts the voir dire here shows a juror's extreme bias to a key type of mitigation evidence he planned to present. People v. Banner, 3 Cal. App. 4th 1315 (1992), found error from counsel's failure to challenge a juror who stated she had been mugged by an addict ten years earlier, when the charge against the defendant was robbery while under the influence of a controlled substance. Montiel contends the bias of Juror Binns is greater than in Banner, since she was adamant that someone who uses drugs must be held fully responsible for his actions.

The state court addressed this issue on direct appeal, see Montiel II, 5 Cal. 4th at 911, however Montiel contends there was no finding of fact, it was not fairly supported by the record, and there was not a full and fair hearing. Montiel argues the state court ruling which must be analyzed is the summary denial of this claim in the state habeas petition, which he argues was objectively unreasonable. The Warden responds Montiel did not raise this claim on state habeas review. The Warden contends the state court on direct appeal did make a factual finding that Juror Binns had the ability and desire to be fair on the issue of penalty, and that Montiel has not shown the state court's determination of facts was unreasonable in light of the evidence. The

Warden argues that in light of the state court's factual finding, Birchfield acted reasonably in not further questioning Juror Binns about alleged bias, and that the state court's conclusion was a reasonable application of Strickland.

The presence of a single biased juror violates a defendant's right to a fair trial, and is a structural error. Dyer, 151 F.3d at 973 n.2. However, an honest yet mistaken answer given on voir dire rarely amounts to a constitutional violation, and to invalidate the trial a juror's dishonest answer must be found to concern a material question. McDonough Power Equip. v. Greenwood, 464 U.S. 548, 555-556 (1984) (holding that to obtain a new trial, a party must demonstrate both that a juror answered a material voir dire question dishonestly and that a correct answer would have provided a valid basis for a challenge for cause). Where no motion was made during jury selection to dismiss the juror for cause, a petitioner assumes a greater burden of showing that the evidence of partiality was so indicative of impermissible bias that the trial court was required to strike the juror even though neither counsel made such a request. United States v. Mitchell, 568 F.3d 1147, 1151 (9th Cir. 2009).

Montiel's assertion here is not that Juror Binns gave a dishonest answer, but that Birchfield was ineffective for failing to further examine her to determine whether she was biased. Montiel argues Juror Binns' view about responsibility for drug use is the equivalent of a juror with conscientious scruples against the death penalty, which results in structural error.

A structural error is a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." Fulminante, 499 U.S. at 310. Structural errors are limited. Johnson v. United States, 520 U.S. 461, 469 (1997). No controlling law holds that a belief such as the one held by Juror Binns, that drug users are responsible for the consequences of their actions, is a material issue affecting the structure of the entire trial. This court will not expand the category of structural error to include views as expressed by Juror Binns. As observed by the state court, Juror Binns indicated she could "follow the law," "go either way" based on the guidelines given to her, "evaluate [the evidence] and make a choice," judge expert psychiatric evidence, and use her common sense. Montiel II, 5 Cal. 4th at 911. Based on the totality of Juror Binns' responses, there is no prejudice from her presence on the

jury.

The belief of Juror Binns is not included in the narrow category of structural errors, and Montiel has not shown that Birchfield's failure to question Juror Binns regarding her beliefs undermines confidence in the outcome. Claim 22 is denied an evidentiary hearing and is denied on the merits.

12. Claim 23

In Claim 23, Montiel contends that counsel failed to preserve and introduce favorable testimony from a witness.

After the remand for a new penalty trial, Birchfield's investigator, Roger Ruby, tape-recorded an interview with Victor Cordova, where Victor said he had been instructed by law enforcement not to volunteer information regarding Montiel's use of PCP before the homicide. Montiel asserts Birchfield was ineffective for failing to use this evidence to challenge Montiel's guilt conviction, or to introduce it at penalty as mitigating evidence.[26] Montiel contends Birchfield seriously impaired Montiel's ability to pursue this claim by either wilfully destroying, or negligently misplacing, the tape and failing to furnish the tape to current counsel. Birchfield's wife, Denise D'Santangelo, declares that Birchfield destroyed a tape in her presence with a pair a scissors, and asserts it was the same tape Montiel's appellate counsel had earlier requested.

Montiel proposes to present the following evidence in support of this claim at an evidentiary hearing which was not presented to the state court: testimony by Birchfield that he failed to present information from Victor in a habeas petition challenging the conviction, why he misplaced or destroyed the tape of the interview with Victor, and that he had no tactical reason for failing to question and/or impeach Victor regarding the statement he made in the taped interview[27]; testimony from investigator Roger Ruby and Birchfield that Victor gave a taped

[26] This claim incorporates by reference Claim 8 - Inadmissible Confession/Jailhouse Informant (¶ IX of state habeas petition) and Claim 13 - Suppression of Evidence of Victor and Montiel's PCP use immediately before the homicide (¶ X of state habeas petition).

[27] Birchfield's declaration does not make these admissions nor discuss the missing tape, it does discuss that he considered filing a habeas petition or extraordinary writ, but based on the issues presented in the direct appeal opinion, not on an interview or statement by Victor.

statement detailing prosecutorial misconduct (specifically, that Victor was instructed not to volunteer information regarding Montiel's PCP use prior to the murder)[28]; testimony by Denise D'Santangelo, Birchfield's ex-wife, that she saw Birchfield destroy a tape with scissors, and that it was the same tape Montiel's subsequent counsel had requested two years earlier (Ex. 23 to federal petition); testimony from a Strickland expert that it was standard practice to present evidence of prosecutorial misconduct on habeas or retrial; and testimony by a jury dynamics expert that evidence of prosecutorial misconduct would greatly support a life sentence. Only the declaration of Denise D'Santangelo was presented in support of this claim in this proceeding.

The Warden observes Montiel offers no explanation in support of this claim as to why Birchfield would intentionally destroy potentially exculpatory evidence given to him by a defense investigator whom he had employed to gather the evidence or fail to use this alleged evidence at trial, and that Birchfield's declaration in support of the petition does not address this issue. The Warden asserts Montiel has failed to supply any evidence in support of this claim outside of the allegations in the petition. The Warden argues even if Birchfield had presented evidence mirroring Victor's declaration, it would not have made a difference to the verdict, since the transcript of Victor's interview with detectives the day after the murder directly contradicts the declaration, and since Victor testified he encountered Montiel in the jail before trial and Montiel asked him to lie about the amount of PCP he had consumed on the day of the murder.

Montiel replies Victor's declaration provides the support for this claim, and Birchfield's declaration (Ex. 22 in support of federal petition) admits a tape of the interview existed before the penalty retrial. Montiel argues an evidentiary hearing is necessary to resolve the factual dispute between Victor's declaration (that he didn't mention sharing PCP with Montiel because the prosecutor told him not to) and his testimony at the penalty re-trial (that he didn't mention sharing PCP with Montiel at the 1979 trial because he feared he would get in trouble by admitting he sold PCP and gave it to Montiel). See 86RT Vol. VI:448.

Montiel asserts an evidentiary hearing is also required to determine whether Birchfield

[28] Ruby testified at the penalty retrial that Montiel's sister Irene had revealed PCP use by Montiel before the crime, but did not mention the interview with Victor.

will deny destroying the tape, and to judge the credibility of Ms. D'Santangelo, who has sworn that he did destroy the tape. Montiel argues this claim adds to the cumulative error caused by Birchfield's ineffective representation. Montiel contends that had Victor explained at the penalty retrial that at the guilt trial he failed to disclose he shared PCP with Montiel because of the prosecutor's instruction, it could have caused the jury at the penalty retrial to doubt the accuracy of the guilt verdicts.

Montiel argues the California Supreme Court's denial of this claim was an unreasonable determination of the facts because proof of prosecutorial suppression of evidence has an enormous impact on the jury, calling into question the prosecution's entire case. The Warden observes the California Supreme Court's denial of this claim on habeas assumed the truth of Victor's 1994 declaration stating he smoked PCP with Montiel before the murder and that the prosecutor told him not to mention it when he testified, as well as assumed that Birchfield failed to preserve the tape of Victor's statement.

Birchfield's 1988 declaration, prepared in support of Montiel's state habeas petition, asserts his investigator Roger Ruby did tape his interview with Victor, but that the tape was no longer in Birchfield's possession by 1988. Exhibit 22 in support of federal petition. Ms. D'Santangelo's 1990 declaration is the only evidence stating the tape Birchfield destroyed was of Roger Ruby's interview with Victor. Ms. D'Santangelo states that after the transfer of some of Montiel's case materials to habeas counsel, she found notes, photographs and a cassette tape relating to the Montiel case. She showed these to Birchfield and he destroyed the tape. She was not sure what was on the tape Birchfield destroyed, only that the tape was of a witness interview because she recognized the markings. She also saw Birchfield destroy notes and photographs relating to Montiel's case, but knew that he kept other files and documents, as well as three other tapes labeled "Montiel." Exhibit 23 in support of federal petition.

Victor's 1994 declaration states that "the District Attorney told me not to say anything about Richard being on PCP. [He] was told to just answer the questions and not say anything about PCP at all." Exhibit 21 in support of federal petition. Victor's assertion about the content of this conversation, which occurred more than 14 years earlier, is not credible as it is related,

since Victor's testimony at the 1979 trial would have violated the stated instructions by stating that Montiel was intoxicated on PCP when he arrived at Victor's house prior to the murder. See 79RT Vol. I:134-135, 138-39. The only information Victor withheld at the 1979 trial, and admitted at the 1986 retrial, was that he and Montiel shared another PCP cigarette prior to leaving the house before the murder. 86RT Vol. VI:395-398, 401-402. Further, Montiel testified at the 1979 trial that he used PCP the morning of the murder, 79RT Vol. II:387, and that he and Victor used more PCP before they left Victor's house before the murder. Id., at 395-396.

There was no prejudice from Birchfield's failure to present Victor's statement about the prosecutor's alleged instructions to Victor about his testimony regarding PCP use at the penalty retrial, as Victor testified at both trials that Montiel was intoxicated when he arrived at Victor's house prior to the murder. 79RT Vol. I:134-135, 138-39. At the penalty retrial, Victor also testified that he and Montiel shared another PCP cigarette prior to leaving the house before the murder, 86RT Vol. VI:395-398, 401-402, and Montiel's sister Irene confirmed Montiel's PCP use prior to the murder. 86RT Vol. VI:324, 329-333. There also is no prejudice from Birchfield's destruction of the tape, as even assuming the truth of Ms. D'Santangelo's declaration, she "was not sure what was on the tape."

Montiel has not shown that Birchfield's failure to present Victor's statement about the shared PCP use undermines confidence in the outcome, or that the tape Birchfield allegedly destroyed was material to his trial. Claim 23 is denied an evidentiary hearing and is denied on the merits.

13. Claim 24

In Claim 24, Montiel contends that counsel failed to present evidence regarding Montiel's drug use to present a diminished capacity defense.

Montiel asserts Birchfield was ineffective in numerous ways related to the presentation, or lack of presentation, of mitigation evidence based on his background, drug use, and resulting diminished capacity. Montiel asserts Birchfield failed to consult with, or present testimony from, a qualified mental health expert specializing in PCP effects, failed to adequately prepare the expert who did testify, and failed to investigate or present evidence of Montiel's psychosocial

history, including his impoverished childhood, abusive and neglectful parents, life-long alcohol and drug abuse, and the impacts of these events had on his mental health. Montiel contends that had this evidence been adequately presented to the jury, there is a reasonable probability he would not have been sentenced to death.

The crimes Montiel was convicted of occurred in January of 1979, his first trial occurred in May of 1979 (the jury hung on penalty), his second penalty trial occurred in September of 1979 (the California Supreme Court affirmed the conviction but reversed the penalty), and his penalty re-trial occurred in November of 1986. Prior to Montiel's crimes, on September 26, 1978, the California Supreme Court abandoned the state's long-standing test for insanity[29], and adopted the American Law Institute (ALI) test: "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks the substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law." People v. Drew, 22 Cal. 3d 333, 345 (1978), superseded by statute in 1982, Cal. Pen. Code § 25(b).

California state law at the time of Montiel's crime and guilt phase trial also provided for the partial defense of diminished capacity, which negated the specific intent, malice or other subjective element of a crime. See People v. Wells, 33 Cal. 2d 330 (1949), and People v. Gorshen, 51 Cal. 2d 716 (1959). Diminished capacity can result from intoxication which prevents someone from acting with express malice, the mental state necessary for first degree murder. People v. Frierson, 25 Cal. 3d 142, 154 (1979); People v. Whitfield, 7 Cal. 4th 437, 462 (1994), Mosk, J., concurring and dissenting. Alternatively, an "irresistible impulse" also can prove diminished capacity. People v. Cantrell, 8 Cal. 3d 672 (1973).

The ALI test remained in effect until June 9, 1982, when the voters approved a new statutory definition for insanity. At the time of Montiel's penalty re-trial, California law regarding insanity required proof by a preponderance of the evidence that the defendant was incapable of knowing or understanding the nature and quality of the act and of distinguishing

[29] The M'Naughten test permitted acquittal if, at the time of committing the act, an accused person was laboring under such a defect of reason from disease of the mind as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know it was wrong. 10 Clark and Fin. 200, 210 (1843).

right from wrong at the time of the offense. People v. Skinner, 39 Cal. 3d 765, 782 (1985). The 1982 statute also codified a 1978 amendment abolishing the defense of diminished capacity. California Penal Code section 28(a) provides that evidence of mental illness may not be admitted to show or negate the capacity to form any mental state, but it is admissible on the issue of whether the accused actually formed the required specific intent, premeditated, deliberated, or harbored malice aforethought, when a specific intent crime is charged.

In Claim 24, Montiel asserts Birchfield was ineffective for failing to present independent expert testimony regarding PCP use and instead attempting to convert the prosecution's expert witness, Dr. Siegel, into a "friendly" witness by eliciting facts supporting intoxication (factor (h) in mitigation), and then bolstering those facts by the testimony of San Quentin psychiatrist, Dr. Louis G. Nuernberger. Montiel contends Birchfield failed to speak to, consult, or interview either expert before their testimony, and failed to consult a mental health expert with expertise in the effect of PCP on mental functioning and behavior. Montiel alleges Birchfield knew or should have known that Dr. Nuernberger was not a forensic psychiatrist familiar with either diminished capacity or the effects of PCP, but had only evaluated Montiel to determine his sanity for the purposes of execution. Montiel contends Birchfield's lack of proper investigation and preparation resulted in the loss of a critical opportunity to present evidence of Montiel's complete inability to form intent, which would have resulted in a life sentence. Montiel contends the California Supreme Court's implicit conclusion that he received effective assistance of counsel was an unreasonable application of established United States Supreme Court precedent, citing Strickland, (Terry) Williams v. Taylor, 529 U.S. 362, 396 (2000), and Wiggins v. Smith, 539 U.S. 510, 534 (2003).

The Warden argues the failure to seek the advice of independent experts is not constitutionally inadequate assistance and that Birchfield's decision to use the prosecution's expert to present the needed testimony about the effects of PCP was a classic choice of trial tactics. The Warden asserts Dr. Pitts' conclusions are not supported by the record and the theories he advanced had little chance of overcoming the significant evidence showing Montiel knew and understood the nature and consequences of his actions. The Warden contends Montiel

has failed to show a reasonable probability that the result of the proceeding would have been different, even if Birchfield had consulted a psychopharmacologist and procured testimony similar to that of Dr. Pitts stating Montiel was incapable of forming the intent to steal or kill, or to premeditate and deliberate. The Warden asserts since Montiel has not shown either counsel's incompetence or prejudice, the claim of ineffective assistance of counsel must fail, and the state court's rejection of this claim was a reasonable application of Strickland.

Montiel replies, in light of Dr. Siegel's experience and his testimony that despite being under the influence of PCP Montiel was able to deliberate and premeditate at the time of the murder and could maturely and meaningfully reflect on the consequences of his actions, it was unreasonable for Birchfield to rely on Dr. Siegel regarding diminished capacity and mitigation. Montiel argues Birchfield had an obligation to investigate in order to determine what type of experts to consult, but despite making no attempt to contact Dr. Siegel, he chose to rely on his opinion, which was already established as adverse to Montiel. Montiel contends Birchfield had no basis to believe Dr. Siegel's testimony would contribute to the jury voting for life. Montiel contends that if Birchfield had consulted with another psychiatrist or psychologist with expertise in the effects of PCP, he would have discovered Dr. Siegel's adverse conclusions were open to serious challenge. Montiel replies that despite the Warden's assertions, Dr. Pitts' declaration does assert that the fact Montiel was able to remember what he did does not mean he was exercising judgment or reasoning at the time of the action. Montiel also argues a qualified expert could have explained that the presence of cognitive abilities (obtaining a knife or going back to get the beer can) does not mean those actions were governed by moral judgment because PCP removes inhibitions.

Montiel proposes to present the following evidence in support of Claim 24 at an evidentiary hearing which was presented on state habeas: testimony by Birchfield that he did not think it necessary, nor did he make an attempt, to consult with mental health experts specializing in PCP effects, and that he knew Dr. Nuernberger was not a forensic psychiatrist or PCP specialist; and testimony by Dr. Pitts that medical experts more qualified than Dr. Siegel were available, that a qualified expert could have explained that Montiel's actions were not governed

by moral judgment in spite of his cognitive ability to obtain a knife before the killing and remember to go back for a beer can, because PCP removes all inhibitions, that the theft of Mankin's purse was sheer impulse, and that PCP does not allow evaluation of behavior or moral judgments.

Montiel also seeks to present the following evidence in support of Claim 24 at an evidentiary hearing which was not presented to the state court: testimony by Dr. Siegel and Birchfield that Birchfield did not interview Dr. Siegel about the evidence he intended to present for the prosecution[30]; testimony by Dr. Nuernberger and Birchfield that Birchfield failed to sufficiently prepare Dr. Nuernberger to testify about the effects of PCP[31]; testimony by a Strickland expert that it was standard practice to interview witnesses before relying on their testimony, to select the best available expert (not a witness for the prosecution) to present testimony, to speak with various experts to procure the one most qualified and influential, and that the strategy of relying on Dr. Siegel, a prosecution witness who testified adversely and persuasively at the guilt trial, was unreasonable; and testimony from a jury dynamics expert of the prejudicial impact of Dr. Nuernberger's obvious lack of expertise and experience and the prosecutor's closing argument about it, and the extent to which Dr. Siegel's testimony persuaded the decision for death.

Birchfield presented evidence at Montiel's penalty re-trial from percipient witnesses who provided support for his defense of intoxication from drug use. Mrs. Mankin's testimony related that she noticed by Montiel's eyes that something was wrong, as they were "starry and glassy" at the time of the robbery. 79 RT Vol. III:17-28 (the 1979 testimony was read into record at the 1986 trial). Montiel's father Richard Sr. testified he knew Montiel was using some type of drug in the month prior to the murder, his mother Hortencia testified he was using drugs and having hallucinations in the month prior to the murder, his brother Antonio testified he was intoxicated

[30] Dr. Siegel's testimony did not say this, and no declaration is presented from Dr. Siegel to support this allegation.

[31] Neither Birchfield's nor Dr. Nuernberger's declarations make this admission. Dr. Neurnberger's declaration says he traveled to Bakersfield the same day he testified and that Birchfield did not provide him with Dr. Cutting's report, the CDC file, or transcripts from the 1979 trial of expert or lay witnesses prior to his arrival, but that he did not recall what materials he may have reviewed upon arrival. His declaration does not mention when, how often or for how long he spoke to Birchfield. See Declaration of Dr. Nuernberger, Exhibit 20, presented on state habeas.

on drugs before his arrest for the murder and could not express himself, did not make sense, was talking about legions of demons, and talked about being the devil, his sister Martha testified she thought Montiel was on drugs because he would not walk straight or talk right, and his sister Irene testified he was under the influence of PCP prior to the murder as she gave him two PCP cigarettes from some she was keeping for him the morning before the murder and that he smoked them both that morning. 86 RT Vol. VI:227-28; 264-73; 291-92, 304-05; 314-15; 324, 332-33, 338-54. Victor testified that prior to the murder, he cut off a piece of dangling flesh from a deep wound on Montiel's left arm, but Montiel registered no pain. 86 RT Vol. VI:403. Victor testified Montiel exhibited bizarre behavior and speech, was in a violent mood, made advances to Kathy Davis, tried to wipe a mole off Lisa Davis's face, challenged Victor by saying "deck me out," grabbed Lisa's purse, and argued with some guys across the street. 86 RT Vol.VI:406-08. Victor also stated before they left to take Montiel to his brother's house, they shared a PCP cigarette. 86 RT Vol. VI:401-02.

Dr. Siegel testified that at the time of the crime Montiel was "grossly intoxicated" on PCP and alcohol and his motor functions and judgment were somewhat impaired, and that PCP had unpredictable effects and could reduce impulse control, cause distorted perception, produce episodic partial amnesia, exaggerate aggressive or violent tendencies, and lead to a chronic mental disorder which includes delusional episodes. Despite these concessions, Dr. Siegel concluded Montiel was not hallucinating at the time of the murder, was capable of goal-oriented activity, and knew what he was doing, stressing Montiel's successful efforts to find and take money from Mr. Ante's house, his immediate concerns about covering up the crime, and his relatively clear memory of the events. 86 RT Vol. V:108-201.

Dr. Nuernberger testified that chronic drug abuse is both a cause, and a result, of deep lifelong alienation and depression, and opined Montiel was legally sane and had no gross mental disorder apart from drug-induced toxic dementia. However, Dr. Nuernberger concluded Montiel's "extended intoxication with PCP and alcohol" eroded his self-control and judgment, fragmented his personality and consciousness, and exaggerated his violent tendencies, to the extent that the drug intoxication was "directly responsible for the homicide," and that behavior

like brushing or picking at a mole could be from acute or advanced stages of PCP intoxication, described as toxic delirium. He emphasized Montiel had displayed cooperative and nonviolent behavior while in the drug-free prison setting, although he admitted on cross-examination that Montiel vacillated between times of passive conformity and extremes of aggressive violence. 86 RT Vol. VI:553-626.

Montiel must show both deficient performance and actual prejudice resulting from the deficiency in order to prevail on a claim of ineffective assistance of counsel. An objective review of Birchfield's performance, measured for reasonableness under prevailing professional norms, including a context-dependent consideration of the challenged conduct as seen from counsel's perspective at the time of that conduct, must be conducted. Wiggins, 539 U.S. at 523 (citing Strickland, 466 U.S. at 688, 689). In assessing prejudice resulting from the alleged ineffective assistance of counsel at the penalty phase of a capital trial, a court must reweigh the evidence in aggravation against the totality of available mitigating evidence. Wiggins, 539 U.S. at 534.

Dr. Siegel testified regarding the effects of PCP use, including reduced impulse control, distorted perception, episodes of partial amnesia, exaggerated aggressive or violent tendencies, and chronic mental disorder with delusions, but concluded that Montiel, despite being "grossly intoxicated" and somewhat impaired, knew what he was doing at the time of the murder. Dr. Nuernberger opined conversely that Montiel's extended PCP use and alcohol intoxication eroded his self-control and judgment, fragmented his personality and consciousness and exaggerated his violent tendencies, and that the intoxication was directly responsible for the homicide. Percipient witnesses provided supportive evidence of Montiel's long-term drug use.

The Court is persuaded by the Warden's contention that Montiel has failed to show a reasonable probability the result of the proceeding would have been different. Even had Birchfield consulted a psychopharmacologist and procured testimony stating Montiel was incapable of forming the intent to steal or kill, or to premeditate and deliberate, that evidence would have been largely duplicative of evidence which was already before the jury and is unlikely to have overcome the significant evidence showing Montiel knew and understood the

nature and consequences of his actions. Claim 24 is denied an evidentiary hearing and is denied on the merits.

14. Claim 25

In Claim 25, Montiel asserts Birchfield was ineffective for failing to prepare Dr. Nuernberger[32] to testify regarding Montiel's diminished capacity in mitigation, alleging Birchfield's first conversation with Dr. Nuernberger did not occur until the day prior to his testimony and only lasted 15 minutes.

Montiel contends Birchfield did not provide Dr. Nuernberger with police reports, Dr. Cutting's report, Montiel's CDC central file, or transcripts of the testimony of Dr. Siegel or any percipient witnesses. See Exhibit 17, declaration of Dr. Nuernberger, ¶ 3. Montiel argues Birchfield failed to adequately prepare Dr. Nuernberger with evidence and information necessary to form a grounded and credible medical opinion, and that Dr. Nuernberger's testimony was critical to establishing Montiel's mental state as a mitigating factor.

The Warden responds that Birchfield's investigator interviewed Dr. Nuernberger prior to the penalty retrial and provided Birchfield with a report of the interview. The Warden opines that had Birchfield provided Dr. Nuernberger with crime reports and transcripts in anticipation of his testimony, Birchfield faced the risk the information might undermine, instead of fortify, the favorable nature of the opinions Dr. Nuernberger was willing to give. On the issue of prejudice, the Warden argues it cannot be inferred that Dr. Nuernberger's testimony would have been of greater benefit to Montiel had additional information been made available to him during preparation of his testimony, and in fact it may have become less favorable. The Warden contends Birchfield may have decided to rely on the positive aspects of Dr. Nuernberger's testimony, which included his conclusion that PCP was responsible for Montiel's behavior.

Montiel replies the Warden's contention is sheer speculation, as Birchfield has not stated the reason he did not provide background information to Dr. Nuernberger was fear that it would undermine his opinion. Montiel argues that even if Birchfield did fear Dr. Nuernberger changing

[32] The heading of Claim 25 includes the failure to prepare and present percipient witnesses, but the text of the claim does not discuss percipient witnesses. The analysis of this claim will only address expert witness Dr. Nuernberger.

his opinion, it would have been better to have discovered that, and if necessary obtained a different expert, than to have allowed Dr. Nuernberger to be impeached on cross-examination by his unfamiliarity with the facts of the case. Montiel observes the timelines of the case belie any argument that Birchfield made a strategic choice, since his investigator's first interview with Dr. Nuernberger did not occur until presentation of the defense case was underway. Montiel argues Dr. Nuernberger was the main defense witness regarding how PCP affected Montiel's thinking and behavior, but his ignorance of the facts of the case left him unable to challenge Dr. Siegel's opinions or to persuade the jury. Montiel asserts a similar lack of preparation regarding expert testimony has been sufficient to support a finding of prejudice in other cases. See Bean v. Calderon, 163 F.3d 1073, 1078-81 (9th Cir. 1998); Clabourne v. Lewis, 64 F.3d 1373, 1384 (9th Cir. 1995). Montiel argues the California Supreme Court erroneously determined that Birchfield's failure to adequately prepare Dr. Neurnberger to testify did not violate Strickland. Montiel contends the state court's application of Strickland to these facts was objectively unreasonable.

Montiel proposes to present the following evidence in support of Claim 25 at an evidentiary hearing which was presented to the state court: testimony by Birchfield that his first conversation with Dr. Nuernberger was the day preceding his testimony and lasted 15 minutes, that he did not give Dr. Nuernberger the necessary documents, such as police reports and transcripts, that he did not review the details of the case with Dr. Nuernberger until during the retrial and then for only 45 minutes over a noon recess which was inadequate to prepare, and that he had no tactical reason for failing to adequately prepare Dr. Nuernberger.[33]

Montiel also seeks to present the following evidence, which was not presented to the state court, in support of Claim 25 evidentiary hearing: testimony by Dr. Nuernberger that had he been

[33] Birchfield's declaration, presented on state habeas, admits the time frames alleged here, but includes that the defense investigator interviewed Dr. Nuernberger and prepared a report which Birchfield reviewed and used to prepare questions. The declaration does not discuss what documents were provided to Dr. Nuernberger nor make admissions of ineffectiveness.

Dr. Nuernberger's declaration, which also was presented on state habeas, says that no records or transcripts were given to him to review in advance of the day he testified – and that he doesn't recall what he reviewed when he arrived. Dr. Nuernberger does not mention anything about the timing or length of discussions he had with Birchfield.

adequately prepared he would not have had to concede a lack of knowledge regarding the murder and Montiel's history of incarceration, and that he did not know he could discuss Montiel's intoxication when it was not covered in his report;[34] and testimony by a Strickland expert that it was standard practice to adequately prepare expert witnesses and that Birchfield's actions were inadequate to prepare Dr. Nuernberger.

Montiel cites to Bean, supra, for support for this claim. In Bean, penalty counsel failed to adequately investigate and present mitigating evidence of mental impairment and failed to prepare experts to testify, even though consulted experts recommended additional testing and there was available evidence of brain damage, mental retardation, incompetence, drug use and an abusive childhood. Counsel's failure was prejudicial when combined with the limited aggravating evidence consisting of only a prior burglary and an altercation where Bean allegedly fired a gun. 163 F.3d at 1078-1081.

Montiel also cites to Clabourne, supra, 64 F.3d at 1384-87, for support of this claim. In Clabourne, penalty counsel called only one expert witness at sentencing, who was contacted at the last moment and not adequately prepared, and instead mainly relied on evidence which had already been presented at the guilt phase. Counsel failed to introduce any evidence of Clabourne's history of mental illness, including psychosis and probable schizophrenia, and Clabourne's susceptibility to manipulation by others. Counsel's failure was prejudicial when combined with the fact that the sentencing judge found only one aggravating factor relating to the circumstances of the crime. 64 F.3d at 1384-87.

Montiel must show both deficient performance and actual prejudice resulting from the deficiency to prevail on a claim of ineffective assistance of counsel. Montiel's history of mental illness is less compelling than Bean's or Clabourne's mental health histories. Dr. Watson summarized Montiel's test results as supportive of findings of "cognitive and neuropsychological deficits and probably brain dysfunction" based on toluene abuse. State Habeas Exhibit 12, 1993 declaration of Dr. Watson, ¶¶ 10-11. Montiel's functioning was revealed to be "at the level of

[34] This admission was not in Dr. Nuernberger's declaration that was presented on state habeas. Dr. Nuernberger made statements during cross-examination at trial regarding his lack of knowledge regarding the charges, but he did not say that he was inadequately prepared.

borderline intelligence, . . . impaired by significant learning disabilities and very severe attention/concentration deficits (in the mildly retarded range)." Id. at ¶ 10. Dr. Watson found that Montiel's impairments "compromise his ability to hold and process information, to understand cause and effect relationships in the context of a rapidly changing sequence of events, and to engage in complex problem solving which requires logical, systematic thinking. As a result, . . . he has rather poor planning skills, is vulnerable to misinterpreting his environment with consequent manifestations of inappropriate and ill-modulated behavior, and has difficulty in making judgments that require deliberation and consideration of abstract consequences." Id. at ¶ 13.

Evidence that was, or could have been, admitted in aggravation against Montiel also was substantially more egregious than the available evidence against Bean or Clabourne, and included the robbery of Eva Mankin; the robbery and murder of Gregorio Ante; a prior felony conviction for second degree robbery of Foster's Freeze in 1972; numerous incidents of prior violence including the stabbing of Montiel's brother Antonio in 1968, an argument/fight with Montiel's sister-in-law Yolanda in 1969; a theft at the 1971 Kern County fair, which included resisting arrest and threating officers; a misdemeanor burglary involving theft of a television from Anthony Ramirez in 1973, to which Montiel pled guilty; and commitment to the Civil Addict Program at the California Rehabilitation Center ("CRC") in July, 1972. Between 1972 and 1978, Montiel spent the majority of his time incarcerated on drug or drug-related offenses, with his longest period of parole lasting ten months in 1977. Montiel began using PCP at the end of 1976 during a two month parole from CRC. By 1977, he was smoking PCP a couple of times a week, and after his release in December, 1978 from the Kern County Jail, Montiel immediately returned to daily, heavy use of alcohol and PCP, which continued through the time of the homicide in January, 1979.

Even assuming Birchfield failed to adequately prepare Dr. Nuernburger to testify, in light of the limited evidence of brain injury, Montiel's less compelling background and his history of violence, it is not likely the jury would have determined that the evidence of mitigation outweighed the evidence in aggravation and have imposed a life sentence. Claim 25 is denied an

evidentiary hearing and is denied on the merits.

15. Claim 26

In Claim 26, Montiel claims that counsel failed to object to prosecutorial misconduct, inadmissible evidence, and improper argument.

Montiel asserts Birchfield's numerous failures to object and request admonition to improper comments by the prosecutor, to inadmissible evidence, to improper argument, and to faulty jury instructions denied Montiel effective assistance of counsel. Montiel contends that without the improper actions of the prosecution and Birchfield's failures, the outcome of the penalty retrial would have been more favorable to him. Listed below are Montiel's assertions of ineffectiveness from Birchfield's failure to object, of which most of the underlying claims were presented to the state court on direct appeal.

(a) Montiel asserts the prosecutor stated numerous times during voir dire that only some of the evidence of guilt, not all of it, would be presented at the penalty retrial. Montiel asserts these statements deprived him of the right to confrontation and to have the jury fairly weigh factors in mitigation, denied him the benefit of any lingering doubt regarding premeditation and intent to rob, and implied to the penalty jury they were not responsible for determining the appropriateness of death as required under Caldwell v. Mississippi, 472 U.S. 320 (1985). The underlying claim was addressed by the California Supreme Court on direct appeal. Montiel II, 5 Cal. 4th at 911-913. The state court found nothing improper in the prosecutor's comments during voir dire, holding the comments regarding the jury's limited role at a separate penalty trial do not eliminate the ability to litigate lingering doubt nor diminish the jury's sense of sentencing responsibility and finding both the prosecution and the defense presented extensive evidence regarding Montiel's mental state and intoxication. Since the state court held there was no error by the prosecutor's comments, Birchfield's failure to object was not ineffective.

(b) Montiel asserts the prosecutor's comments during voir dire that Montiel would be in court every day, dressed up and decent, and the victim would not be there, were improper and calculated to inflame the jury. Birchfield objected and the trial court sustained the objection, but no admonition was requested. The California Supreme Court addressed the underlying claim on

direct appeal, Montiel II, 5 Cal. 4th at 914-915, holding there is no basis for reversal as the prosecutor's remarks were brief and did not call attention to anything the jurors would not readily infer, the trial court's sustaining the objection indicated the prosecutor's remarks were improper, and the jury was given the general instruction to disregard anything that had been stricken. The state court found that Birchfield's failure to request admonition may have been tactical and the omission did not undermine confidence in the judgment. Since the state court held there was no prejudice from the prosecutor's comments, Birchfield's failure to request admonition, even if deficient, cannot be prejudicial.

(c) Montiel asserts the testimony of Deputy Leavell introduced threats he made years earlier against Leavell's and Sgt. William's families and homes, which were inadmissible nonstatutory aggravating evidence. The California Supreme Court addressed the underlying claim on direct appeal, Montiel II, 5 Cal. 4th at 916-917, holding the threats were admissible to demonstrate the nature of Montiel's unlawful conduct, and their admission did not infringe his constitutional right to free speech. The state court also held Birchfield's failure to object to the admission of this testimony was not incompetent performance. Id.

(d) Montiel asserts Dr. Siegel's testimony concerning Montiel's alleged sale of and use of drugs other than PCP was improper because it was irrelevant to Dr. Siegel's opinion and was not admissible as a factor in aggravation. The California Supreme Court addressed the underlying claim on direct appeal, id., at 918-920, holding Dr. Siegel was entitled to place his conclusions in the context of Montiel's overall pattern of drug use, so his reference to the use of other drugs was not improper, the comment about selling drugs was brief and could hardly have been a surprise to jurors who were already aware of Montiel's drug-centered lifestyle. The state court also held Birchfield's failure to object or request a limiting instruction was not prejudicial. Id.

(e) Montiel asserts Dr. Siegel's introduction of Montiel's alleged confession to cellmate Palacio was improper as a basis for his opinion of Montiel's mental state and deprived Montiel of his right to confrontation. Montiel argues that California Evidence Code § 801(b) limits the type of information an expert can rely on in forming an opinion to information which "reasonably may be relied upon," that Palacio's testimony was plainly unreasonable since he was

obeying the dictates of law enforcement in exchange for the abrogation of a felony complaint, and that others admit Montiel was still under the influence of PCP or going through withdrawals during this time period. Montiel argues in reply that the state court failed to consider whether the evidence was constitutionally acceptable under Gregg v. Georgia, 428 U.S. 238 (9172). The California Supreme Court addressed the underlying claim on direct appeal, Montiel II, 5 Cal. 4th at 918-92, holding Birchfield's failure to pursue a hearsay objection was not facially incompetent, as even a successful objection probably would not have prevented Palacio being called as a witness, or if he was unavailable his 1979 testimony being presented, and even if Birchfield should have objected, there was no prejudice as the circumstantial evidence indicating Montiel possessed criminal intent prior to the murder was extremely strong.

(f) Montiel asserts Dr. Siegel presented improper hearsay testimony by testifying about Montiel's long history of violence, which deprived Montiel of his right to confrontation. The California Supreme Court mentions the underlying claim on direct appeal. Montiel II, 5 Cal. 4th at 918-923. Even though the state court did not specifically address the claim of denial of confrontation, the mention of the presentation of the claim warrants a finding that the claim was implicitly denied. The state court did hold that Birchfield's failure to object was not grounds for reversal as the testimony by Dr. Siegel was consistent with Montiel's own admissions.

(g) Montiel asserts error in the trial court's taking judicial notice of the financial gain special circumstance previously ruled inapplicable to his case, the trial court's consideration of the invalidated financial gain special circumstance in denying the motion to modify the verdict (see subclaim (u) below), and the prosecutor making numerous comments in argument about the invalidated financial gain special circumstance, all of which Montiel contend violate his constitutional rights to due process, a reliable sentence and to be free from double jeopardy. The California Supreme Court addressed the underlying claim on direct appeal, id., at 925-926, holding the striking of the financial gain special circumstance because it overlapped the robbery-murder special circumstance did not invalidate the jury's finding underlying the special circumstance, specifically that it included a finding that the murder was intentional, so the introduction of this evidence did not violate Montiel's constitutional rights. The state court held

Birchfield's failure to object does not undermine confidence in the judgment as the danger was minimal the jury would double-count any duplicative aspects of the special circumstances.

(h) Montiel asserts prosecutorial misconduct in cross-examining Montiel's mother, seeking to discredit her testimony regarding Montiel's drug use and its effects by questioning her failure to mention it during her testimony in 1979 when she had not previously been questioned about it and was only asked about a 1968 assault on Montiel's brother, and arguing to the jury her testimony was fabricated because the strategy in 1979 did not work.[35] The California Supreme Court addressed the underlying claim on direct appeal, Montiel II, 5 Cal. 4th at 926-928, finding no prejudice as there was no dispute about the main point of the testimony--that is, that Montiel was a serious, chronic drug user who was grossly intoxicated at the time of the murder, and that defense questioning advised the jury the witness had not been previously asked about Montiel's drug use. The state court held Birchfield's failure to object was not prejudicial as there was no dispute about Montiel's drug use and the misleading "sting" of the prosecutor's questioning was diminished by defense counsel's redirect examination that Montiel's mother had not previously been asked about his drug use.

(i) Montiel asserts prosecutorial misconduct in cross-examining Montiel's sister, seeking to discredit her testimony about Montiel's drug use by questioning her failure to mention it during her testimony in 1979 when she had not been asked about it, and comparing her testimony to Montiel's hearsay statement to Dr. Siegel. The California Supreme Court addressed the underlying claim on direct appeal, id. at 926-928, finding no prejudice as there was no dispute about the main point of the testimony, that is, that Montiel was a serious, chronic drug user who was grossly intoxicated at the time of the murder, and that defense questioning advised the jury the witness had not been previously asked about Montiel's drug use, plus holding there was no prejudice from Birchfield's failure to impeach her testimony about giving Montiel a PCP cigarette as inconsistent with Montiel's statements to Dr. Siegel, as the matter was highly collateral and Montiel's interview statements to Dr. Siegel were admissible. Id. at 928 n.22. The

[35] These allegations are the basis for the claim in Montiel's state habeas petition that Birchfield was ineffective for failing to object, question his mother to clarify, or call trial counsel Lorenz to explain. See subsection (v), supra.

state court held Birchfield's failure to object was not prejudicial as there was no dispute about Montiel's drug use and the misleading "sting" of the prosecutor's questioning was diminished by defense counsel's redirect examination that Montiel's sister had not previously been asked about his drug use. Id. at 927-28.

(j) Montiel asserts prosecutorial misconduct in cross-examining Montiel's father, seeking to impeach his testimony about Montiel's sad mood after his arrest by questioning if Montiel was "jeering and sneering" during the preliminary hearing when non-testimonial conduct is irrelevant (the defense objection was sustained, but no admonition was requested or given, without which Montiel argues the comment violated his due process, fair trial and reliable penalty rights), and arguing to the jury that evidence of Montiel's drug use was not brought up in 1979. The California Supreme Court addressed the underlying claim on direct appeal, holding a reasonable jury would understand by the trial court's ruling that the comment about Montiel's demeanor was not a proper question and should be disregarded, so there is no basis for reversal. Montiel II, 5 Cal. 4th at 931 and 927. The state court held Birchfield's failure to request admonition was harmless, id. at 931, and finding no prejudice from the failure to object to the prosecutor's argument about the delayed evidence of drug use, as there was no dispute about the main point of the testimony, that is, that Montiel was a serious, chronic drug user who was grossly intoxicated at the time of the murder, that defense questioning advised the jury the witness had not been previously asked about Montiel's drug use, and that the misleading "sting" of the prosecutor's questioning was diminished by Birchfield's redirect examination that Montiel's family had not previously been asked about his drug use. Id. at 927-28.

(k) Montiel asserts prosecutorial misconduct in cross-examining Salvatore Russo, a teacher at San Quentin, seeking to imply that Montiel's participation would make him eligible for early release, undermining the instruction that under life without parole he would not be released, compounding the error by eliciting testimony from correctional officer Norman Davis which implied Montiel would be paroled, and substituting the word "not" for "never" in the instruction: "the defendant will never be released from prison." The California Supreme Court addressed the underlying claim on direct appeal, id. at 931-32, holding that although the

prosecutor's comments to Russo were probably improper, Birchfield's failure to object or move to strike does not undermine confidence in the judgment as the comment was subtle and the jury was instructed that a death sentence would be carried out and a sentence of life without parole meant Montiel would not be released from prison and even if counsel should have objected, that omission does not undermine confidence in the judgment; contrary to Montiel's allegations, C.O. Davis did not say anything which suggested Montiel might be released from prison; and there is no evidence the jury speculated about the word substitution in the instructions. Montiel II, 5 Cal. 4th at 931-32.

(l) Montiel asserts prosecutorial misconduct by the admission of Dr. Cuttings' opinion during the cross-examination of Dr. Neurenberger, and the subsequent use of the opinion as substantive evidence, when the opinion was inadmissible as hearsay, irrelevant to mitigation, and privileged. The California Supreme Court addressed the underlying claim on direct appeal, id. at 923-925, holding the use of Dr. Cutting's opinion at penalty re-trial was not improper as a violation of privilege, since it was waived by Montiel placing his mental state in issue, and it did not violate hearsay or confrontation as it was proper cross-examination for testing a witness' credibility. Montiel II, 5 Cal. 4th at 923-925. The state court held Birchfield's failure to request a limiting instruction regarding evidence from Dr. Cutting's opinion was harmless as the prosecutor did not strongly argue it should be given independent consideration and it was unlikely the jury gave improper consideration to the substance of the evidence. Id. at 924.

(m) Montiel asserts prosecutorial misconduct in questioning Montiel about his expectation of a new trial, implying his good behavior would result in reversal, which Montiel argues diminished the jury's sense of responsibility in violation of Caldwell, 472 U.S. at 328-29; about his needs and wants, such as art supplies, books, TV, etc., being met in prison and introducing his daily routine as a suggestion of unfairness to the victim, which Montiel contends was improper as it was a situation over which he had no control; and about his religious beliefs, attempting to impeach Montiel by his disagreement with "an eye for an eye." The California Supreme Court addressed the underlying claim on direct appeal, Montiel II, 5 Cal. 4th at 932-934, finding that the prosecutor's attack on the sincerity of Montiel's rehabilitation efforts was

not improper, that arguing all Montiel's needs were met in prison was proper rebuttal to evidence of good prison behavior, and that questioning about Montiel's religious beliefs did not violate his right to freedom of religion or diminish the jury's sense of responsibility in sentencing. The state court held Montiel's claims that Birchfield was ineffective for failing to object to the prosecutor's questions were without merit. Id. at 932.

(n) Montiel asserts the prosecutor improperly impeached his father for failing to testify about Montiel's PCP use in 1979 when he was not asked about it nor was it brought to his attention (see subclaim j above), and implied that Montiel committed no violent acts between the 1973 theft of a TV and homicide in 1979 because he was incarcerated, when no evidence was in the record to support this conclusion. The California Supreme Court found no prejudice from Birchfield's failure to object to the prosecutor's argument about the delayed evidence of drug use, as there was no dispute about the main point of the testimony, that is, that Montiel was a serious, chronic drug user who was grossly intoxicated at the time of the murder, that defense questioning advised the jury the witness had not been previously asked about Montiel's drug use, and that the misleading "sting" of the prosecutor's questioning was diminished by Birchfield's redirect examination that Montiel's family had not previously been asked about his drug use. Montiel II, 5 Cal. 4th at 927-28. The California Supreme Court addressed the underlying incarceration claim, id. at 935-936, finding the prosecutor's argument was not precluded as it was a reasonable inference from evidence of 1973 burglary conviction that Montiel spent some time in custody, and Birchfield's failure to object or request an admonition was harmless as prosecutor's argument was not improper. Id. at 935.

(o) Montiel asserts the prosecutor improperly argued the absence of mitigating evidence counted as aggravation (Davenport error[36]) for factors (d) (extreme mental or emotion disturbance), (e) (victim participation or consent), (f) (moral justification or extenuation), (g) (duress or substantial domination) and (j) (accomplice or minor participant). Montiel argues the state court's failure to analyze the error, or to consider that Birchfield's failure to object

[36] People v. Davenport, 41 Cal. 3d 247, 290 (1985).

amounted to ineffective assistance of counsel, was prejudicial. The California Supreme Court addressed the underlying claim on direct appeal, id. at 936-938, holding there was no improper argument by the prosecutor regarding factors (d) and (f); that factor (j) was not subject to Davenport error as it had not been determined to be solely mitigating; and that despite the prosecutor's improper argument regarding factors (e) and (g), it was not likely the jury was misled as they were properly instructed about their sentencing duty. Since the state court held the error was harmless, there is no prejudice from Birchfield's failure to object.

(p) Montiel asserts the prosecutor's improperly impeached the testimony of his ex-wife, Rachel, with a prior conviction for selling heroin that was inadmissible. The California Supreme Court mentioned the underlying claim on direct appeal, Montiel II, 5 Cal. 4th at 930 n.26, but did not address it, but implicitly denied it by concluding that any arguable error was harmless due to the insignificance of the evidence. Since the state court held the error was harmless, there is no prejudice from Birchfield's failure to object.

(q) Montiel asserts the trial court erred in presenting to the jury the issue of whether Montiel used a firearm during the 1972 robbery of Foster's Freeze (that is, whether he had a handgun or a starter pistol), and that Birchfield was ineffective by asking a victim whether he fell to the ground to "duck the bullets" which assumed adverse facts about the existence of "bullets" not in evidence. The California Supreme Court addressed the underlying claim on direct appeal, Montiel II, 5 Cal. 4th at 917-918, holding the evidence was sufficient that Montiel brandished a handgun, and the question asked by Birchfield was brief and only suggested the witness ducked reflexively. The state court did not address the claim that Birchfield was ineffective for failing to object to presenting the use of firearm issue to the jury, but the holding the evidence was sufficient to find that Montiel brandished a firearm, id. at 917, is enough to find no prejudice from trial counsel's failure to object.

(r) Montiel asserts the trial court erred in presenting to the jury the issue of whether Montiel assaulted a peace officer while evading arrest for a theft at the fair in 1971. Montiel presented the underlying claim of trial error claim regarding the presentation of the assault issue to the jury in his Opening Brief on direct appeal, see Claim XXV at pages 152-155, so the

California Supreme Court's failure to address the claim is an implicit denial. The state court did address the related underlying claim of instructional error, id. at 916, holding the jury was instructed on the elements of assault stemming from violent resistance to arrest, and that there was ample evidence from which to infer criminal activity. The state court did not address whether Birchfield was ineffective for failing to object to presenting the issue to the jury, but the holding that the evidence was sufficient to find that Montiel was guilty of assault, id. at 916, is enough to find no prejudice from Birchfield's failure to object.

(s) Montiel asserts the erroneous admission of ambiguous testimony by Officer Leavell which Montiel alleges fails to prove elements of an assault while resisting arrest at county fair over 15 years earlier, and instead asserts suggested a struggle to escape, not an attempt to commit a violent injury (see subclaim (r) above). The California Supreme Court did not address the admission error or trial counsel's effectiveness on direct appeal, but held that there was no violation of due process, a fair trial or a reliable penalty as the jury was carefully instructed regarding the elements of assault and the evidence supports the finding of assault. Montiel II, 5 Cal. 4th at 915-916. The state court held that the evidence was sufficient to find Montiel guilty of assault, which is enough to find no prejudice from Birchfield's failure to object. Montiel further asserts the prosecutor improperly attempted to impeach the favorable 1986 testimony by Montiel's father, including his denial that Montiel attacked him and not remembering any prior unfavorable statements, with statements made to the responding deputy about the assault. The California Supreme Court did not address the underlying prosecutorial error claim, but the impeachment claim of Montiel's father was presented in Montiel's Opening Brief on direct appeal, see Claim XXVII at pages 160-162, and so was implicitly denied. The state court held that the failure of trial counsel to object to impeachment of Montiel's father did not undermine confidence in the judgment. Montiel II, 5 Cal. 4th at 930-931.

(t) Montiel asserts the trial court erred in failing to give an instruction specifying that Dr. Siegel's sources were subject to a limiting instruction and advising the jury that Dr. Siegel may only use Montiel's statements, which were made for purposes of diagnosis, as a basis for his opinion and not for the truth of the statements. The California Supreme Court addressed the

underlying claim on direct appeal, id. at 918-922, holding that admission of the evidence without limiting instruction did not undermine confidence in the judgment and that Montiel's statements from prior psychological reports, which were revealed to the jury by Dr. Siegel, were consistent with other statements by Montiel and not grounds for reversal. Montiel further asserts the prosecutor erred by using as substantive evidence in argument many of Montiel's statements which were made for purposes of diagnosis and relied on by Dr. Siegel. The California Supreme Court did not address the underlying subclaim, but it was presented in Montiel's Opening Brief on direct appeal, see Claim IX at pages 85-89, and so was implicitly denied. The state court, id. at 918, held that Birchfield's failure to object or request a limiting instruction was not incompetent so reversal is not warranted.

(u) Montiel asserts it was error for trial court to consider financial gain special circumstance and to state specific reasons on motion to modify (see subclaim (g) above), and the prosecutor made improper arguments on the motion to modify: that Montiel struck his pregnant sister-in-law Yolanda in the stomach when the evidence did not support that conclusion, that 35 of 36 jurors found for death, that the victim's family prayed for death, and that Montiel would be a danger in the future. The California Supreme Court addressed the underlying claim on direct appeal, Montiel II, 5 Cal. 4th at 945-946, finding the record suggests the trial court used "financial gain" as a synonym for robbery and gives no indication the court artificially inflated the seriousness of the crime by counting two special circumstance findings; that although the prosecutor argued evidence of the assault on Yolanda, the trial court's comments do not suggest it gave the assault any significant weight; that the statement about Montiel's dangerousness was based on evidence of his potential for future violence and not prohibited; and that even if the comments that 35 of 36 jurors found for death and the victim's family prayed for death were improper, there was no indication the trial court weighed that evidence in reaching its decision. Since the state court held these claims of error lack merit, there is no prejudice from Birchfield's failure to object.

(v) Montiel asserts the prosecutor improperly argued recent fabrication in questioning Hortensia's failure to previously testify about Montiel's hallucinations, delusions and drug use,

and in arguing that Montiel had to come up with different evidence since whatever he told Dr. Cutting in 1979 did not work. The California Supreme Court addressed the underlying claim on direct appeal, Montiel II, 5 Cal. 4th at 926-928, finding no prejudice from prosecutor's argument or from Birchfield's failure to object as there was no dispute about the main point of the testimony, that is, that Montiel was a serious, chronic drug user who was grossly intoxicated at the time of the murder, and that defense questioning advised the jury the witness had not been previously asked about Montiel's drug use, and the misleading "sting" of the prosecutor's questioning was diminished by defense counsel's redirect examination that Montiel's mother had not previously been asked about his drug use.

Montiel requests an evidentiary hearing on 20 of the 22 subclaims in Claim 26 (excluding subclaims (r) and (u)), unless the Warden concedes the facts are not in dispute or a determination is made that the Warden has failed to present sufficient evidence to refute the facts presented. Should a hearing be ordered, Montiel proposes to present the following evidence in support of this claim at an evidentiary hearing: testimony by Birchfield and from a Strickland expert asserting the ineffectiveness of counsel for the facts set forth in subclaims (a) through (f), (h) through (q), (s), (t) and (v).[37] In regards to subclaim (g), Montiel proposes to present testimony by Birchfield that he had no tactical reason for stipulating to judicial notice of the financial gain special circumstance but entered into it because of inadequate preparation;[38] testimony from a Strickland expert that it was standard practice, in light of the California Supreme Court's decision, to assert that the financial gain special circumstance be omitted at retrial; and testimony from a jury dynamics expert that the introduction of the financial gain special circumstance had a persuasive impact and that the prosecutor's "counting" references which referred to the additional special circumstance was extremely effective in persuading the jury to vote for death.

The Warden asserts these claims are largely duplicative of issues raised and rejected on direct appeal to the California Supreme Court, and are not argued in Montiel's points and

[37] Birchfield's declaration does not address the facts alleged in subclaims (b) and (n) through (t). No declaration from a Strickland expert was presented on state habeas.

[38] Birchfield's declaration does not make these admissions.

authorities. The Warden contends the California Supreme Court has already heard, considered, and denied these claims. The Warden argues that for the two claims the state court found where Birchfield might have had tactical reasons for his failure to object or request admonition, subclaims (b) and (e), the state court also found that Montiel was not prejudiced. See Montiel II, 5 Cal.4th at 914-915 and 920-921.

Montiel replies the individual instances of prosecutorial misconduct, judicial abuse of discretion, and various violations of his Sixth, Eighth, and Fourteenth Amendment rights should be considered both individually and cumulatively. Montiel asserts that allowing the jury to consider vague evidence in aggravation, like the assaults on police officers at the county fair in 1971 and on his brother, violated his right to due process. Montiel argues the Warden's reliance on the reasoning of the California Supreme Court is insufficient because that court failed to sufficiently consider the constitutional merits of the claims, frequently overlooking the underlying claim of ineffective assistance of counsel and failing to provide the heightened review required by the Constitution. Montiel also disputes that Birchfield had a tactical reason for failing to object or request admonition regarding subclaims (b) and (e). Montiel argues the finding by the California Supreme Court that Birchfield was not ineffective for failing to object to Dr. Siegel's recitation of Palacio's testimony, subclaim (b), was based on an incorrect assumption that Palacio was available to testify or that his testimony would have been admitted under an exception to the hearsay rule when there was no evidence to support either situation. As a result, Montiel urges that this Court is not bound by the state court's conclusions.

Montiel asserts the cumulative prejudicial impact of these errors by Birchfield make it clear his representation fell below the constitutionally required standard, despite the failure of the California Supreme Court to find the individual errors harmful. Montiel contends he has made a colorable claim that the trial court unconstitutionally failed to give limiting instructions for the various instances of inappropriately admitted evidence, and the state high court failed to consider whether limiting instructions were constitutionally required in order to prevent arbitrary and capricious sentencing and also failed to address whether Birchfield's failure to object was ineffective assistance of counsel. Montiel argues the California Supreme Court's implicit

conclusion that he received effective assistance of counsel was an unreasonable application of established United States Supreme Court precedent under Strickland.

The Warden replies Montiel's assertion that these claims are not entitled to deference because the California Supreme Court's denial of these claims was not supported by clearly enumerated grounds, fails to acknowledge that even in such a case, federal habeas review is not de novo, but only an independent review to determine whether the state court's decision was objectively reasonable. Further, the Warden observes that these claims were all raised on direct appeal and denied by the state court with reasoned analysis. The Warden concludes Montiel has failed to demonstrate the California Supreme Court's decisions are contrary to, or an unreasonable application of, clearly established United States Supreme Court precedent, and so is not entitled to relief.

Where a claim that has been adjudicated on the merits in state court, federal habeas relief may only be granted if the petitioner shows the state court's decision was "contrary to" or "involved an unreasonable application of" clearly established United States Supreme Court law, or that it was based on an "unreasonable determination of the facts." 28 U.S.C. § 2254(d)(1) and (d)(2); Richter, supra, 131 S. Ct. at 785. Under (d)(1), a state court decision is "contrary to" federal law if it fails to apply the correct controlling Supreme Court authority or comes to a different conclusion when presented with materially indistinguishable facts, and is an "unreasonable application" of Supreme Court law if the correct legal standard is identified but is applied to the facts in an objectively unreasonable manner. Cone, supra, 535 U.S. at 694. A challenge under (d)(2) requires the federal court to determine that a state court's factual finding was not merely wrong, but was objectively unreasonable in light of the evidence presented in the state court proceeding. Taylor, supra, 366 F.3d at 999; Andrade, supra, 538 U.S. at 75; Miller-El, supra, 537 U.S. at 340.

A petitioner bears the burden of showing the state court decision meets the requirements of 28 U.S.C. § 2254(d)(1) and (d)(2) on the basis of the record that was before the state court. Miller-El, 537 U.S. at 340; Pinholster, supra, 131 S. Ct. at 1398. The standard of § 2254(d) is difficult to meet and highly deferential, as it demands that state court decisions be given the

benefit of the doubt. Richter, 131 S. Ct. at 786; Visciotti, supra, 537 U.S. at 24-25. None of Montiel's allegations regarding the state court's denial of these claims are sufficient to meet the exceptions of § 2254(d)(1) or (d)(2), that the state court's decision was contrary to or involved an unreasonable application of clearly established United States Supreme Court law, or was based on an unreasonable determination of the facts.

The California Supreme Court on direct appeal denied on the merits the majority of the subclaims of ineffective assistance of counsel alleged in this claim, either by specifically addressing the effectiveness of trial counsel, or by finding no prejudice from the underlying claim which would defeat any claim that counsel was ineffective even if his performance was deficient. Three subclaims – (q), (r) and (s)(1) – were not addressed by the California Supreme Court on direct appeal, but the evidence of the underlying claims were sufficient to find Montiel guilty of brandishing a firearm and of assault, so that any failure of trial counsel was without prejudice.

As none of the alleged errors by trial counsel state a violation of constitutional law, there is no reason to grant habeas relief based on cumulative error. Rupe, supra, 93 F.3d at 1445.

Montiel has failed to overcome the findings of the state court that the errors complained of were without prejudice, so the alleged failures by Birchfield also are without prejudice. Claim 26 is denied an evidentiary hearing and is denied on the merits.

16. Claim 27

In Claim 27, Montiel contends that counsel introduced evidence adverse to Montiel because counsel did not adequately investigate and prepare witnesses called to testify.

Montiel asserts Birchfield failed to adequately investigate and prepare witnesses to testify. Birchfield admitted, in his declaration in support of Montiel's state habeas petition, that the first time he talked with Montiel's family was on the day they testified. See State Habeas Petition Exhibit 18, ¶ 50. When called as a defense witness at the penalty re-trial, Montiel's father denied Montiel had been delusional before the homicide and denied he had ever heard Montiel "talking about the devil." Both of these statements conflicted with testimony from Montiel's mother. Montiel's mother also revealed that Montiel had been released from jail just

one month prior to the homicide. Montiel further contends Birchfield's failure to interview and prepare other mitigation witnesses, including his ex-wife Rachel and her mother Helen Pacheco, resulted in inconsistent testimony, the impeachment of many witnesses, and prejudice to Montiel.[39]

Montiel argues there is no reasonable or tactical justification for Birchfield's failure to properly prepare witnesses, or to adequately investigate the facts of their intended testimony. Montiel asserts that had Birchfield adequately investigated, he would have been able to successfully exclude allegations of prior violence by Montiel. Montiel contends if the jury had heard consistent, favorable testimony which was devoid of references to prior episodes of violence, it is reasonable the jury would have reached a different verdict. Montiel states that under Strickland and its progeny, Birchfield's representation was ineffective, and the California Supreme Court's converse conclusion was contrary to established United States Supreme Court precedent.

Montiel proposes to present the following evidence in support of this claim at an evidentiary hearing: testimony by Birchfield that his failure to interview Montiel's parents resulted in not knowing what testimony would be presented nor its scope, that he had no tactical reason for this failure and it was caused by inadequate preparation[40]; testimony by Montiel's mother and father, and by Birchfield[41] that Birchfield did not interview Montiel's parents until the day they were scheduled to testify; and testimony from a Strickland expert that it was standard practice to thoroughly interview witnesses. The testimony by Montiel's parents and a Strickland expert were not presented to the state court.

The Warden only responds to the allegation regarding the testimony of Montiel's father denying that Montiel talked about the devil. The Warden argues Birchfield cannot be held responsible for every answer witnesses give and asserts that prejudice cannot be proved since

[39] Montiel admits in his reply he did not allege facts in his amended petition regarding Birchfield's failure to seek exclusion of the allegation he assaulted his sister-in-law Yolanda Estrada 16 years prior. Montiel now abandons this issue.

[40] Birchfield's declaration does not make these admissions.

[41] Birchfield does admit this in his declaration.

Montiel's mother testified she had heard Montiel make those remarks. The Warden contends the testimony of Montiel's father is not in direct conflict to the testimony from his mother, as the jury could reasonably infer Montiel had talked about the devil at times when his mother, but not his father, was present to hear him. The Warden asserts Montiel's mother's testimony was in fact bolstered by the testimony of his brother Antonio, who also said he heard Montiel talk about the devil.

The Warden observes the claim regarding the testimony of Montiel's mother which revealed that Montiel had been released from jail one month before the murder was considered and rejected by the California Supreme Court on direct appeal, and that Montiel has not mentioned this state court determination nor attempted to demonstrate it was unreasonable. The Warden contends Montiel has failed to show prejudice based on the introduction of adverse evidence, and the California Supreme Court's rejection of this claim was a reasonable application of Strickland.

Montiel admits in his reply that these allegations, standing alone, do not establish prejudice, but contends that they do establish prejudice when considered in conjunction with the numerous other incidents of ineffective assistance by Birchfield. As the other claims that Birchfield rendered ineffective assistance are without merit, see IAC analysis supra and infra, there cannot be any cumulative error. Claim 27 is denied an evidentiary hearing and is denied on the merits.

17. Claim 29

In Claim 29, Montiel asserts Birchfield failed to investigate and present facts in mitigation regarding Montiel's reasons for drug use, and thus failed to counter Dr. Siegel's characterization that Montiel was self-centered and seeking hedonistic pleasure, temporary euphoria and escape.[42]

Montiel contends readily available witness testimony and records instead show Montiel to be a chronically depressed individual, who after years of physical and psychological neglect

[42] The mitigation allegations supporting this claim are mainly taken from the social history prepared in 1993 by Gretchen White, Ph.D., in support of Montiel's first state habeas petition. See Exhibit 8.

and deprivation, turned to alcohol and drugs as the only relief from anxiety, pain and failure. Montiel asserts the available evidence in mitigation would have shown he was raised in an environment of abject poverty, domestic violence and paternal abandonment. Montiel alleges he was exposed to toxic chemicals while living next to a cattle rendering yard and while working in the fields and as a flagger for crop dusting, and that his parents' alcoholism contributed to the continual poverty and neglect of the children. Montiel asserts the inability of his parents to deal with the loss of their Mexican and Yaqui Indian heritage contributed to the chaos and isolation in the family, which was also exacerbated by his mother's belief in the supernatural and unconventional healing.

The Warden asserts Montiel has not demonstrated that counsel at either his guilt trial or penalty retrial were deficient, and even assuming Montiel shows that additional mitigating evidence was available, the failure to present this evidence does not warrant reversal. The Warden argues the mitigation evidence Montiel now states Birchfield should have presented would mainly have been cumulative to what was already presented, would not have countered the horrendous nature of the murder, and is speculative. The Warden contends the record shows that Birchfield's failure to present more witnesses at the penalty retrial was not a result of incompetence, and that he provided the jury with an overall picture of Montiel as someone who was remorseful and should be allowed to live out the rest of his life in prison. The Warden further contends some of the evidence now proffered by Montiel includes negative aspects from his childhood which were inconsistent with the overall defense strategy, or were solely related to various members of Montiel's family and were irrelevant. The Warden concludes the additional mitigation offered by Montiel on habeas would not have altered the result in his case, and might have elicited damaging rebuttal evidence.

The Warden asserts that the declarations by Montiel's proposed Strickland expert were not presented to the state court, and that Montiel should not be permitted to rely on them because he has failed to demonstrate he was not at fault for failing to develop that evidence in state court. The Warden argues that even if the evidence is properly before this Court, it does not fundamentally alter the nature of the claim presented in state court, and as such the state court's

adjudication is entitled to deference under the AEDPA and does not involve an unreasonable application of Strickland.

Montiel replies that without a legitimate explanation of why he had used and abused drugs, the jury was unlikely to accept the defense argument that his judgment and thinking was altered by PCP. Montiel asserts Dr. Siegel's testimony portrayed him as a self-centered, hedonistic, drug-using murderer, which only led the jury to view his PCP use as aggravating the crime. Montiel disputes that Birchfield made a tactical decision to advance the positive aspects of his childhood instead of the negative aspects, and argues the picture presented was materially inaccurate. Montiel contends that without a true picture of his childhood, there was no reason to justify his drug use other than pleasure and hedonism. Montiel contends Birchfield's presentation of his childhood as normal and happy was not a reasoned choice, as Birchfield failed to interview any of his family members until the day before they were called to testify.

Montiel argues the great majority of the information about his family would have been admissible as explanation of his background and character. Montiel asserts this information was the basis for Dr. White's opinion that he was a person without the tools for a successful life. Montiel contends neuropsychological testing like that performed by Dr. Watson (which supported the finding that Montiel suffers from cognitive and neuropsychological deficits and probable brain dysfunction), combined with testimony from a doctor with expertise in PCP intoxication, would have provided powerful evidence that Montiel could not evaluate the moral consequences of his conduct at the time of the murder.

Montiel and his family lived next to a rendering yard for ten years starting when he was three years old, Ex. 8, ¶¶ 28–30, which in conjunction to working in the fields and as a flagger for crop dusting[43], allegedly exposed him to toxic chemicals that caused his anxiety, depression, and mood fluctuation (see Petition, ¶ 730), and could have been reasonably inferred as an additional reason why he began inhaling toluene as early as age ten (in an alleged effort to relieve these symptoms), which lead to his use of other drugs. Montiel argues introducing

[43] No dates for Montiel's work in the fields or as a flagger are given in the social history.

evidence from his childhood would not have opened the door to prejudicial information, since evidence of his truancy and discipline problems would not have been surprising or disconcerting, and evidence of gang membership was inadmissible. Montiel contends he was never a member of a gang, observes that evidence of gang membership alone would not have been admissible so it would have been irrelevant, and further, it is not a factor under California Penal Code § 190.3 so its admission would have been excludable as prejudicial.

Montiel contends that had Birchfield adequately investigated and presented evidence of his background and childhood, it would have bolstered the opinion of Dr. Neurnberger, and there is a reasonable probability his life would have been spared. See Wallace v. Stewart, 184 F.3d 1112, 1118 (9th Cir. 1999) (remanding for evidentiary hearing upon finding a reasonable possibility a death sentence would not have been imposed if background information had been presented); Bean, supra, 163 F.3d at 1081 (holding counsel's failure to conduct a background investigation and advise experts of the results of neuropsychological testing undermined confidence in the penalty verdict). Montiel asserts independent review of the record is proper since the California Supreme Court did not provide a reasoned explanation for the denial of this claim. Montiel argues such a review will establish that relief is warranted under the standards imposed by the AEDPA.

Montiel points to the following evidence about his character, childhood and background, which was developed and presented during state habeas proceedings, as support for Claim 29.

> Montiel's drug use began at about ten years old when he began sniffing glue, which continued until he was 16 or 17. His parents knew what was happening (although at trial they denied they knew Montiel used drugs prior to age 18), and that he was missing school, but they were not able to address the problem. Montiel was routinely advanced to the next grade in school even though he did poorly, resulting in his failing the ninth and tenth grades with Ds and Fs, and dropping out of school during the second semester of tenth grade. Montiel has little memory of school after the third or fourth grade because he was sniffing glue. Neuropsychological testing indicates Montiel has significant learning disabilities and has severe attention and concentration deficits in the mildly retarded range, conditions of which glue sniffing can be a contributing cause. Montiel also began developing headaches when he was 10 or 11, which may have been related to pesticide exposure as his mother associated them with warm weather since he usually had them while working in the

> fields in the summer.
>
> After dropping out of school, Montiel began drinking more alcohol, sniffing less glue, and using seconal and Benzedrine. His younger brothers were using heroin. Montiel began dating his future wife, Rachel Estrada, when he was 16. He was drinking alcohol every day and working as a bus boy, and was actively abusing LSD, mescaline, "whites," and seconal. He tried to enlist in the military to serve in Vietnam, but was rejected. He was married when he was 18 and Rachel was 15, as she was pregnant.
>
> Montiel's marriage was marked by arguments, and repeated separations and reconciliations (although Rachel testified they lived together for three years after their marriage, until they separated in 1970). Their first child, Julie Ann, was born July 7, 1967, after a separation of several months. Their second child, Sandra[44], was born 1 ½ years later, but she died of a heart defect at two weeks old. Their third child, Richard Jr., was born in 1970. Montiel and Rachel separated for the last time in 1971. During their last two separations, Montiel began to use heroin heavily. Rachel also became a heavy heroin user after the birth of their son.
>
> In the year following the breakup of his marriage, Montiel became fully addicted and was hospitalized at least two times for drug overdoses. Montiel was committed to the Civil Addict Program at the California Rehabilitation Center ("CRC") in July, 1972. Between then and the murder in January, 1979, Montiel spent the majority of his time incarcerated on drug or drug-related offenses, with his longest period of parole lasting 10 months in 1977.
>
> During the years of his marriage and subsequent incarcerations many of Montiel's close friends and relatives died, contributing to his sense of hopelessness. His best friend, Inez Salazar, died in a vehicle accident in 1969; his daughter Sandra died from a heart defect in 1969; his older brother Raymond died in 1975, allegedly from cirrhosis caused by heavy drinking following the breakup of his marriage; and his younger brother Manuel was murdered in 1977.
>
> Montiel began using PCP at the end of 1976 during a two month parole from CRC. By 1977, he was smoking PCP a couple of times a week, and was noted to talk about magic, the supernatural, and being in "a different world." After his release in December, 1978 from the Kern County Jail, Montiel immediately returned to daily, heavy use of alcohol and PCP, which continued until the time of the homicide in January, 1979.

Declaration of Dr. Gretchen White, Exhibit 8.

Montiel asserts it was standard practice in 1986, and in fact was an obligation, for capital trial attorneys to use psychosocial histories as part of the defense when there were potential issues of drug or alcohol use. A psychosocial history provides information to bridge the cultural

[44] Sandra's name was provided by the testimony from Rachel and from Montiel's father. See 86 RT Vol. VI:221 and 354.

gap and enable the jury to understand why substance abuse should mitigate the offense and justify a sentence of life. Montiel alleges counsel had a duty to conduct a reasonable investigation into these areas in order to be able to make informed decisions about how best to represent him, and that Birchfield failed to develop or use such a history in his defense. Montiel contends that had Birchfield performed a reasonable investigation, evidence would have been uncovered to refute the prosecution's claim that Montiel had a tendency to be violent and was violent even when not intoxicated.

Montiel proposes to present the following evidence, which was presented to the state court during his habeas proceedings, in support of Claim 29 at an evidentiary hearing: testimony by Hortensia, Inez Salazar,[45] and Dr. White regarding symptoms of Montiel's depression during life-long drug abuse, childhood living conditions during childhood of severe poverty and malnutrition, parental absence due to work, father uninvolved, abusive, and repeatedly abandoned the family;[46] testimony by Dr. White regarding Montiel's psychosocial history, long standing alcohol and drug use, the contribution of many deaths to his depression and substance abuse, and the significant detrimental impact on his mental health from his mother's supernatural beliefs; testimony by Hortensia and Ismael Hernandez regarding Montiel's exposure to pesticides during his childhood;[47] testimony from Dr. Watson regarding brain dysfunction caused by prolonged abuse of toluene, Montiel's functioning at borderline intelligence, impairment by significant learning disabilities and very severe attention deficits, that the tests performed on Montiel were available in 1986, that failure in school leads to loss of self-esteem, depression and substance abuse; and school records showing poor attendance and academic performance, supporting the conclusions of Drs. White, Watson and Nuernberger by demonstrating social and

[45] Dr. White states in the social history that Inez Salazar died in 1969. Ex. 8 at & 160. A declaration from Ismael Hernandez, a childhood friend, was submitted on state habeas, which asserts Ismael and Montiel sniffed glue and drank alcohol together daily, and that he observed Montiel had rashes on his arms and irritated eyes while they were working in the fields. State Habeas Exhibit 13.

[46] A declaration from Hortensia, which discussed Montiel's childhood, as well as Dr. White's social history, were presented to the state court on state habeas.

[47] Hortensia and Ismael Hernandez alleged in their declarations presented on state habeas that Montiel was exposed to pesticides during childhood.

mental problems during Montiel's childhood.[48]

Montiel also seeks to present the following evidence, which was not presented to the state court, in support of Claim 29: testimony by Birchfield that he did not interview Montiel regarding his drug use, that he did not investigate or request the preparation of a psychosocial history, that he had no tactical reason for not doing so, that he would have presented information from Montiel's psychosocial history if he had it, that his attempt to show Montiel as a happy, normal child resulted from his failure to investigate;[49] testimony by Richard Sr. and Montiel regarding symptoms of Montiel's depression during life-long drug abuse, childhood living conditions during childhood of severe poverty and malnutrition, parental absence due to work, father uninvolved, abusive, and repeatedly abandoned the family; testimony by Dr. Watson regarding Montiel's exposure to pesticides during his childhood[50]; testimony from an agricultural neurotoxic expert about the adverse health effects, including anxiety, depression and mood fluctuations, from neurotoxic exposure, and the importance of exposure as a factor in causing long-standing substance abuse; testimony from Rachel Estrada (Montiel's ex-wife) that Montiel was engaged in self-destructive behavior during their marriage, was actively abusing drugs, and got worse toward the end of the marriage;[51] testimony from a Strickland expert that it was standard practice to order a psychosocial history and of his opinion on the reasonableness of Birchfield's presenting Montiel as a happy and normal child in light of the evidence of his troubled history; testimony from a jury dynamics expert that Dr. Siegel's testimony about Montiel's hedonistic drug use was a critical factor in sentence, that a psychosocial history would have mitigated the impact of Dr. Siegel's testimony and made it more likely to view Montiel as someone deserving of mercy; and his own testimony that he was not a member of the Mexican Mafia.

[48] Montiel's school attendance records are only provided from Kindergarten through 3rd grade, which is prior to the time when he states he began sniffing glue.

[49] Birchfield's declaration does not make these admissions.

[50] A declaration by Dr. Watson was presented on state habeas, but it did not comment about pesticide exposure.

[51] Rachel's testimony at the penalty retrial stated that Montiel was not using drugs while they were together. No declaration making these contrary statements was presented on state habeas.

Montiel argues, like in Wiggins, supra, 539 U.S. 510, the California Supreme Court's rejection of this claim involved an unreasonable application of clearly established United States Supreme Court law. Montiel asserts Birchfield's investigation of his family background was extremely superficial, and did not meet the obligations embraced by Wiggins that capital counsel explore all avenues leading to facts relevant to the penalty phase. Montiel contends the real facts – of his father's drinking binges, beatings of his mother, and abandonment of the family, combined with their dire poverty and his mother's belief in magical remedies and her inability to cope – explained the reasons for his substance abuse and the history of his ruined life. Montiel asserts that had the jury heard the full story, there is a reasonable probability his life would have been spared.

The Warden contends, unlike counsel's investigation in Wiggins, Birchfield's investigation into potential mitigation was reasonable in scope. Birchfield chose to emphasize the positive aspects of Montiel's early life and to argue he was not inherently violent, and his substance abuse problem was the cause of his violent behavior on the date in question. The Warden observes that in pursuing this theory, Birchfield called a total of nineteen witnesses who testified about Montiel's pattern of substance abuse starting as a teenager and to incidents of Montiel hallucinating and speaking incoherently for weeks before the murder. The Warden argues that even if it is determined Birchfield inadequately investigated Montiel's substance abuse, Montiel has failed to demonstrate he suffered resulting prejudice. The Warden contends Montiel's evidence is far less compelling than that in Wiggins as there is no evidence that Montiel was physically or sexually abused, he was not removed from his home and placed in foster care, and there is no allegation Montiel has diminished mental capacity, and Birchfield did elicit testimony that drug abuse is a cause and result of, and that Montiel suffered from, life-long depression.

An ineffective assistance claim has two components: A petitioner must show that counsel's performance was deficient, and that the deficiency prejudiced the defense. Strickland, 466 U.S. at 687. The question is whether counsel's deficient performance renders the result of the trial unreliable or the proceedings fundamentally unfair." Lockhart v. Fretwell, supra, 506

U.S. at 372. Deficient performance falls below an objective standard of reasonableness, which is defined in terms of prevailing professional norms. Strickland, 466 U.S. at 688. A reviewing court must determine the prevailing professional norms, and where additional mitigation would have been cumulative of evidence which was presented and would not have outweighed the aggravating evidence of the circumstances of the crime and defendant's criminal history no prejudice is shown. Bobby v. Van Hook, 558 U.S. 4, 7-9, 12-13 (2009) (per curiam). Even assuming Birchfield was deficient in failing to investigate and present evidence of Montiel's reasons for his drug use – that he was a chronically depressed individual, who after years of physical and psychological neglect and deprivation, turned to alcohol and drugs as the only relief from anxiety, pain and failure, and that he was raised in an environment of abject poverty, domestic violence and paternal abandonment – it is not likely that the failure to present such evidence would have prejudiced the defense sufficient to undermine confidence in the outcome of the trial.

Montiel cites to Wiggins for support for this claim. In that case, the mitigating evidence counsel failed to discover and present was powerful. Wiggins experienced severe privation and abuse while in the custody of his alcoholic, absentee mother and physical torment, sexual molestation, and repeated rape while in foster care. His time spent homeless and his diminished mental capacities further augment his mitigation case. The Court held that Wiggins had the kind of troubled history relevant to assessing a defendant's moral culpability. Wiggins, 539 U.S. at 535; Penry v. Lynaugh, 492 U.S. 302, 319 (1989) (defendant's background and character are relevant because of society's long-held belief that defendants who commit criminal acts which are attributable to a disadvantaged background are less culpable). Given the nature and extent of the abuse Wiggins suffered, there is a reasonable probability that a competent attorney who was aware of his history would have introduced it at sentencing and that a jury confronted with such mitigating evidence would have returned with a different sentence. Wiggins, 539 U.S. at 2542-2543. Instead, the only significant mitigating factor the jury heard was that Wiggins had no prior convictions, and he had no record of violent conduct the State could have introduced to offset the powerful mitigating narrative. Id. at 2543. The Supreme Court held that had the jury been able

to place Wiggins' excruciating life history on the mitigating side of the scale, there is a reasonable probability that at least one juror would have struck a different balance. Thus, the available mitigating evidence, taken as a whole, might well have influenced the jury's appraisal of his moral culpability. Id. at 2543-2544.

In contrast, Montiel's available mitigating evidence is less compelling, as he has no history of "severe privation and abuse" – there is no evidence he was sexually molested or raped, placed in foster care, or was homeless. Additionally, Montiel does have a history of prior violent incidents to counter the mitigating evidence, including a prior felony – second degree robbery in 1972 of Foster Freeze – and numerous other violent incidents – a scuffle and stabbing of his brother Antonio in 1968; an argument or fight with his sister-in-law Yolanda in1969; a theft at the Kern County fair in 1971, where he resisted arrest and made threats to the officers; and a misdemeanor burglary in 1973, to which Montiel pled guilty, involving the theft of a television from Anthony Ramirez. From the time Montiel was committed to the Civil Addict Program at the California Rehabilitation Center in July 1972, until the murder in January 1978, the majority of Montiel's time was spent incarcerated on drug or drug-related offenses, with the longest period in those more than five years that he was out of prison being ten months in 1977.

Montiel also relies on Caro v. Woodford, 280 F.3d 1247, 1255 (9th Cir. 2002), where counsel's non-strategic failure to investigate brain damage despite knowing of exposure to neurotoxicants was prejudicial. The Ninth Circuit remanded Caro's case for an evidentiary hearing, holding that counsel's nonstrategic failure to investigate Caro's brain damage, despite the known risk of neurotoxicants, constituted deficient performance under Strickland, and that a showing of brain damage would demonstrate prejudice to establish his ineffective assistance of counsel claim. Caro, 280 F.3d at 1250 (emphasis added). Three experts testified at an evidentiary hearing before the District Court that Caro suffered from brain damage caused by his exposure to neurotoxicants and/or his personal background. The experts concluded Caro suffered from "organic frontal brain damage," "structural and functional brain damage," and "persistent central nervous system and peripheral damage." The fact that Caro had a reasonably high IQ, high marks in school, satisfactorily performed in the Marines, negative blood results for

pesticides, and had normal psychiatric and neurological evaluations both before and after trial, was not found by the experts to be inconsistent with a finding of brain damage, especially frontal brain damage. Following the presentation of the evidence, the District Court ruled that the record irrefutably established Caro suffered brain damage as a result of his exposure to toxic pesticides as well as his personal background, relying on Caro's presentation of expert opinions by three prominent, well-respected witnesses that he suffers from frontal lobe brain damage caused by head injury, exposure to toxic pesticides and the combination of both factors, and that the Warden did not present any witnesses or evidence to the contrary.

The Ninth Circuit upheld the District Court's findings that Caro's trial counsel provided ineffective assistance by failing to investigate and present evidence of Caro's brain damage, even though he was aware of Caro's extraordinary exposure to pesticides and toxic chemicals. Similarly, trial counsel did not present testimony at penalty of the effects of the severe physical, emotional, and psychological abuse Caro was subjected to as a child, including several instances of head injuries, and failed to present testimony of the detrimental impact such abuse had on Caro's brain. The Court found the omitted evidence to be compelling, especially in light of the fact that the evidence of premeditation was not particularly strong. The omitted evidence included expert testimony explaining the effects of Caro's psychological defects on his behavior, and that his behavior was physically compelled, not premeditated or due to a lack of moral control.

Caro's experts testified he suffered from brain damage caused by his exposure to neurotoxicants, his personal background, or some combination of the two. First, it was determined that Caro suffered from organic brain damage, finding five indications of abnormality in the frontal lobe of Caro's brain (where three or more abnormalities are a reliable indication of damage). These indications of abnormality included: (1) "mixed dominance" (preference for eye and foot opposite to that of hand preference), (2) a "suck" reflex (abnormal if found in adult), (3) a "snout" reflex (abnormal if found in adult), (4) paratonia (inability to relax limbs), and (5) apraxia (frontal lobe or subcortical dysfunction; inability to execute learned purposeful movements). Also significant for the diagnosis of frontal brain damage were Caro's

history of pica (a symptom of a neurological or psychiatric disorder, which is usually only found in children and is manifested by the ingestion of non-nutritive substances, such as large quantities of dirt); head injuries; abuse by his mother and father; poisoning by Clorox; and epileptic-type seizure, which he had as an adult.

Second, it was determined that Caro suffered from both structural and functional brain damage based on: his chronic and acute exposure to cholinesterase inhibitors (used as pesticides); his exhibition of many of the autonomic symptoms of such exposure, including myosis of the eye, nausea, diarrhea, frequent and forced urination, constant thirst, and muscle twitching; indicators of depression, including suicide threats; memory loss and other disassociative events; his mother's anemia; poverty-stricken childhood; history of physical, sexual, and emotional abuse; and childhood injuries. It was also opined that Caro suffered from a genetic abnormality, reflected in his family's history of alcoholism and depression, which interacted with his exposure to neurointoxicants to increase the risk of brain dysfunction.

Finally, it was concluded that Caro suffers "persistent CNS [central nervous system] and peripheral damage," due to acute and chronic exposure to neurotoxicants, citing Caro's early exposure as a child of farm workers, his work as a flagger, and his work at FMC Chemical Corporation. Caro's multiple exposures to pesticides, from in utero right through infancy to adulthood would "cause transient and permanent neurological, psychiatric, and behavioral damage."

In contrast, as noted above in Claim 25, Montiel's evidence of brain damage is significantly less serious than the evidence in Caro. Dr. Watson found Montiel's test results were supportive of "cognitive and neuropsychological deficits and probably brain dysfunction," and his functioning to be "at the level of borderline intelligence, . . . impaired by significant learning disabilities and very severe attention/concentration deficits (in the mildly retarded range)." State Habeas Exhibit 12, 1993 declaration of Dr. Watson, ¶ 10. Dr. Watson further found Montiel's impairments "compromise his ability to hold and process information, to understand cause and effect relationships in the context of a rapidly changing sequence of events, and to engage in complex problem solving which requires logical, systematic thinking. As a

result, . . . he has rather poor planning skills, is vulnerable to misinterpreting his environment with consequent manifestations of inappropriate and ill-modulated behavior, and has difficulty in making judgments that require deliberation and consideration of abstract consequences." Id. at ¶ 13. Dr. Watson's opinion of Montiel's intellectual deficits and brain dysfunction was based on his abuse of toluene, not on pesticide exposure. Id. at ¶ 11.

Birchfield did present evidence in mitigation, including testimony by Montiel's family and friends about his drug use and the effect it had on him, and attempted to have the prosecution's expert provide support for the theory that Montiel's ability to premeditate was impaired by his drug use. See Claim 24, supra, pages 85-86. Even if Birchfield had obtained an expert who would have testified consistently with Dr. Watson's opinion, it is not likely, in light of the limited evidence of brain injury, Montiel's less compelling background, and his history of violence that the jury would have determined that the evidence of mitigation outweighed the evidence in aggravation and have imposed a life sentence. Claim 29 is denied an evidentiary hearing and is denied on the merits.

19. Claim 30

In Claim 30, Montiel contends that counsel failed to present evidence of consistently good adjustment to confinement.

At the penalty retrial, Montiel presented evidence that he was a model prisoner both while on death row and while in Kern County awaiting retrial. The prosecutor suggested Montiel modified his usual improper or violent behavior in order to improve the outcome of his penalty retrial. Montiel asserts Birchfield was ineffective for failing to present rebuttal evidence showing Montiel's consistent adjustment to custody and non-violent history. Montiel asserts the following evidence was readily available and could have been presented: a 1972 parole agent report that Montiel was "highly cooperative" while incarcerated; that Montiel was "a mainstay in the group sessions" while in CRC in 1972; that during a disturbance in November of 1972, Montiel influenced peace and harmony in his dorm and the institution; that Montiel had been active in ethnic representation; that Montiel sought to help others and not just benefit himself; that Montiel had been commended for voluntary work and was in leadership of the disciplinary

crew; that Montiel had "good institutional behavior and response" while in CRC in 1976; and that Montiel's program response was adequate and positive while at Tehachapi. Montiel contends the presentation of this evidence would have convinced the jury Montiel did not present a significant risk if sentenced to life.

Montiel proposes to present the following evidence in support of this claim at an evidentiary hearing: testimony by Birchfield that he had no tactical reason or informed basis for failing to present history of good institutional adjustment, and that there was no persuasive evidence Montiel was a member of the Mexican mafia;[52] his own testimony that he was not a member of the Mexican mafia, that he intervened during a riot at CRC in 1972 to prevent further violence, was assigned to informational team following the riot and received a commendation for his participation, and that he did not discuss these things with Birchfield because he was not asked about them (no declaration was presented on state habeas stating this); testimony from parole agent C. Cordova that Montiel was highly cooperative while at the county jail;[53] testimony by CRC counselor F. O'Donnell that Montiel was a mainstay of group sessions, instrumental in maintaining peace and harmony during a racial disturbance in 1972, and good-natured with an altruistic character;[54] testimony from a Strickland expert that it was standard practice to demonstrate positive institutional adjustments and that Birchfield should have investigated and presented mitigation from Montiel's institutional history (not presented on state habeas); and testimony from a jury dynamics expert that had Birchfield presented evidence of good institutional adjustment, the jury would have been persuaded Montiel was not a significant disciplinary or safety risk if sentenced to life and would have been less likely to sentence him to death. The Strickland and jury dynamics opinions were not presented on state habeas.

The Warden argues Birchfield's failure to present evidence of Montiel's earlier custodial history was based on tactics to avoid mentioning Montiel was a member of the Mexican Mafia, a

[52] Birchfield's declaration does not make this admission.

[53] This is stated in the November 2, 1972 report in Exhibit 2 (submitted in support of both State and Federal Petitions).

[54] These conclusions are stated in the 3/26/73 report contained in Exhibit 2.

violent prison gang. The Warden observes Montiel's counsel from the guilt trial filed a motion in limine to prohibit the prosecution from introducing any evidence about his gang membership, and that Victor's interview with detectives and Montiel's CRC records contain allegations that he was associated with the Mexican Mafia. The Warden further argues the evidence Montiel states should have been presented would have opened the door to presentation of negative evidence of his adjustment, showing numerous disciplinary actions. The Warden asserts that whether or not Montiel actually belonged to the Mexican Mafia, Birchfield could have reasonably concluded it would have been disastrous for the jury to hear this evidence.

The Warden asserts Montiel's declaration submitted in support of this claim was not presented to the state court, and that Montiel should not be permitted to rely on it because he has failed to demonstrate he was not at fault for failing to develop that evidence in state court. The Warden argues, that if the evidence is properly before this Court, it does not fundamentally alter the nature of the claim presented in state court, and as such the state court's adjudication is entitled to deference under the AEDPA and does not involve an unreasonable application of Strickland.

Montiel replies there is no evidence Birchfield knew of the allegations of gang membership, as he waited until the last moment to prepare for trial and it is extremely unlikely he obtained Montiel's institutional records. Montiel asserts again that he was never a member of the Mexican Mafia, that there is no evidence of his membership, and that his institutional records merely refer to possible gang membership. Montiel contends had the prosecutor attempted to rebut evidence of good institutional adjustment with evidence of gang membership, Birchfield could have blocked the rebuttal at an in limine hearing. Montiel argues even if the evidence of gang membership had come before the jury, the negative value of such evidence would have been outweighed by the fact that he always did well in custody and had shown strong leadership in attempting to restore the peace before and after a major prison riot.

Montiel argues that since penalty phase jurors weigh moral, not legal, culpability, the power of such evidence is enormous. In (Terry) Williams, supra, 529 U.S. at 398, the counsel's failure to present mitigation including commendations awarded to Williams for helping break up

a prison drug ring and for returning a guard's wallet were found prejudicial under Strickland. Montiel contends he did far more than Williams, and the California Supreme Court's determination there was no prejudice from trial counsel's failure to present mitigation was objectively unreasonable.

The sentencer in a capital case cannot be precluded from considering any relevant mitigating evidence. Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978). Testimony that a defendant proffers regarding his past good behavior while incarcerated might serve as a basis for a sentence less than death, so such evidence may not be excluded from the sentencer's consideration. Skipper v. South Carolina, 476 U.S. 1, 4-5 (1986).

Montiel must show both deficient performance and actual prejudice resulting from the deficiency to prevail on a claim of ineffective assistance of counsel. Birchfield did present the testimony of four witnesses (a guard, a teacher and the psychiatrist from San Quentin, and a guard from the Kern County jail) who stated Montiel exhibited good behavior while in prison. Birchfield's failure to additionally present the CRC documents may have been tactical, as the documents contain negative information, including a reference to Montiel's gang affiliation. Ex. 2 to Federal Petition, 6/19/75 Referral to Outpatient Status (Montiel's adjustment to institutional life below average); 6/6/77 Report to Narcotic Addict Evaluation Authority (Montiel stabbed while in county jail, anonymous information indicated Nuestra Familia ordered him killed because of his association with Mexican Mafia); 6/10/77 Case Conference (same); 7/6/77 Closing Summary, CRC Corona (Montiel's brother Manuel was killed by what appeared to be Nuestra Familia gang members); 7/21/77 Letter to Presiding Judge of Kern County Superior Court (Montiel had four stays in Civil Addict Program for 1,805 days, and was previously reviewed for exclusion due to burglary and sales and use of narcotics, now excluded for gang association). In addition to presenting evidence of Montiel's mental state and degree of intoxication, Birchfield also presented the testimony of various family members that Montiel's family life was happy, and that he was well behaved and a good student until he chose the wrong friends and became involved with drugs and alcohol in high school. Further, the prosecutor did not argue that Montiel would be dangerous in the future, but argued that Montiel had behaved

well in prison in order to make a good impression on retrial.

In (Terry) Williams, supra, 529 U.S. 362, trial counsel failed to investigate and present evidence in mitigation which included Williams' commendations for helping to crack a prison drug ring and for returning a guard's wallet, as well as testimony that he was "least likely" to be dangerous and seemed to thrive in a structured environment, as well as extensive records describing Williams' nightmarish childhood, the imprisonment of his parents for criminal neglect, severe and repeated beatings by his father, his removal from home and one abusive foster home, and that Williams was "borderline mentally retarded" and didn't advance beyond sixth grade. Even though the background evidence contained some negative information (two juvenile commitments for aiding and abetting larceny when he was 11, pulling a false fire alarm when he was 12, and breaking and entering when he was 15), the decision not to introduce the voluminous amount of evidence that did speak in Williams' favor was not a tactical decision, but an omission due to the lack of preparation by trial counsel. Whether or not the omissions were sufficiently prejudicial to have affected the outcome, they demonstrated that trial counsel failed to conduct a thorough investigation into Williams' background. 529 U.S. at 1514-1515.

Unlike (Terry) Williams, Birchfield did present evidence of Montiel's good adjustment in prison through the testimony of prison employees, who were more likely to be viewed as unbiased by the jury than other witnesses. Even if Birchfield's failure to present the CRC documents was deficient performance, it could not have resulted in prejudice as similar evidence was before the jury. Further, the CRC documents do contain references which contradict Montiel's contention, and show he did not always have a good adjustment to institutional life. Claim 30 is denied an evidentiary hearing and is denied on the merits.

20. Claim 32

In Claim 32, Montiel contends that counsel failed to move to recuse the district attorney.

Montiel contends Kern County has a long history of excluding members of Montiel's race (Hispanic and Native American) from civic affairs and from fair, equal treatment in the criminal justice system. Claim 32 incorporates the allegations and arguments from Claim 31. See also Exhibits 16 and 26, declarations of H. A. Sala, Esq.; Exhibit 25, declaration of David J.

Rivera, Esq.; Exhibit 27, declaration of Stanley Simrin, Esq.; and Garceau v. Calderon, F-95-cv-5363, Claim H. Montiel seeks leave to file excerpts from People v. Sixto, Kern County Case No. 22566, addressing systematic exclusion. Montiel asserts it was within the ability of both Lorenz and Birchfield, and was their duty, to move for recusal of the Kern County District Attorney's office. Montiel alleges counsels' failure to do so deprived him of a fair guilt trial and a reliable determination of penalty by risking that the outcome of his trials were affected by impermissible considerations of race.

Montiel proposes to present the following evidence in support of this claim at an evidentiary hearing: testimony by attorneys David Rivera, H.A. Sala and Stanley Simrin[55] regarding the long history of excluding Hispanics from civic affairs in Kern County and that the District Attorney's office engaged in prejudicial charging, negotiations, disparate treatment of victims based on race and had a pattern and practice of striking Hispanics from jury venires; and testimony by Lorenz and Birchfield that they have numerous years of experience in Kern County and knew or should have known about Hispanic animus pervasive in Kern County;[56] and testimony from a Strickland expert that a competent Kern County practitioner would have moved to recuse the District Attorney's office in light of the discriminatory pattern and practice of animus against the same race as the defendant. No evidence of these assertions, except the declaration of Mr. Sala, was presented on state habeas.

The Warden asserts the declarations submitted in support of this claim were not presented to the state court, and that Montiel should not be permitted to rely on them because he has failed to demonstrate he was not at fault for failing to develop that evidence in state court. The Warden argues that if the evidence is properly before this Court, it does not fundamentally alter the nature of the claim presented in state court, and as such the state court's adjudication is entitled to deference under the AEDPA and does not involve an unreasonable application of Strickland.

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[55] Mr. Rivera stated that Kern County prosecutors in 1987 had a practice of striking Hispanics from juries; Mr. Sala stated that from 1983-1990, Kern Co. prosecutors treated Hispanic and African-American defendants unfairly as compared to Caucasian defendants, as well as striking Hispanics from juries; and Mr. Simrin stated that in his 25 years of practice in Kern Co. (up to 1996), prosecutors had a practice of striking Hispanics from juries.

[56] Birchfield's declaration does not make this admission.

The Warden contends the recusal of a prosecutor, or of an entire prosecutorial agency, requires showing a conflict exists which would render a fair trial unlikely. The stringent two-part test established in California for granting a recusal motion requires a showing that "the circumstances of the case evidence a reasonable possibility that the District Attorney's office may not exercise its discretionary function in an evenhanded manner," and that the conflict is so grave as to render fair treatment throughout the defendant's criminal proceedings unlikely. California Penal Code § 1424. The Warden asserts Montiel cannot show he was prejudiced by the failure of his counsel at guilt or penalty to move for recusal. The Warden contends Montiel has not claimed, and even if so claimed cannot adequately support, that his case was affected by the absence of Latinos from positions of authority in the county and the District Attorneys' office. Additionally, the Warden asserts Montiel has not attempted to show that his guilt trial was affected by the alleged practice of the Kern County District Attorney's office to discriminatorily challenge jurors based on race, and that any allegations of discriminatory challenges from the penalty retrial were supported by valid, non-discriminatory reasons as discussed in Claim 4(C).

Montiel replies the presence of discriminatory bias in the Kern County prosecutor's office tainted every stage of his trial, and justifies recusal based on a violation of his constitutional rights. Montiel argues the submitted declarations of three lawyers who regularly practice in Kern County are sufficient to substantiate a colorable claim, and that at a minimum the Warden's opposition presents a factual dispute which at the least requires an evidentiary hearing. Montiel contends the denial of this claim by the California Supreme Court was an unreasonable application of Strickland, and the lack of a reasoned analysis by the state court requires independent review.

Montiel must show both deficient performance and actual prejudice resulting from the deficiency to prevail on a claim of ineffective assistance of counsel.

> California courts have visited the issue of recusing state prosecutors a number of times. For recusal to be ordered, "the conflict must be of such gravity as to render it unlikely that defendant will receive a fair trial unless recusal is ordered." People v. Conner, 34 Cal. 3d 141, 147, 193 Cal. Rptr. 148, 666 P.

2d 5 (1983) (citing Calif. Penal Code § 1424).

Matter of Grand Jury Investigation of Targets, 918 F. Supp. 1374, 1378-79 (S.D. Cal. 1996) (footnotes omitted). See also U.S. v. Mapelli, 971 F.2d 284, 287-88 (9th Cir. 1992) (two AUSAs disqualified for exposure to defendant's immunized testimony, but entire office not disqualified); People v. Conner, 34 Cal.3d 141, 148 (1978) (entire felony division of Santa Clara District Attorney's office disqualified because one of the prosecutors was shot at by the defendant, and talked about the incident with over half of his co-workers); People v. Lepe, 164 Cal. App. 3d 685, 689 (1985) (entire District Attorney's office disqualified where District Attorney himself had previously represented the defendant and had the power to hire, evaluate, promote and fire the deputies under him).

Montiel's allegations of county-wide animus against, and exclusion of, Hispanics are insufficient to show such a grave conflict existed so that recusal of the entire Kern County District Attorney's office was justified. Despite Montiel's assertions to the contrary, the submitted declarations in support of this claim do not state a colorable claim, and the Warden's position to that effect does not create a factual dispute which requires an evidentiary hearing. Montiel must show both deficient performance and actual prejudice resulting from the deficiency to prevail on a claim of ineffective assistance of counsel. As there is no showing which establishes prejudice from this claim, it cannot form a basis for ineffective assistance by counsel. Claim 32 is denied an evidentiary hearing and is denied on the merits.

B. Prosecutorial Misconduct Claims

Montiel contends that habeas relief is warranted due to prosecutorial misconduct. Claims 8, 21, 28 are premised upon the issue of prosecutorial misconduct. "A prosecutor's actions constitute misconduct if they 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" Wood v. Ryan, 693 F.3d 1104, 1113 (9th Cir. 2012) (quoting Darden v. Wainwright, 477 U.S. 168, 181 (1986)). "The appropriate standard of review for such a claim on a writ of habeas corpus is the narrow one of due process, and not the broad exercise of supervisory power." Id. (quoting Darden, 477 U.S. at 181). "On habeas review, constitutional errors of the 'trial type,' including prosecutorial misconduct, warrant relief only if

the 'had substantial and injurious effect or influence in determining the jury's verdict.'" Id. (quoting Brecht v. Abrahamson, 507 U.S. 619, 637-38 (1993)).

1. Claim 8

In Claim 8, Montiel contends that the prosecutor relied upon an inadmissible confession during trial.

Montiel alleges that at the time of his arrest he was intoxicated on PCP to the extent that he had no memory of what happened prior to his arrest. In response to questions from cellmates, Montiel contends he explained his understanding of the charges against him, that the authorities "said" he had committed certain crimes.

Montiel alleges the following facts regarding the trial testimony from one of his cellmates, Michael Palacio, a.k.a. Michael Castro (hereafter "Palacio"[57]):

1. Palacio was acting at the request of law enforcement as he talked to them before questioning Montiel, made a deal with law enforcement in exchange for the information, testified against Montiel in return for dismissal of pending felony marijuana charges against him, and falsely testified that no officer asked him to elicit a confession from Montiel.
2. Palacio received information about the charges against Montiel from a newspaper article prior to questioning Montiel.
3. Palacio, after requested to by the prosecutor, failed to disclose Montiel appeared "high" at the time of their conversations.
4. Palacio was told by his parole officer he would suffer "consequences" if he failed to testify.

Montiel asserts the following actions by the prosecutor were misconduct: (a) the failure to disclose Palacio was acting at the request of law enforcement while he was questioning Montiel; (b) false and misleading testimony was presented that Palacio spoke to Montiel before

[57] The California Supreme Court referred to this witness as Michael Palacio in both direct appeal opinions, as does Montiel in the federal petition. The declaration in support of the amended petition, dated March 17, 1995, is signed Michael Castro, but states he is also known as Michael Palacio. Ex. 24. This order will use "Palacio" to maintain uniformity with the petition and state court opinions.

he had contact with law enforcement, that Palacio contacted law enforcement versus law enforcement contacting Palacio, and that Palacio did not receive information about the case before he talked to Montiel; and (c) the failure to prove that Montiel's statement was voluntary in light of his intoxication.

Montiel contends that had the prosecution disclosed the above information, Lorenz could have successfully moved for suppression of the alleged admissions as the product of an unlawful government interrogation and as involuntary under then-existing California law. The alleged admissions would have then been unavailable as a basis for the clinical determination of Montiel's mental state. Montiel argues Lorenz's failure to investigate and object to Palacio's testimony was deficient performance and was prejudicial.

Montiel asserts the conclusions reached by the state courts were unreasonable determinations of the facts, and the admission of his statements were contrary to established United States Supreme Court precedent which unduly prejudiced his trial since it was the only evidence of criminal intent being formed prior to the murder.

Montiel proposes to present the following evidence in support of this claim at an evidentiary hearing which was not presented to the state court: testimony by Palacio, Detective Orman and Detective Clendenen that Palacio made a deal to extract information from Montiel and to testify in exchange for the dismissal of pending felony charges, that they first met after Palacio was summoned from his cell by the detectives, and the detectives asked Palacio to investigate whether Montiel remembered facts about the crime; testimony by Palacio that prior to his testimony at Montiel's trial his parole agent threatened negative consequences would result should he fail to testify, that the District Attorney's office told him not to mention Montiel's PCP use or that Montiel was still under the influence while in his cell, that his prior statements to detectives are not a fair and accurate representations of his interaction with Montiel, that Montiel did not talk until after he was prompted, that he did not ask the jailer to set up a meeting between him and detectives; and Montiel's own testimony that he first spoke with Palacio after his arraignment, and was still recovering from PCP use at the time.

The Warden asserts Palacio has renounced critical portions of the 1995 declaration upon

which Montiel relies. Also, the Warden argues the transcript of Palacio's January 17, 1979 interview directly conflicts with his 1995 declaration, as during the interview Palacio related a number of details about the Ante killing he could only have learned from Montiel. The Warden further contends Montiel's allegation that he was unable to make a reasoned and intelligent waiver of his rights and confess to Palacio is contradicted by the fact that Montiel did exercise his right to remain silent on January 16, 1979, when given his Miranda rights by detectives. Miranda v. Arizona, 384 U.S. 436, 444 (1966). The Warden argues that generally, statements by defendants to cellmates are admissible, unless government agents deliberately elicited the incriminating statements after the right to counsel attached. Massiah v. United States, 377 U.S. 201, 206 (1964); United States v. Henry, 477 U.S. 264, 267 n.3 (1980); Kuhlmann v. Wilson, 477 U.S. 436, 459 (1986) (Massiah violation requires some action beyond mere listening which is designed to deliberately elicit incriminating remarks). The Warden argues that Montiel fails to offer any evidence beyond what was presented on state habeas, that evidence refuting Palacio's 1995 declaration has been presented, and that the record shows the facts Palacio said Montiel revealed were not part of the police reports at the time, but only confirmed later. The Warden contends even accepting Montiel's allegations that law enforcement deliberately used Palacio to elicit an unknowing confession, the admission of the confession was harmless beyond a reasonable doubt, since even without the confession the evidence was substantial of Montiel's intent to steal and to kill, and that he premeditated and meaningfully reflected on the consequences of his actions.

Montiel contends the prosecution violated Brady v. Maryland, 373 U.S. 83, 87 (1963), by instructing Palacio not to disclose information about PCP and Montiel's symptoms. Montiel asserts Palacio's trial testimony was prejudicial since it was the only evidence that he obtained a knife after seeing the money in the victim's shirt, which undoubtedly persuaded the jury Montiel was in control and capable of premeditation. Without this evidence, Montiel argues it is reasonably probable the jury might have given him the benefit of the doubt on his diminished capacity claim.

Montiel moves to strike the Warden's Supplemental Exhibit 4 to supplemental opposition

to first amended petition, a report of a December 19, 1999 interview of Palacio by special agent Juan Morales, on the ground that it consists of hearsay and contains information which would not be admissible at a hearing under Rule 56(e) of the Federal Rules of Civil Procedure. Alternatively, if this evidence is considered, Montiel contends it establishes the existence of disputed facts which require resolution at an evidentiary hearing.

This claim was presented to the state court in Montiel's state habeas petition (claim IX) ; the court summarily denied it on its merits.

Under Brady, "the suppression by the prosecution of evidence favorable to an accused [Brady evidence] violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Brady, 373 U.S. at 87. There are two general types of Brady evidence: knowing use of perjured testimony, and failure to disclose exculpatory evidence. United States v. Agurs, 427 U.S. 97 (1976); United States v. Bagley, 473 U.S. 667, 678 (1985).

Presentation of false evidence violates due process and requires a new trial. Mooney v. Holohan, 294 U.S. 103, 112 (1935). This is so even where the prosecution does not solicit the false information but only allows it to go uncorrected, Napue v. Illinois, 360 U.S. 264, 269 (1959), irrespective of the good or bad faith of the prosecution. Brady, 373 U.S. at 87. To justify a new trial, the false evidence must be material, i.e., reasonably likely to affect the judgment of the jury. Id. "The principal [underlying Brady] is . . . avoidance of an unfair trial to the accused." Id. The knowing use of perjured testimony is material "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." Agurs, 427 U.S. at 103. This is equivalent to the Chapman v. California, 386 U.S. 18, 24 (1967) harmless error standard. Bagley, 473 U.S. at 679-80 n.9

The failure to disclose exculpatory and impeachment evidence favorable to the defense 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. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." Bagley, 473 U.S. 682. Bagley materiality is not a sufficiency of the evidence test. Kyles v. Whitley, 514 U.S. 419, 435 (1995).

"The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." Id. at 434.

Montiel's proffered testimony by Palacio alleges that his parole agent threatened negative consequences if he failed to testify at Montiel's trial; that the District Attorney's office told Palacio not to mention Montiel's PCP use or that Montiel was still under the influence while in his cell; that his prior statements to detectives are not a fair and accurate representation of his interaction with Montiel; that Montiel did not talk until after he was prompted; and that he did not ask the jailer to set up a meeting between him and detectives. These statements are contrary to Palacio's trial testimony, and are based on a declaration made in 1993 (but not signed until March, 1995). Ex. 24. The Warden submitted an investigative report by DOJ Investigator Juan Morales, of a December 13, 1999, interview with Palacio and counsel for the Warden where Palacio refutes the statements in his 1993/1995 declaration and affirms his trial testimony. Suppl. Ex. 4. In the 1999 interview, Palacio did admit Montiel was high on something, possibly PCP, when he first was brought into the cell, but asserts that despite this Montiel was still able to recall details about the murder. Id., at pg. 2-3. The Warden filed a transcript of the interview between Palacio and Sheriff's Investigators Orman and Clendenen on January 17, 1979, which supports the testimony Palacio gave at trial and relates Montiel's statement that he used the money taken from Ante to buy heroin and clothes, but does not say that Montiel was still high when he was brought to the jail cell. Suppl. Ex. 2.

Palacio admitted at trial that he read a newspaper article about Montiel's crime, but denied that he read the article before his first conversation with Montiel. 79A Vol.II:288. The prosecutor offered the relevant newspaper articles to show that some of the information Palacio testified to was not contained in the articles. A redacted transcript of the articles was submitted to the jury. Id., at 297-302; 79A CT Vol.II:244. This issue was presented to, and resolved by, the jury.

Palacio did not testify at the preliminary hearing that Montiel was under the influence of PCP when he talked with him, but stated Montiel said he used the money taken from Mr. Ante to

buy a "spoon of heroin" and some clothes. 79A CT Vol.I:124, 126. At trial Palacio only testified Montiel used the money to buy clothes. 79A RT Vol.II:285. Even if Palacio had testified that Montiel appeared to be intoxicated on PCP at the time they talked, it is not reasonably likely to have affected the judgment of the jury.

Palacio related in the 1999 interview with the AG and DOJ investigator, that he initially thought he would only have to testify at Montiel's preliminary hearing, but was later told if he did not testify at the trial the agreement to dismiss the marijuana charges would be invalidated. Palacio asserts that he testified truthfully at the preliminary hearing and the trial. Suppl. Ex. 4. The proffered evidence is insufficient to undermine confidence in the outcome of Montiel's trial.

The only evidence indicating that Palacio's questioning of Montiel was at the request of law enforcement is from the 1993/1995 declaration, which is contradicted by Palacio's initial interview with law enforcement, his testimony at both the preliminary hearing and the trial, and his 1999 interview. Palacio's testimony at trial stated he initiated contact with the detectives, that he did not talk to anyone from the sheriff's office prior to his first conversation with Montiel and he did not question Montiel but asserts instead that Montiel volunteered the information. 79A Vol.II:287. The transcript of Palacio's January 17, 1979 interview with Sheriff's Investigators Orman and Clendenen affirms that Palacio initiated the contact with law enforcement. Suppl. Ex. 2. In light of the evidence presented at trial, and of the prior consistent statements from Palacio that he initiated contact with law enforcement and his later reiteration of that fact, the 1993/1995 declaration, attached as Ex. 24 to the amended petition, is insufficient to establish that perjured testimony was presented, to establish misconduct by the prosecutor, or to undermine confidence in the outcome of Montiel's trial.

Montiel has failed to show the recantation by Palacio in his 1993/1995 declaration is credible or undermines confidence in the outcome. Claim 8 is denied an evidentiary hearing and is denied on the merits.

2. Claim 21

In Claim 21, Montiel contends that the prosecutor improperly used peremptory challenges based upon race.

During jury selection, the prosecutor exercised peremptory challenges against two women with Hispanic surnames, following which the defense objected. The trial judge said he could see a reason for the challenge of Elizabeth Gutierrez, but the reason to challenge Sonja Gomez was less clear. The prosecutor responded he was excusing jurors who had no strong feelings on the death penalty. The judge noted there were about 11 others who had said the same thing and the prosecutor was "treading on dangerous ground." '86RT Vol. III:473-74. The trial judge found the defense failed to make a showing of systematic exclusion because there was a reason to excuse Ms. Guiterrez. The judge denied the motion, stating that at least the prosecutor had a reason other than race. Montiel claims that contrary to the prosecutor's stated reason, Juror Renz, Juror Reinelt, Juror Sanchez, Juror Semas and Mrs. Guimarra, all had views on the death penalty as neutral as, or weaker than, Mrs. Gomez's view. Montiel asserts the trial judge committed clear error in the belief that more than one impermissible challenge must occur before systematic exclusion is shown.

The California Supreme Court denied this claim on the merits, holding that although the trial court mistakenly believed only multiple discriminatory exclusions were forbidden, the ultimate denial of Montiel's motion was proper as the prosecutor's statement about Mrs. Gomez's views on the death penalty was revealed by further discussion to be a genuine, non-discriminatory reason for the challenge. Montiel II, 5 Cal. 4th at 909-11.

Montiel contends the merits of the claim of systematic exclusion of Hispanics was not resolved, despite the state court addressing this issue on direct appeal, as the incorrect legal standard was used, the state court's conclusion is not fairly supported by record, and there was no full and fair hearing. Montiel argues the state court imposed the incorrect standard from Wheeler, supra, 22 Cal. 3d 258, that required him to show a "strong likelihood" of discrimination in order to establish a prima facie case of racial bias, instead of the "inference" of discrimination standard from Batson, supra, 476 U.S. 79. Montiel asserts that where the state court uses the incorrect standard, the rule of deference under the AEDPA does not apply, see Fernandez v. Roe, 286 F.3d 1073, 1077 (9th Cir. 2002), and the claim should be reviewed de novo.

Montiel proposes to present the following evidence in support of this claim at an

evidentiary hearing which was not presented to the state court: testimony by Birchfield that he did not know the proper legal standard under Wheeler, that he did not recognize the prosecutor failed to excuse non-Hispanics with equal or stronger positions as that stated for the excusal of Ms. Gomez, that he had no tactical reason not to renew the objection prior to swearing in the jury;[58] testimony from a Strickland expert that it was standard practice to be familiar with the relevant voir dire legal standards, and that the failure to renew an objection fell far below the standard of representation in the community; and testimony by prosecutor Andrew Baird that his stated reason for excusing Ms. Gomez was inconsistent with her answers, since he did not excuse non-Latino jurors with similar answers.[59]

The Warden asserts the trial judge's finding of no purposeful discrimination was a factual finding entitled to deference. The Warden concludes the trial judge correctly resolved the issue, as the California Supreme Court found on direct appeal. The Warden disputes Montiel's assertion that, based on a comparative analysis of other jurors, the prosecutor's reason for excusing Ms. Gomez was pretext for discrimination, and argues the other jurors cited stated stronger support for the death penalty than did Ms. Gomez.

The Warden agrees with Montiel that the state court's application of the incorrect legal standard requires de novo review of this claim, but asserts such review is limited to the question of whether there was a prima facie showing of bias. See Paulino v. Castro, 371 F.3d 1083, 1090-92 (9th Cir. 2004). The Warden does not dispute Montiel made a prima facie showing that one or more jurors were excluded on the basis of race, but argues there was no prejudice because the prosecutor offered a race-neutral explanation and the trial court ultimately ruled the prosecutor did not intentionally discriminate against Hispanics. The Warden asserts this is a factual finding which relies largely on an assessment of the prosecutor's credibility and is entitled to deference since it is fairly supported by the record. Hernandez v. New York, 500 U.S. 352, 364-365 (1991).

Montiel replies that other jurors did not state stronger support for the death penalty than

[58] Birchfield's declaration does not make these admissions.

[59] No declaration is submitted from Mr. Baird making these admissions.

did Ms. Gomez, and the trial court's ruling was based on a mistaken view that the discriminatory excusal of a single juror was permitted. Montiel asserts the trial court failed to make an appropriate finding under Wheeler by failing to make a proper comparative analysis with respect to non-Hispanic jurors who were not excluded, thus misapplying the legal standard. See Burks v. Borg, 27 F.3d 1424, 1428 (9th Cir. 1994). Montiel argues the comparative analysis of struck and remaining jurors establishes the prosecutor's race-neutral reason was a pretext for discrimination, and the trial court's failure to make a determination whether there was purposeful discrimination undermines the statement that the prosecutor had a reason other than race for excusing Ms. Gomez. Montiel also contends trial counsel was ineffective in failing to make a proper and successful Wheeler objection, and in failing to renew the Wheeler objection prior to the jury being empaneled.

Montiel asserts the finding by the California Supreme Court that the trial court believed the prosecutor had a non-discriminatory purpose in challenging Ms. Gomez was inherently flawed and is not entitled to a presumption of correctness. Montiel contends the analysis by the state court was a mixed finding of fact and law and thus subject to de novo review. Assuming arguendo that the state court did make a historical finding of fact, Montiel argues it would not qualify for a presumption of correctness since there was not a full and fair hearing, the finding was not fairly supported by the record, the correct legal standard was not applied, and the prosecutor's stated reason was not analyzed in light of the voir dire examination.

Montiel further contends the California Supreme Court reviewed this claim under People v. Johnson, 47 Cal. 3d 1194 (1989), which has been ruled an incorrect legal standard and not deserving of deference. See Burks v. Borg, 27 F.3d at 1428. Lastly, Montiel alleges that had Birchfield reasserted an objection at the conclusion of jury selection, a comparative analysis would have uncovered the obvious pretext in the prosecutor's stated reasons for the challenge.

The Warden contends Burks held that as long as a trial judge made findings unimpeded by an erroneous reading of the law, later appellate affirmance of those findings under an incorrect standard does not diminish the deference due the trial court's findings. Id. The Warden asserts that in this case, the trial court did engage in a comparative analysis of the

prospective jurors' responses, so the finding as to the prosecutor's good faith is entitled to deference.

In Burks, 27 F.3d at 1427, a disagreement with California over Batson rulings was examined. The Ninth Circuit held that a trial court's finding could be overturned where a comparison between the answers given by prospective jurors who were struck and those who were not fatally undermines the prosecutor's credibility. United State v. Chinchilla, 874 F.2d 695 (9th Cir. 1989). The California Supreme Court held that, for purposes of both Wheeler and Batson, though the Superior Court may compare responses, the appellate court should not conduct such an inquiry on its own, and instead should "give great deference to the trial court's determination that the use of peremptory challenges was not for an improper or class bias purpose." Johnson, supra, 47 Cal. 3d at 1221. Although the United States Supreme Court has not expressly ruled on the role of comparative analysis on appellate review, they recently reaffirmed that the AEDPA imposes a highly deferential standard and demands that state court decisions be given the benefit of the doubt. Felkner v. Jackson, 562 U.S. ___, 131 S. Ct. 1305 (2011) (per curiam). The Court found no basis to overturn the state court's denial of Jackson's Batson claim where the trial court credited the prosecutor's race-neutral explanations, that decision was upheld on appeal after a careful review of the record, and the appellate court's decision was plainly not unreasonable. Id. at 1307.

Excluding venire members from a trial jury based on the prospective juror's race violates the Equal Protection Clause of the Constitution. Batson, supra, 476 U.S. 79. Analysis of a Batson claim involves three steps: first, the defendant must establish a prima facie case of purposeful discrimination "by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose," id. at 93-94; second, once the defendant has made out a prima facie case, the burden shifts to the prosecution to come forward with a race-neutral explanation for the strike, Johnson v. California, 545 U.S. 162, 168 (2005); and third, the trial court then must determine whether the defendant has established "purposeful discrimination" by the prosecution. Purkett v. Elem, 514 U.S. 765, 767 (1995) (per curiam). The AEDPA imposes a highly deferential standard when evaluating state court Batson rulings, demanding those

decisions be given the benefit of the doubt. Jackson, supra, 131 S. Ct. at 1307 (review of a Batson issue that turns on an "evaluation of credibility" is entitled to "great deference").

Montiel's objection that the California Supreme Court used the wrong, and higher, standard from Wheeler regarding the establishment of a prima facie case fails. When examining this claim on appeal, the California Supreme Court viewed the trial court's inquiry of the prosecutor's justification for challenging Gomez as an implicit finding that Montiel stated a prima facia case. See Montiel II, 5 Cal. 4th at 910 n.8. Since the incorrect standard was not imposed on direct review, the California Supreme Court's determination affirming the trial court's "sincere and reasoned effort" to evaluate the prosecutor's good faith and subsequent acceptance of the nondiscriminatory explanation for the strike, id. at 910-911, is granted deference under the AEDPA.

Montiel's further assertion that the appropriate standard of review on habeas is de novo, since the California Supreme Court's finding was a mixed question of law and fact, is incorrect under the AEDPA. The California Supreme Court denied this claim on the merits on direct review, and that determination is entitled to deference unless it was unreasonable. Landrigan, supra, 550 U.S. at 473. Here, the trial court performed comparative analysis of Gomez's voir dire and the voir dire of other jurors, and found the prosecutor's explanations of his actions to be race-neutral. Montiel fails to state a claim of error under Batson. The California Supreme Court's denial of this claim on the merits is not unreasonable.

Montiel has not shown that the state court's denial of this claim is contrary to federal law, an unreasonable application of Supreme Court law, or an unreasonable determination of the facts. Claim 21 is denied an evidentiary hearing and is denied on the merits.

3. Claim 28

In Claim 28, Montiel contends that the prosecutor introduced inaccurate and misleading opinion testimony from Dr. Siegel.

Montiel contends Dr. Siegel's testimony that Montiel had a "potential for violence" and was violent even when not intoxicated, was inaccurate and misleading. Montiel asserts the prosecutor failed to correct this information even though he knew or should have known it was

inaccurate. Further, Montiel asserts Birchfield was ineffective for failing to present evidence to refute Dr. Siegel's testimony and support the defense that Montiel was not violent when not under the influence of narcotics, denying him a fair and reliable penalty determination.

Montiel proposes to present the following evidence in support of this claim at an evidentiary hearing: CRC records showing violent behavior only while Montiel was under the influence of drugs/alcohol (these records were presented to the state on habeas); testimony by Birchfield that he had evidence contradicting the testimony of Dr. Siegel and had no tactical reason not to present it or to object to the misleading testimony by Dr. Siegel; testimony from a Strickland expert that it was standard practice to refute the testimony of prosecution witnesses which negatively impact the defense theory and Birchfield's failure to present evidence contravening Dr. Siegel's testimony was ineffective assistance; and testimony from a jury dynamics expert that had evidence contradicting Dr. Siegel's testimony about Montiel's violent nature been presented, the jury would have been more inclined to grant Montiel a life sentence. The CRC records and the ineffective assistance of counsel claim were presented on state habeas, but the declaration from Birchfield does not make these admissions. No declaration from a Strickland or a jury dynamics expert stating the above assertions was presented in the state or federal proceedings.

The Warden argues Dr. Siegel's testimony was not inaccurate or misleading regarding Montiel's potential for violence as the testimony related information gathered from interviews with Montiel and others, as well as what was included in psychological reports. The Warden contends even if Dr. Siegel's testimony was improper and either the prosecutor or Birchfield should have taken steps to rectify the error, Montiel cannot show prejudice since other evidence was presented at the penalty retrial of five episodes of violence from Montiel's past, three of which did not include any indication of intoxication, which subsumed any inaccuracy by Dr. Siegel. The Warden asserts Montiel has failed to state a prima facie claim for relief based on Dr. Siegel's testimony at the penalty retrial.

Montiel replies the evidence contradicts Dr. Siegel's blanket assertion that Montiel had a potential for violence even when not intoxicated, observing a report states that while sober he is

personable and very easy going. Montiel contends Birchfield failed to cross-examine Dr. Siegel on these contradictory passages in the documents Dr. Siegel relied on. Montiel argues the admission of Dr. Siegel's testimony was misconduct because it discussed the substance of another expert's opinion, instead of merely reviewing that opinion in forming his own opinion. Montiel asserts the admission of this evidence violated state law and his Sixth Amendment right to confrontation, and that Birchfield failed to object. Montiel argues the California Supreme Court's determination on direct appeal that Birchfield's failure to object was not prejudicial under Strickland was erroneous, since the claim includes not only the failure to object but also the failure to counteract the evidence by cross-examining Dr. Siegel with statements that Montiel was not violent when not intoxicated. Montiel asserts that when this claim is considered in light of Birchfield's overall failure, prejudice is satisfied.

Deliberate deception of a court and jurors by the presentation of known false evidence, including the failure to correct false evidence, is unconstitutional, and requires a finding of materiality, as required under Brady, supra, 373 U.S. at 87. Giglio v. United States, 405 U.S. 150, 153-154 (1972). Prejudice from Brady or Giglio error requires a showing of a reasonable probability the result of the trial would have been different if the evidence had been disclosed. Strickler v. Greene, 527 U.S. 263, 282, 289 (1999).

Even assuming that Dr. Siegel's testimony about Montiel's potential for violence was not supported by the evidence, the question is whether that testimony was prejudicial. Evidence was presented at the penalty retrial of five episodes of violence by Montiel from 1968 through 1973. 86RT Vol. V:3-9, 33-35, 35-43, 43-47, 48-60, and 93-98. Law enforcement officers testified regarding three of these events, stating there was no evidence observed indicating that Montiel was intoxicated. See id. at 42-43, 57-60, and 98. In light of this evidence, it is not possible that Dr. Siegel's testimony, even if erroneous, was prejudicial.

Prejudice from Strickland error requires a showing that counsel's deficient performance prejudiced the defense such that without counsel's unprofessional errors the result of the proceeding would have been different. 466 U.S. at 694. The lack of prejudice from Dr. Siegel's testimony defeats the claim of Birchfield's failure to object to Dr. Siegel's testimony or to

attempt to counteract the testimony, as even if assumed to be deficient, it cannot undermine confidence in the outcome.

Montiel has not shown that Dr. Siegel's testimony prejudiced the outcome of his trial, or that Birchfield's failure to object or attempt to counter that testimony undermines confidence in the outcomes. Claim 28 is denied an evidentiary hearing and is denied on the merits.

C. Remaining Claims

1. Claim 31: Denial of Right to Neutral Venue and Fair Cross-Section Representation

In Claim 31, Montiel contends that he was denied the right to a neutral venue and a fair jury.

Montiel claims Kern County has a long, well-recognized history of excluding members of Montiel's race (Hispanic and Native American) from participation in civic affairs and from fair treatment equal to whites, particularly in the criminal justice system. Montiel asserts these facts support the claims:

In 1978, Hispanics comprised about 25% of the population of Kern County, but only 0.3% of the bench. There were no Hispanics on the Board of Supervisors or the City Council, nor among any of the department heads in county government. In 1979, 20 of the 36 elementary schools were segregated, in violation of state standards. Over 30% of the students were minorities, while only 10.8% of the teachers were minorities. About 22% of the students were Hispanic, as compared to 5.5% Hispanic teachers. In 1986, only 6.2% of school administrators and 5.4% of teachers in Kern County were Hispanic. None of the top real estate sellers in 1979 or 1986 were Hispanic.

The official community reflected the general community, including the attitude of excluding non-whites from equal access to civil rights and liberties. This exclusion reflected the community's animus toward Hispanics, particularly farm worker families who were considered to be a different and lower class of people. They were geographically and socially separated by the majority, attended de facto separate schools, and did not participate in the social, civil and religious activities of the white community. This animus was pervasive throughout law

enforcement. In 1975, the California Supreme Court found the UFW made a prima facie showing that Kern County law enforcement, including the District Attorney's office, had unlawfully practiced invidious discrimination against farm workers attempting to collectively organize. Murcia v. Municipal Court, 15 Cal. 3d 286, 293 (1975).[60]

a. *Change of Venue*

Montiel asserts the pretrial publicity in this case was substantial and made it clear Montiel was a Hispanic charged with a capital offense.

A criminal defendant is entitled to an impartial jury. Irvin v. Dowd, 366 U.S. 717, 722 (1961). Where prejudicial publicity makes seating an impartial jury impossible, a motion for change of venue must be granted. Harris v. Pulley, 885 F.2d 1354, 1360 (9th Cir. 1988); Gallegos v. McDaniel, 124 F.3d 1065, 1070 (9th Cir. 1997). Prejudice of the venire may be presumed or actual. On habeas review, the district court must make an independent review of the record to determine if prejudice existed which denied the petitioner a fair trial. Jeffries v. Blodgett, 5 F.3d 1180, 1189 (9th Cir. 1993).

"Prejudice is presumed when the record demonstrates that the community where the trial was held was saturated with prejudicial and inflammatory media publicity about the crime." United States v. Sherwood, 98 F.3d 402, 410 (9th Cir. 1996). Prejudice is rarely presumed "because 'saturation' defines conditions found only in extreme situations." Jeffries, 5 F.3d at 1189. "It is not all publicity that causes prejudice to a defendant, but only that publicity that operates to deprive the defendant of a fair trial." United States v. Bailleaux, 685 F.2d 1105, 1108 (9th Cir. 1982) (overruled on other grounds).

To establish actual prejudice, the defendant must demonstrate that the jurors exhibited "actual partiality or hostility that could not be laid aside." Harris v. Pulley, 885 F.2d at 1363. A defendant is entitled to an impartial jury, but that does not mean a jury completely ignorant of the facts. United States v. Flores-Elias, 650 F.2d 1149 (9th Cir. 1981); see also Sherwood, supra, 98 F.3d at 410 (actual prejudice not demonstrated despite 96% of jurors admitting they were aware

[60] The showing made in Murgia was sufficient to grant a motion for discovery. No subsequent opinion was published regarding the results of the granted discovery or of the disposition of the discrimination lawsuit.

of the case and 60% knowing the victim was kidnapped, where empaneled jurors stated they could be impartial).

Montiel contends the publicity before his trial, and before his penalty re-trial, was the type where a court could not believe the answers of jurors and would be compelled to find bias as a matter of law, since the headlines and articles were not factual or neutral, but directly discussed Montiel's guilt. Montiel claims the nature and extent of the publicity was reasonably likely to prejudice the community against him. Montiel alleges neither Lorenz nor Birchfield investigated or made motions seeking a change of venue, or conducted a thorough voir dire to demonstrate that an unbiased jury could not be selected, failing to meet the existing standards for legal representation.

Montiel contends the failure of his counsel to seek a change of venue was compounded by the court's failure to act to protect Montiel's right to a fair trial and reliable penalty determination, and that the prosecutor's discriminatory use of a peremptory challenge against Mrs. Gomez and Ms. Guiterrez (see Claim 21) is evidence of the unconstitutional systematic exclusion of Hispanics from Kern County juries.

Montiel proposes to present the following evidence in support of this claim at an evidentiary hearing which was not presented to the state court: testimony by attorneys David Rivera, H.A. Sala[61] and Stanley Simrin regarding the long history of excluding Hispanics from civic affairs in Kern County and that the District Attorney's office engaged in prejudicial charging, negotiations, disparate treatment of victims based on race and had a pattern and practice of striking Hispanics from jury venires; and testimony from a Strickland expert that it was standard practice to object to pervasive racial animus and that Lorenz and Birchfield should have more thoroughly questioned potential jurors regarding animus towards Hispanics.

The Warden asserts the evidence Montiel submits in support of this claim was not presented to the state court, and that Montiel should not be permitted to rely on it because he has failed to demonstrate he was not at fault for failing to develop that evidence in state court. The

[61] A declaration from Attorney Sala was presented on state habeas, but it alleges misconduct by the Kern County District Attorney, not prejudicial publicity. See Claim 32.

Warden argues that if the evidence is properly before this Court, it does not fundamentally alter the nature of the claim presented in state court, and as such the state court's adjudication is entitled to deference under the AEDPA and does not involve an unreasonable application of Strickland.

The Warden observes Montiel has not included as exhibits any of the publicity prior to his trial which he describes as "lurid" and "prejudicial" and supportive of a change of venue. The Warden asserts that prejudice from pretrial publicity is rarely presumed. Sheppard v. Maxwell, 384 U.S. 333, 356-57 (1966) (prejudice presumed where media accounts contained inflammatory, prejudicial information that was inadmissible at trial); Ridau v. Louisiana, 373 U.S. 723 (1963) (prejudice presumed where case involved televising of a twenty minute in-jail interrogation of defendant by police where defendant confessed to the murder for which he was ultimately convicted). The Warden argues Montiel's citation to six articles is insufficient to demonstrate that the presumed prejudice principle applies to his case or that a change of venue was warranted.

Turning to the question of actual prejudice, the Warden observes in 1979 the trial court inquired whether prospective jurors had been exposed to publicity about the case, and points to the excusal of the only juror who answered affirmatively, and that two jurors, who were ultimately excused, indicated later during jury selection that they had read about the case. The Warden points to the questionnaire given to the 1986 penalty phase jury, which inquired about whether they had heard of the case, and to the subsequent questioning during voir dire about any affirmative answers. The Warden notes that only two of the empaneled jurors remembered hearing any publicity about the case, and both stated they had not formed an opinion about the case and could be fair. The Warden contends Montiel's claim against trial counsel is unfounded as counsel did question the prospective jurors. The Warden argues the questioning of potential jurors regarding any racial bias against Latinos was not warranted by Lorenz, Birchfield, or the court, since the victim was also a member of a minority group. The Warden concludes a change of venue was not warranted on the basis of racial prejudice.

Montiel argues the publicity prior to both trials was sufficient to place counsel on notice

that a change of venue should have been sought and that steps should have been taken to assure the jury had not been, and would not be, exposed to media during the trial. Montiel asserts the news articles during his trial were sufficiently prejudicial to justify presumed prejudice because they were published immediately prior to his trial and when his sentence was reversed, they contained lurid headlines and details of the alleged crimes, and they made it known that Montiel was Latino. The brief in support of Montiel's federal petition gives the following sampling of prejudicial news article headlines: "Throat slash murder suspect arrested after anonymous tip"; "Legal maneuvering delays murder trial"; "Death suspect recalled seeing gory body 'a trip'"; "Four will testify defendant bragged of murder"; "Death sentence called 'God's will'"; and "Kern killer returns to death row."

This claim was presented to the California Supreme Court in Montiel's state habeas corpus petition. On February 21, 1996, that court summarily denied the claim on its merits.

None of the evidence Montiel has presented in support of his state or federal habeas petitions, nor proposes to present in support of this claim, meets the extreme situation necessary to find presumed prejudice. The headlines referenced in the supporting points and authorities are primarily factual in nature, and are not identified as published prior to the trials. Both juries at guilt and at penalty retrial were repeatedly admonished not to read or listen to news reports about the trial. Montiel has not demonstrated presumed prejudice.

A review of the voir dire from both the 1979 guilt phase and the 1986 penalty retrial fails to show actual prejudice. The transcript from the 1979 guilt phase shows that 74 potential jurors were questioned in order to empanel 12 jurors and three alternates. During general voir dire, the trial judge stated a preference for jurors who know nothing about the case, but if not, that they could put what they read or heard out of their mind and decide the case on what was presented in court. 79A RT Voir Dire 4/23, 4/24, 4/25/79, at page 18. The potential jurors were questioned about their ability to judge the case based on the evidence presented in court repeatedly throughout voir dire. See id. pages 37, 150, and 282. Five potential jurors were excused for cause because they knew people involved with the crime: Larry Mendez and Gerald Horton because they knew Henry Ante, id. at pages 35 and 248; Alex Alveraz because he went to school

with Montiel, id. at page 30; and Danny Owens and Elva Renfree because they knew David Ante, id. at pages 122 and 241. Two potential jurors were excused for bias, Jim Borden, at page 235 (knows city firemen as he worked with them, would tend to believe their testimony over other testimony because he knows them), and John Geisler, at page 182. Mr. Geisler said, "I wouldn't want him judging me, because I don't think it is strict enough. Q. You don't think you should. You could decide a case fairly on the evidence that's presented in court? A. Not in this one, no, because I would definitely be too strong."

A review of the transcript from 1986 penalty retrial reveals that 21 of the 100 potential jurors who completed the juror questionnaire marked "Yes" to question No. 6, "Have you heard of this case before?" Of the 21, six potential jurors[62] also answered "Yes," or "?," to question No. 7, "Do you know anything about this case except that it is now pending in this court?" Of those six potential jurors, Mr. Barton's name was not drawn during jury selection, and only Linda Sesmas served on the jury. The other four potential jurors were excused, Mr. Scetena for hardship, Mr. Williams for cause (bias), Mr. Porter during death qualification (would never impose a death sentence), and Ms. Rall peremptorily by the defense. During voir dire, Ms. Sesmas said that her niece lived in an area related to the crime and she had been concerned for her, and that she had heard about the case through the news, but that she could decide the case based on the evidence presented in court. Vol. III, page 345.

Pamela Guimarra served on the jury and answered "Yes" to question No. 6, but "No" to question No. 7. During voir dire she indicated she had a vague recollection of the case and that Montiel looked vaguely familiar, but stated she could decide the case on the evidence presented in court. Vol. III, page 379.

There is no evidence that the jury, in either 1979 or in 1986, was prejudiced against Montiel due to exposure to publicity or could not be impartial and none of the evidence Montiel proposes to present in support of this claim shows bias or prejudice on the part of the jury. Montiel must show both deficient performance and actual prejudice resulting from the deficiency

[62] Those potential jurors were James Barton, James Porter, Francine Rall, Domenieo Scatena, Linda Sesmas, and R.O. Williams.

to prevail on a claim of ineffective assistance of counsel. There is no showing of prejudice from this claim, so it cannot form a basis for ineffective assistance by counsel.

Montiel has not shown the extreme situation necessary for a finding of presumed prejudice existed at either of his trials, and there is no evidence that either the guilt or penalty retrial juries were actually prejudiced against Montiel or that they could not be impartial. As there is no prejudice shown which would justify a change of venue motion, counsel's failure to file such a motion cannot be ineffective assistance. Claim 31(a) is denied an evidentiary hearing and is denied on the merits.

b. *Fair Cross-Section*

Montiel contends that the impaneled jury did not represent a fair cross-section of the community because Hispanics were underrepresented. Montiel contends the Kern County population of adult Hispanics was 16.3% based on INS and census figures, but only 8.3 % of those who appeared for jury duty.

The Sixth Amendment guarantees a criminal defendant an impartial jury drawn from a fair cross-section of the community. Taylor v. Louisiana, 419 U.S. 522, 530 (1975). "In order to establish a prima facie violation of the fair-cross-section requirement, the defendant must show: (1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this under-representation is due to the systematic exclusion of the group in the jury-selection process." Duran v. Missouri, 439 U.S. 357, 364-66 (1979) (Duren met the test by showing that women, a distinct group, were over half the population but only 15% of jury venires over the course of nearly a year).

Statistics which show a 10% or less absolute disparity between the group representation on the jury venire and in the community have been insufficient to establish proof of unconstitutional discrimination. "We cannot say that purposeful discrimination based on race alone is satisfactorily proved by showing that an identifiable group in a community is under-represented by as much as 10%." Swain v. Alabama, 380 U.S. 202, 208-09 (1965), overruled on other grounds by Batson, supra, 476 U.S. at 90-96.

Montiel argues Kern County did not have appropriate procedures in place to assure Hispanics would be properly and proportionally represented in the jury venire. Montiel asserts that in combination with Claim 21 regarding improper peremptory challenges, he has plead sufficient facts to state a claim of the denial of his right to be tried by a fair cross-section of the community. Montiel asserts the number of Hispanics who appeared is not a fair and reasonable representation of the community and neither Lorenz nor Birchfield investigated or moved to quash the venire.

The Warden asserts Montiel has failed to satisfy the second and third prongs of the test from Duran, 439 U.S. at 364, that the representation of a "distinctive" group in the venire is not fair and reasonable related to the community's population and that this under-representation is due to systematic exclusion of the group in the jury-selection process. The Warden contends Montiel's claim of under-representation of minorities on Kern County jury panels is meritless as he has failed to establish an absolute disparity that rises to an unconstitutional level between the percentage of minorities on the panel and in the community. Further, the Warden argues Montiel's assertion that "jury selection procedures" did not ensure sufficient Hispanics, is insufficient to constitute a showing of systematic exclusion.

Montiel replies his petition sets forth a prima facie case of systemic racial prejudice against Hispanics in Kern County during the time of his trial and penalty retrial which mandates voir dire questioning regarding racial prejudice. Montiel argues the failure of the trial court or his counsel to recognize the likelihood that such prejudice might infect his trial deprived him of his right to a fair and impartial jury and his right to be tried in a neutral venue.

This claim was presented was presented to the California Supreme Court in Montiel's state habeas corpus petition. On February 21, 1996, that court summarily denied the claim on its merits.

The statistics relied on by Montiel are figures compiled by Dr. Terry Newell from a study of Kern County venires from 1980 to 1981, which were previously presented in the federal habeas petition of Ronald Sanders. The Ninth Circuit rejected Sanders' claim, asserting Dr. Newell's study was highly likely to have substantially overstated the disparity between the

percentage of Hispanics in the county and in the jury venire, as no attempt was made to control for illegal immigration. See Sanders v. Woodford, 373 F.3d 1054, 1069-70 (9th Cir. 2004) (overruled on other grounds by Brown v. Sanders, 546 U.S. 212 (2006)). Another under-representation challenge which was based the comparison on the number of Hispanics in the jury venire versus the total population, was also rejected by the Ninth Circuit because the relevant comparison population to the venire should have been the number of Hispanics who were jury-eligible citizens, not the total population. United States v. Artero, 121 F.3d 1256, 1262 (9th Cir. 1997).

The opinions of Mr. Simrin, Mr. Rivera and Mr. Sala are untimely, partisan, subjective views, not easily corroborated years later, which should have been presented in the trial court. Neither Lorenz nor Birchfield objected to the jury venire generally, nor did they file a pretrial motion to challenge the District Attorney's alleged biased jury selection practices or to seek the judge's intervention in limine during jury selection. No published court decisions, empirical studies, or statistics of the racial composition of Kern County jury panels, trial juries or jury selection practices are offered. Even if such alleged discriminatory jury selection practices existed in the Kern County District Attorney's office, no objective evidence shows it impacted Montiel's trial.

Montiel's proffered statistics of 8.0% absolute disparity between adult Hispanics in the total population and the Hispanics on the jury venire is not significantly greater than the 7.7% disparity found by the Ninth Circuit to be within allowable limits. United States v. Suttiswad, 696 F.2d 645, 650 (9th Cir. 1982). In addition, Montiel offers only these statistics to prove systematic exclusion. This evidence is substantially less persuasive than evidence which has been found to show unconstitutional discrimination. A disparity of 14% combined with the government's stipulation that no black had served on any jury in the county in the past 25 years was sufficient to show purposeful discrimination. Hernandez v. State of Texas, 347 U.S. 475, 480-81 (1954). A trio of cases from Georgia found that disparities ranging from 14.7% to 19.7% were sufficient when combined with jury selection procedures using tax rolls which required blacks to file on yellow paper and whites on white paper. Whitus v. Georgia, 385 U.S. 545

(1967); Jones v. Georgia, 389 U.S. 24 (1967); Sims v. Georgia, 389 U.S. 404 (1967). Similarly, a 16% disparity combined with selection process which identified race on the jury form constituted prima facie evidence of discrimination. Alexander v. Louisiana, 405 U.S. 625, 630-31 (1972).

None of the evidence Montiel presented to the state court, nor proposes to present in support of this claim, presents a prima facie case that the fair cross-section requirement was violated. Montiel must show both deficient performance and actual prejudice resulting from the deficiency to prevail on a claim of ineffective assistance of counsel. As there is no showing of prejudice from this claim, it cannot form a basis for ineffective assistance by counsel. Claim 31(b) is denied an evidentiary hearing and is denied on the merits.

2. Claim 33: Unwarranted Shackling

In Claim 33, Montiel contends that he was inappropriately shackled during his trials.

Unjustified shackling impacts a defendant's constitutional rights when viewed by the jury, by "creating an inherent danger that the jury may form the impression that the defendant is dangerous or untrustworthy." Rhoden v. Rowland, 172 F.3d 633, 636 (9th Cir. 1999) (citing Holbrook v. Flynn, 475 U.S. 560, 568-69 (1986)). Where the jury did not see the shackles, any error may be harmless. Rhoden, at 636. Shackling, like prison clothes, indicates a need to separate a defendant from the community at large, creating a risk the jury may believe the defendant is dangerous or untrustworthy. Flynn, 475 U.S. at 568-69. A jury's brief or inadvertent glimpse of shackles outside the courtroom does not warrant habeas relief. Rhoden, 172 F.3d at 636. Any error in the imposition of a defendant's shackles is harmless where they are not actually seen by the jurors. Id. at 636. To evaluate if shackling had a substantial and injurious effect on the verdict, id. at 637-38, the court must look to the scene presented to the jurors and determine whether what the jurors saw was so prejudicial it posed an unacceptable threat to Montiel's right to a fair trial. Flynn, 475 U.S. at 572.

Montiel asserts he was inappropriately shackled at both guilt and penalty trials. Montiel claims the leg iron attached to the courtroom floor was obvious to the jurors, and the shackles were probably observed by the jurors when on numerous occasions bailiffs walked him past the

open door of the jury room. Montiel contends there was no credible or admissible evidence that such restraints were warranted or necessary, and that the trial court made no such determination. Counsel unreasonably failed to object to the use of such restraints, which diminished his presumption of innocence, deprived him of a fair determination of guilt and a reliable determination of penalty. Montiel argues the shackling prejudiced him at the penalty phase since unsubstantiated testimony was offered that he had great potential to commit further violent acts.

Montiel proposes to present the following evidence in support of this claim at an evidentiary hearing which was not presented to the state court: his own testimony that the handcuffs and leg irons were visible to jurors as he was transported to and from courtroom, and the attachment of leg irons to the metal ring on the floor was visible to jurors; testimony by Lorenz and Birchfield that they had no tactical reason for failing to challenge the use of shackles[63]; testimony from a Strickland expert that it was standard practice to challenge the use of shackles; testimony from a jury dynamics expert about the prejudicial impact from the use of shackles, that the jury would have considered Montiel as presenting the risk of present and future violence, that the presumption of innocence would have been substantially impaired, and that the use of shackles would have significantly contributed to the decision to render a sentence of death; and photos and other evidence showing what Montiel looked like to the jury while in shackles and when his leg irons were attached to the floor.

The Warden asserts Montiel's declaration submitted in support of this claim was not presented to the state court, and that Montiel should not be permitted to rely on it because he has failed to demonstrate he was not at fault for failing to develop that evidence in state court. The Warden argues that if the evidence is properly before this Court, it does not fundamentally alter the nature of the claim presented in state court, and as such the state court's adjudication is entitled to deference under the AEDPA and does not involve an unreasonable application of Strickland.

The Warden further contends there is no mention of shackling in the record from either

[63] Birchfield's declaration does not make this admission.

the guilt or the penalty retrial. Even assuming Montiel was shackled as he alleges, the Warden asserts there was no prejudice from a brief or accidental viewing during transport and there was no indication the jury saw the leg chain in the courtroom. The Warden contends that any failure on the part of counsel to object was not prejudicial, since it is not reasonably probable the result of the proceedings would have been different even had counsel objected. If the leg chain was briefly visible to the jury, the Warden asserts that the viewing would not have had a substantial and injurious effect on the verdicts as the key issue at both trials was Montiel's mental state, not his identity as the killer, and also would not have impacted the issue of future dangerousness if sentenced to life as the jury heard undisputed evidence of Montiel's good behavior in prison.

Montiel replies the trial court's failure to determine that compelling circumstances required he be shackled during trial mandates an evidentiary hearing be conducted to determine whether the shackling was justified. Montiel declares he believes some jurors saw deputies unhooking his leg shackle from a floor hook during his guilt trial or the penalty retrial. Montiel argues the jury's viewing a shackled defendant, especially in combination with evidence presented at the penalty retrial of several violent acts he committed, was sufficient to create the impression that he was dangerous. Montiel asserts the California Supreme Court did not address this claim, and states the anticipated evidentiary hearing will establish he was prejudiced by counsel's failure at both trials to object to the shackling, and that it is reasonably probable the outcome of both trials would have been different had he not been shackled.

This claim was presented was presented to the California Supreme Court in Montiel's state habeas corpus petition. On February 21, 1996, that court summarily denied the claim on its merits.

No statement was provided, in support of either Montiel's federal or state habeas petitions, that any juror observed his shackles. Montiel proposes to present as evidence in support of this claim his own testimony that the handcuffs and leg irons were visible to jurors as he was transported to and from courtroom and that the attachment of leg irons to the metal ring on the courtroom floor was visible to jurors, as well as photos and other evidence showing what Montiel looked like to the jury while in shackles and when his leg irons were attached to the

floor. Even considering the proposed evidence Montiel seeks to present, he has not presented a sufficient basis to support this claim. Habeas relief is not available where the jury did not see, or only briefly or inadvertently saw, a defendant's shackles. The facts underlying this claim, which is denied on the merits, cannot form a basis for ineffective assistance by counsel. Claim 33 is denied an evidentiary hearing and is denied on the merits.

3. California Death Penalty Law Unconstitutional in Form and Application

In Claim 35, Montiel contends that California's death penalty law is unconstitutional in form and application.

There are two aspects to the capital sentencing process, the eligibility phase and the sentencing phase. Tuilaepa v. California, 512 U.S. 967, 971 (1994). In the eligibility phase, the jury's discretion must be channeled and limited to ensure that death is a proportionate punishment and that its imposition is not arbitrary and capricious. Buchanan v. Angelone, 522 U.S. 269, 275-76 (1998). By contrast, the selection phase requires a broad inquiry into all relevant mitigating evidence to allow an individualized determination. Tuilaepa, at 971-73; Zant v. Stephens, 462 U.S. 862, 878-79 (1983). That requirement is met when the sentencer can consider relevant mitigating evidence 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; Buchanan, 522 U.S. at 276; Eddings v. Oklahoma, 455 U.S. 104, 114-15 (1982).

a. *Claim 35a: Failure to Adequately Narrow*

Montiel claims the statutory scheme under which he was sentenced contains so many special circumstances upon which a finding of felony murder could be based that it fails to perform a narrowing function, resulting in an arbitrary and unpredictable penalty. Furman v. Georgia, 408 U.S. 238 (1972); Stephens, 462 U.S. at 877 (a death penalty statute must genuinely narrow the class of eligible persons). Montiel asserts California's statute is so overbroad it is almost impossible for the perpetrator of a first degree murder not to be death eligible and that the special circumstances potentially designate nearly every homicide as felony murder and death eligible. Montiel contends that blanket or across-the-board eligibility for the death penalty fails to account for differing degrees of culpability, enhances the possibility of arbitrary sentences

without regard for blame, and possibly violates due process. See Adamson v. Ricketts, 865 F.2d 1011, 1025-26 (9th Cir. 1988) (en banc) (overruled on other grounds by Walton v. Arizona, 497 U.S. 639 (1990)).

The Warden admits that, although this claim was not presented to the state court, the exhaustion requirement was waived, and that de novo review under pre-AEDPA law is warranted since deference under 29 U.S.C. § 2254(d)(1) is not applicable. The Warden asserts the United States Supreme Court found California's 1977 death penalty statute had sufficient checks on arbitrariness to be constitutional without proportionality review, since it required the jury to find at least one special circumstance, thus limiting the death sentence to a subclass of capital-eligible cases. Pulley v. Harris, 465 U.S. 37, 53 (1984); Tuilaepa, 512 U.S. at 975-80; (Keith) Williams v. Calderon, 52 F.3d 1465, 1484 (9th Cir. 1995). The Warden contends that although the statute at issue here is the 1978 death penalty law, the result is the same. Mayfield v. Woodford, 270 F.3d 915, 924 (9th Cir. 2001) (en banc), declined hear an appeal on this claim, holding that California's 1978 death penalty statute narrows the class of persons eligible for death. The Ninth Circuit again addressed the issue in Karis v. Calderon, 283 F.3d 1117, 1141 n.11 (9th Cir. 2002), finding the 1978 statute satisfies the narrowing requirement set forth in Stephens, supra, as the special circumstances apply to a subclass of defendants convicted of murder and are not unconstitutionally vague, and the sentence selection is made on individualized determination based on the character of the individual and the circumstances of the crime.

Montiel replies the Warden's citation to Tuilaepa deals with the sentencing factors, not the eligibility factors, of the California statute, and that Justice Blackmun's dissent indicates the issue of whether California's statute adequately narrows the class of persons eligible for the death penalty has not been decided. See 512 U.S. at 994-95. Montiel asserts the California Supreme Court failed to address this claim on his appeal, and thus review is warranted. Montiel argues that to the extent the state court has ruled on any constitutional issue pertaining to the death penalty, the decision failed to account for the holdings of the United States Supreme Court in Furman, supra, 408 U.S. 238, and Gregg, supra, 428 U.S. 153, and their progeny, thus failing

to apply clearly established law.

The California Supreme Court has considered and rejected the challenge that the numerous special circumstances of § 190.2 embrace all murders, thus failing to narrow the class of persons for whom the death penalty is reasonably justified. "[T]he special circumstances set forth in the statute are not over inclusive by their number or terms, nor have the statutory categories been construed in an unduly expansive manner." People v. Arias, 13 Cal. 4th 92, 187 (1996) (citing People v. Crittenden, 9 Cal. 4th 83, 155 (1995) and People v. Bacigalupo, 6 Cal. 4th 457, 467 (1993)). Constitutional principles require statutes to rationally narrow the death-eligible class in a qualitative manner, which California's statues do. People v. Burgener, 29 Cal. 4th 833, 884 n.7 (2003).

United States Supreme Court jurisprudence requires that death penalty schemes distinguish between "the few cases in which it [the death penalty] is imposed from the many cases in which it is not." Furman, supra, 408 U.S. at 313 (White, J., concurring). This is accomplished by channeling the jury's discretion using objective standards capable of appellate review, Godfrey v. Georgia, 466 U.S. 420, 428 (1980), by findings of specifically defined "aggravating circumstances." In California, the narrowing "aggravating circumstances" are referred to as "special circumstances." See Penal Code § 190.2 (a).

The narrowing function of a death penalty statute can be satisfied by one of two methods. The statute may narrow the definition of a capital offense so that the narrowing function of death eligibility occurs at the guilt phase. Lowenfield v. Phelps, 484 U.S. 231, 246 (1988) (discussing Louisiana and Texas death penalty statutes which operate in this manner). Like the Louisiana and Texas statutes at issue in Lowenfield, California law places the narrowing function in the guilt phase proceedings by the jurors' unanimous finding beyond a reasonable doubt of at least one statutory special circumstance. Bacigalupo, supra, 6 Cal.4th at 468. Other states define capital offenses more broadly and "provide for narrowing by jury findings of aggravating circumstances at the penalty phase." Lowenfield, 484 U.S. 246 (referring to the Georgia death penalty statute at issue in Stephens, supra, 462 U.S. 862); see also Bacigalupo, id., (discussing the same statutory process in Arizona, Florida, and Georgia).

In Williams, supra, the Ninth Circuit held the 1977 California death penalty statute, which is the predecessor to the 1978 statute under which Montiel was convicted, offered "constitutionally-sufficient guidance to jurors to prevent arbitrary and capricious application of the death penalty." 52 F.3d at 1484 (citing Harris, 465 U.S. at 51-54 (holding California's 1977 statute complies with the requirements of Furman)). The sentencing factors of the 1977 statute are substantially the same as the factors from the 1978 statute. See Cal. Penal Code ' 190.3, former section added by Stats. 1977, c. 316, eff. Aug. 11, 1977, repealed and new section 190.3 added by Initiative Measure eff. Nov. 8, 1978.

Montiel fails to suggest any meaningful distinction between the 1977 statute approved in the Williams and Harris cases and the 1978 statute under which he was sentenced. Under the 1977 statute, like the 1978 statute, "a person convicted of first-degree murder is sentenced to life imprisonment unless one or more 'special circumstances' are found, in which case the punishment is either death or life imprisonment without parole. [Citation omitted.] Special circumstances are alleged in the charging papers and tried with the issue of guilt at the initial phase of the trial. At the close of evidence, the jury decides guilt or innocence and determines whether the special circumstances alleged are present. Each special circumstance must be proved beyond a reasonable doubt. [Citation omitted.] 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." Harris, 465 U.S. at 51. Apart from these holdings, two Ninth Circuit cases have held that the 1978 statute adequately narrows the class of persons eligible for the death penalty. Mayfield, supra, 270 F.3d at 924; Karis, supra, 283 F.3d at 1141 n.11.

Montiel has not established that California's 1978 statute violates the Eighth Amendment under Furman and its progeny. California's statute requires juries in capital cases to find at least one special circumstance based on the facts of the crime or on the defendant's history, thus distinguishing those defendants convicted of first degree murder who are selected for death from those who are not. Tuilaepa, 512 U.S. at 972; Furman, 408 U.S. at 189. The consideration of aggravating and mitigating factors at the penalty phase, including the defendant's character and

background and the circumstances of the crime, allows for an individualized determination of sentence, thereby directing and limiting the sentencer's discretion to avoid arbitrary and capricious action. California v. Brown, 479 U.S. 538, 540 (1987); Lockett v. Ohio, 438 U.S. 586, 604-05 (1978); Woodson v. North Carolina, 428 U.S. 280, 303-04 (1976). Finally, California's statute requires that the defendant either killed, intended to kill, or acted with reckless indifference to human life, so the death penalty is proportionate to the crime committed. Enmund v. Florida, 458 U.S. 782, 787 (1982); Tison v. Arizona, 481 U.S. 137 (1987).

The California Supreme Court and the Ninth Circuit Court of Appeals have both rejected claims asserting that California's death penalty statute fails to adequately narrow the class of defendants eligible for death. Montiel has not shown that conclusion is contrary to federal law, an unreasonable application of Supreme Court law, or an unreasonable determination of the facts. Claim 35a is denied on the merits.

b. *Claim 35b: General Defects*

Montiel also alleges California's capital sentencing process suffers from a wide variety of procedural and substantive defects. Montiel argues these defects failed to give proper guidance to the jury, resulting in a vague, arbitrary and capricious selection of the death sentence. The alleged defects include the failure to designate which factors are mitigating and which are aggravating, exacerbated by instructional error regarding the definitions of mitigation and aggravation; the failure to require a finding beyond a reasonable doubt that aggravation outweighs mitigation; the failure to require a finding that death is the appropriate sentence beyond a reasonable doubt; the failure to require a finding unanimously and beyond a reasonable doubt on the existence of aggravating factors; the failure to require written findings: of which aggravating factors were applied, of proof beyond a reasonable doubt of each aggravating factor, of unanimity of each aggravating factor (including factor (b)), that aggravation outweighs mitigation beyond a reasonable doubt, and that death is appropriate beyond a reasonable doubt; and the lack of a requirement for a procedure enabling meaningful review.

The Warden responds that there is no federal constitutional requirement that section 190.3 factors be defined as aggravating and mitigating; that the sentencer determine death is the

appropriate sentence beyond a reasonable doubt; that any aggravating factor be found unanimously or true beyond a reasonable doubt; for written findings of the factors relied on to impose death; or precluding the use of unadjudicated acts in aggravation. The Warden asserts the contentions are groundless that California's death penalty law is unconstitutional for failing to require written findings of which aggravating factors were applied; proof beyond a reasonable doubt of each factor; unanimity of each aggravating factor (including factor (b)); that aggravation outweighs mitigation beyond a reasonable doubt; that death is appropriate beyond a reasonable doubt; and for failing to provide a procedure enabling meaningful review. The Warden concludes that the United States Supreme Court has found the method and scope of appellate review in California to be sufficient, and has not found any constitutional deficiency regarding the inclusion of age as a sentencing factor.

Montiel replies that the sentencing factors of section 190.3 are unconstitutional because they induce duplicative consideration by the jury. Montiel contends the failure to label the sentencing factors, which allows evidence in mitigation to be deemed aggravating, the questionable validity of the circumstances of the crime factor (§ 190.3(a)), and the relationship with the special circumstances, which include an overbroad portion of murder defendants into the death penalty sentencing phase and allows duplicative consideration of prior and present crimes, results in an arbitrary and capricious death penalty scheme.

Montiel argues the fatal constitutional flaw in California's death penalty scheme is that both the trial court and the reviewing appellate court rely on overly inclusive eligibility criteria and amorphous sentencing factors without requiring the trier of fact to disclose the reasons for their determination. Omitting proportionality review further strips away protection against arbitrary and capricious decisions. Montiel concludes that although each individual segment of California's death penalty scheme seems within the confines of the Constitution, review of the entire scheme reveals the constitutional inadequacies.

The California Supreme Court rejected on direct appeal these challenges to the constitutionality of California's death penalty law. Montiel II, 5 Cal.4th at 943.

Montiel's allegation that the failure to designate which factors are mitigating and which

are aggravating was exacerbated by instructional error regarding the definitions of mitigation and aggravation is undermined by United States Supreme Court precedent. A trial court is not required to define the section 190.3 factors as either aggravating or mitigating, or to instruct the jury how to weigh any particular fact in the capital sentencing decision. Tuilaepa, 512 U.S. at 978-79. Instead, sentencing factors must have a common-sense core of meaning understandable by the jury, allowing an individualized determination of the appropriate penalty. Id. at 972–73, 975. Further, capital sentence selection permits the jury broad discretion. Id. at 979. California's factors are constitutionally sound. Ibid.; see also, Harris, supra, 465 U.S. at 51-53; accord, Boyde v. California, 494 U.S. 370, 386 (1990).

Montiel's allegations regarding the failure to require beyond a reasonable doubt findings or written findings do not entitle him to relief. The California Supreme Court, in People v. Cox, 53 Cal. 3d 618, 692 (1991), held that unanimity, written findings, and proof beyond a reasonable doubt were not required under the constitution to confirm aggravating factors exist, that aggravating factors outweigh mitigating factors, or that death is appropriate. Accord, Bonin v. Vasquez, 807 F. Supp. 589, 622-23 (C.D .Cal. 1992). The failure of California's statute to require written findings or specify a burden of proof, i.e., that aggravating factors must outweigh mitigating factors beyond a reasonable doubt, does not violate the constitution. Harris v. Pulley, 692 F.2d 1189, 1194-95 (9th Cir. 1987) (overruled on other grounds by Pulley v. Harris, 465 US. 37 (1984); Bonin, 807 F. Supp. at 622-24. Constitutional requirements do not compel unanimity of aggravating factors, but are satisfied when each juror agrees that total aggravation outweighs total mitigation. Accord, Bonin, 807 F. Supp. at 623.

In Williams, supra, the Ninth Circuit held that the 1977 California death penalty statute, the predecessor to the 1978 statute under which Montiel was convicted, offered "constitutionally-sufficient guidance to jurors to prevent arbitrary and capricious application of the death penalty." 52 F.3d at 1484 (citing Harris, supra, 464 U.S. at 51–54). Relevant to Montiel's claims, the court further held that the statute did not suffer from the failure to require written findings. Id. at 1484–85.

The grounds alleged do not violate the Constitution. Montiel's 1986 penalty retrial jury

was properly instructed to consider only those factors it deemed "applicable;" that sentencing involved subjective weighing, not mechanical counting, of factors; that the jury was free to assign the appropriate value to the factors; that its task was to determine which penalty was justified and appropriate by considering all aggravation and mitigation evidence; and that the death penalty could be imposed only if each juror was persuaded the aggravating evidence is so substantial in comparison with the mitigating evidence that death was warranted. See Montiel II, 5 Cal. 4th at 937.

Montiel's allegation that California's statute has no requirement for a procedure enabling meaningful review is not well taken. In California, appellate review of capital cases is provided by Penal Code section 1239(b). After a judgment of death is rendered, an appeal is automatic without any action by the defendant or his counsel. The mandate of this provision, which safeguards the rights of those on whom a death sentence is imposed, is so compelling that even where defendant's counsel does not make an appearance and no brief or argument is presented, a duty is imposed upon the high court to examine the complete record of the trial and ascertain whether the defendant was given a fair trial. People v. Perry, 14 Cal. 2d 387, 392 (1939), quoted in People v. Stanworth, 71 Cal. 2d 820, 833 (1969).

A claim challenging the adequacy of state appellate review is not cognizable on federal habeas. The "right of appellate review is statutory, did not exist at common law, and is not required by the United States Constitution." Agana Bay Development Company Ltd. v. Supreme Court of Guam, 529 F.2d 952, 956 (9th Cir. 1976), overruled on other grounds by Guam v. Olsen, 540 F.2d 1011 (9th Cir. 1976). However, once a state has established the right to appeal, that state's procedures must comport with the demands of Due Process and Equal Protection. Evitts v. Lucey, 469 U.S. 387, 393-94 (1985). Montiel does not show he was denied Due Process or Equal Protection. Further, the Constitution does not require proportionality review. Harris, supra, 465 U.S. at 43-44.

The California Supreme Court has rejected similar claims asserting that various errors of California's death penalty statute render it unconstitutional. The United States Supreme Court also has rejected various claims attacking the constitutionality of California's death penalty

statute. Montiel has not shown that those conclusions are contrary to federal law, an unreasonable application of Supreme Court law, or an unreasonable determination of the facts. Claim 35b is denied on the merits.

c. *Unconstitutional As Applied*

Montiel contends various aspects of California's death penalty statute and related jury instructions, as applied to his case, violated his constitutional rights. Montiel objects to the application of his age as a factor in aggravation, the introduction of unadjudicated crimes, instructions regarding "criminal activity" which allowed double counting of the crimes underlying the murder, the failure of instructions to correct the commonplace misunderstanding regarding the release of life-sentenced prisoners, the failure to instruct that the jury could affirmatively exercise mercy, triple counting of the same facts at guilt, eligibility, and sentence, the deprivation of the benefits of the California Determinate Sentencing Act, and the failure to instruct that the lack of mitigation does not constitute aggravation.

The California Supreme Court considered these arguments on Montiel's direct appeal and denied them on the merits. Montiel II, 5 Cal.4th at 932, n.29, 938-40, 943.

Montiel also objects to the prosecutor's unfettered discretion and lack of mandated selection procedures regarding prosecution, his death sentence not being proportionate to his culpability or as compared to similarly situated defendants, and the prosecutor's use of peremptory challenges against all "pro-life" jurors.

These arguments were not addressed by the California Supreme Court in Montiel's direct appeal, however the state court has rejected the same claims in other cases. See People v. Keenan, 46 Cal.3d 478, 505 (1988); Caro, supra, 46 Cal. 3d at 1068; People v. Champion, 9 Cal. 4th 879, 907 (1995), overruled on other grounds by People v. Combs, 34 Cal. 4th 821, 860 (2004). The same claims also have been rejected by the United States Supreme Court. See Jurek v. Texas, 428 U.S. 262, 274 (1976), Proffitt v. Florida, 428 U.S. 242, 254 (1976), and Gregg, supra, 428 U.S. at 199-200; Harris, supra, 465 U.S. at 43-44; Gray v. Mississippi, 481 U.S. 648, 672 (1987) (concurrence of Powell, J.).

Standing alone or taken together, Montiel contends these errors require reversal of his

sentence. Montiel argues the California death penalty statute is unconstitutional as applied in his case, and created an unjustifiable risk that the sentencer acted in an arbitrary and capricious manner. The California Supreme Court invalidated the financial gain special circumstance in Montiel's first direct appeal, but the prosecutor recharged the financial gain special circumstance at the penalty retrial and at closing argument urged the jury to "count" the various special circumstances and sentence selection factors which point to the death penalty.[64] Montiel asserts the California Supreme Court did not re-weigh or conduct harmless error analysis of the invalid special circumstance on the second direct appeal, but erroneously presumed the jury understood the financial gain special circumstance to refer only to the money which was taken. Montiel asserts this was insufficient review which imposed an arbitrary assumption and violated his rights under the Eighth and Fourteenth Amendments.

Montiel contends the sentence selection factors were unconstitutional as applied due to the consideration of the financial gain special circumstance which tainted other evidence under section 190.3. Montiel asserts the extent to which the invalid financial gain special circumstance infected the sentencer cannot be known since there is no written explanation of the reasons for the sentence. Montiel argues his case sufficiently presents the arbitrariness of California's death penalty scheme, as the jury was presented with evidence of the capital crime, previous convictions, and previous criminal activity, despite the danger of giving duplicative weight to this evidence under various sentencing factors: (a) the circumstances of the crime; (b) violent criminal activity; and (c) prior felony conviction. Montiel asserts the confusion created by these over-lapping factors fail to provide sufficient reliability as required by the Constitution, which is shown by the California Supreme Court's tolerance of possible juror error. See Montiel II, 5 Cal. 4th at 939.

The California Supreme Court found that section 190.3 factors (a), (b), and (c) allow for consideration of all convicted offenses and other acts of criminal violence, but held that nothing in the statute or the instructions implies these matters may be considered more than once. Also,

[64] Neither claim of misconduct, in charging the financial gain special circumstance on penalty retrial or in urging the jury to count the special circumstances, are presented as separate claims in Montiel's petition.

the state court found the prosecutor's argument did not urge the jury to consider the same aggravating aspects of Montiel's criminal behavior or history more than once. Montiel II, at 939.

The federal constitution requires that sentencing factors have a common-sense core of meaning understandable by the jury, which permits the jury broad discretion and allows an individualized determination of the appropriate penalty. Tuilaepa, 512 U.S. at 972–73, 975, 979. Nothing in Montiel's claims against the California death penalty statute as applied to his case show a violation of this requirement.

The California Supreme Court and the United States Supreme Court both have rejected similar claims asserting that various errors of California's death penalty statute render it unconstitutional. Montiel has not shown that those conclusions are contrary to federal law, an unreasonable application of Supreme Court law, or an unreasonable determination of the facts. Claim 35c is denied on the merits.

4. Cumulative Error

Montiel contends that habeas relief is warranted to due cumulative errors which formed a pervasive pattern of unfairness and thereby resulted in a fundamentally unfair trial. Claims 17(a) and 34 are premised upon the issue of cumulative error.

The California considered these claims on direct appeal and rejected them. Montiel II, 5 Cal. 4th at 943-44.

a. *Claim 17(a)*

In Claim 17(a), Montiel contends the extensive violations of his constitutional rights during his guilt trial form a pervasive pattern of unfairness, resulting in a fundamentally unfair trial.

Montiel asserts the errors combine to exacerbate the prejudice of each individual error, and are evidence of the actual conflict of interest by trial counsel. See Mak v. Blodgett, 970 F.2d 614, 622 (9th Cir. 1992) and Cain v. Cupp, 442 F.2d 356, 357 (9th Cir. 1971). Montiel argues the implicit finding by the California Supreme Court that Lorenz provided effective assistance at trial was an unreasonable application of Strickland.

Montiel argues the analysis by the California Supreme Court failed to comport with

substantially identical facts and errors in cases where the Ninth Circuit granted relief. See Killian v. Poole, 282 F.3d 1204, 1211 (9th Cir. 2002) (habeas relief granted based on perjury by the prosecution's main witness, the prosecution's failure to disclose impeachment evidence, and the prosecution's comment on privileged activities) and Alcala v. Woodford, 334 F.3d 862, 894 (9th Cir. 2003) (habeas relief granted based on failure of defense counsel to challenge prosecution expert and witness testimony, improper admission of evidence, and failure of defense counsel to conduct on-site investigation). Montiel asserts the errors he now presents go to the heart of the prosecution's theory of the case against him, and undermine every important element of proof offered by the prosecution. Montiel contends his counsel was wholly ineffective in presenting evidence regarding his ability to form intent and in challenging the perjury by Dr. Siegel, that the prosecution actively suppressed evidence and used an otherwise inadmissible confession against him to establish his guilt. Montiel argues these errors are not minor and undermine the verdict against him.

The Warden contends none of the individual claims alleged by Montiel demonstrate error and/or resultant prejudice, so there is nothing to accumulate, and no reason to reverse his conviction. The Warden argues that even if any errors are found to have occurred during the guilt trial, they did not render Montiel's trial fundamentally unfair, either individually or cumulatively.

Where no claim states a violation of constitutional law, there is no reason to grant habeas relief based on cumulative error. Rupe v. Wood, 93 F.3d 1434, 1445 (9th Cir. 1996); Hoxsie v. Kerby, 108 F.3d 1239, 1245 (10th Cir. 1997) ("Cumulative-error analysis applies where there are two or more actual errors"). None of the claims Montiel has advanced challenging the guilt phase of his trial present a basis for habeas relief. Claim 17(a) is denied evidentiary hearing and is denied on the merits.

b. *Claim 34*

Claim 34 also contends that there were so many cumulative errors of constitutional dimension at his trials that they formed a pervasive pattern of unfairness, exacerbating the individual prejudice of each act or omission.

Montiel proposes to present the following evidence in support of this claim at an evidentiary hearing which was not presented to the state court: testimony from a Strickland expert that the entire record shows the representation by Lorenz, Birchfield and Fuller fell far below the standard of practice and had a cumulative effect resulting in ineffectiveness and the overall collapse of Montiel's defense; and testimony from a jury dynamics expert that the entire record shows the cumulative impact of counsels' ineffectiveness would have grossly influenced the jury's decision to render a death sentence.

The Warden contends that none of the individual claims alleged by Montiel demonstrate error or resultant prejudice, so there is nothing to accumulate and no reason to reverse his sentence. The Warden asserts Montiel has not demonstrated that he received ineffective assistance of counsel, or that the prosecution engaged in misconduct. The Warden argues that, even if errors are found to have occurred, they did not individually or cumulatively render Montiel's trial fundamentally unfair, and as such the California Supreme Court's rejection of this claim was not contrary to or an unreasonable application of federal law.

Montiel replies that the state court found instances of prejudice in his case, see Montiel II, 5 Cal. 4th at 914, and asserts that each of his claims makes a sufficient showing that his constitutional rights were violated. Montiel contends that should some of his claims fail to warrant the issuance of habeas corpus, the cumulative effect of these claims should be considered. The ineffective assistance of counsel claims may be aggregated for consideration under the "cumulative prejudice" doctrine, Harris v. Wood, 64 F.3d 1432 (9th Cir. 1995), and claims regarding the constitutionality of the death penalty, introduction of inadmissible evidence, prosecutorial misconduct, and other structural errors may be evaluated under a Fourteenth Amendment Due Process "cumulative error" analysis. Kelly v. Stone, 514 F.2d 18 (9th Cir. 1975).

Montiel asserts each phase of his case was marked by judicial error, including the in-chambers conference between Ms. Fuller and the trial judge, the use of the improper standard to evaluate the Wheeler challenge, and providing the financial gain special circumstance to the jury. Montiel contends that in addition to prejudice from the judicial errors, he was prejudiced by

repeated instances of prosecutorial misconduct and the collapse of a meaningful defense by ineffective assistance of counsel, including the failure to properly prepare evidence to support available mitigation and the failure to object to inadmissible evidence.

Where no claim states a violation of constitutional law, there is no reason to grant habeas relief based on cumulative error. Rupe, supra, 93 F.3d at 1445; Hoxsie, supra, 108 F.3d at 1245. None of the claims Montiel has advanced challenging either the guilt phase trial or the penalty re-trial present a basis for habeas relief. Claim 34 is denied evidentiary hearing and is denied on the merits.

V.

CERTIFICATE OF APPEALABILITY

Rule 11(a) of the Rules Governing § 2254 Cases charge district courts with issuing or denying a certificate of appealability ("COA") when entering a final order adverse to a petitioner for a writ of habeas corpus. The standard for granting a COA under 28 U.S.C. § 2253(c)(2) is a "substantial showing of the denial of a constitutional right." This, in turn, requires a "showing that reasonable jurists could debate whether . . . the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" Slack v. McDaniel, 529 U.S. 473, 484 (2000); Sassounian v. Roe, 230 F.3d 1097, 1101 (9th Cir. 2000). Meeting this standard is not onerous. Rather, the standard "is relatively low." Jennings v. Woodford, 290 F.3d 1006, 1010 (9th Cir. 2002); Beardslee v. Brown, 393 F.3d 899, 901-02 (9th Cir. 2004). For the Court to issue a COA, Montiel "need not show that he should prevail on the merits," Barefoot v. Estelle, 463 U.S. 880, 893 n.4 (1983), but must meet the threshold requirement of showing that reasonable jurists could debate whether the claims should have been resolved differently or that the issues presented deserve encouragement to proceed further. See Miller-El, 537 U.S. at 336.

Accordingly, the Court has sua sponte evaluated the Claims within the amended petition for suitability for the issuance of a COA. See 28 U.S.C. § 2253(c); Turner v. Calderon, 281 F.3d 851, 864–65 (9th Cir. 2002).

Montiel must only "sho[w] that reasonable jurists could debate" the district court's

resolution or that the issues are "adequate to deserve encouragement to proceed further." Miller–El, 537 U.S. at 327. 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.

Having reviewed its determinations and rulings in adjudicating Montiel's amended petition, the Court finds that the Miller-El standard is met with respect the Court's resolutions of Claims 24 and 25. The Court therefore will grant a Certificate of Appealability as to those issues. The Court declines to issue a Certificate of Appealability for its resolution of any procedural issues or any of Sanchez's other habeas claims.

VI.

CONCLUSION AND ORDER

Based upon the foregoing, it is HEREBY ORDERED that Claim 26, subclaims (r) and (u) and Claim 35 as stated above are DENIED on the merits. Montiel's request for an evidentiary hearing is DENIED. Claims 8, 9, 10, 11, 12, 13, 14, 15, 16, 17a, 17b, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, and 34 as stated above are DENIED an evidentiary hearing and are DENIED on the merits. A Certificate of Appealability is ISSUED as to the Court's resolution of Claims 24 and 25 and DECLINED as to Montiel's other Claims. The Clerk of the Court is directed to TERMINATE the Warden's motion for summary judgment, VACATE scheduled dates and ENTER JUDGMENT forthwith.

IT IS SO ORDERED.

Dated: **November 25, 2014**

/s/ Lawrence J. O'Neill
UNITED STATES DISTRICT JUDGE

39 Cal.3d 910
Supreme Court of California,
In Bank.

The PEOPLE, Plaintiff and Respondent,
v.
Richard G. MONTIEL, Defendant and Appellant.

Crim. 21243.
|
Sept. 26, 1985.
|
Rehearing Denied Oct. 31, 1985.

Synopsis
Defendant was convicted in the Superior Court, Kern County, Marvin E. Ferguson, J., of various offenses, including murder. Penalty was set at death. Appeal automatically followed. The Supreme Court, Lucas, J., held that: (1) defendant was not entitled to enter plea of not guilty by reason of insanity after his trial had commenced; (2) trial judge sufficiently reflected on admissibility of photographs of murder victim prior to ruling that they were admissible; (3) finding that murder was intentional and carried out for financial gain was sufficient finding of "intent to kill" felony-murder special circumstance; (4) giving unqualified "Briggs Instruction," in penalty phase was error; and (5) giving "sympathy instruction" in penalty phase was error.

Affirmed in part, reversed in part and remanded.

Kaus, J., filed concurring opinion.

Attorneys and Law Firms

*****573 *914 **1249** Quin Denvir and Frank O. Bell, Jr., State Public Defenders, under appointment by the Supreme Court, Ezra Hendron, Chief Asst. State ***915** Public Defender, and Carol Jean Ryan, Deputy State Public Defender, for defendant and appellant.

George Deukmejian and John K. Van de Kamp, Attys. Gen., Robert H. Philibosian, Chief Asst. Atty. Gen., Arnold O. Overoye, Asst. Atty. Gen., Willard F. Jones and William George Prahl, Deputy Attys. Gen., for plaintiff and respondent.

Opinion

LUCAS, Justice.

This automatic appeal follows a judgment imposing a penalty of death pursuant to the 1978 death penalty law. (Pen.Code, §§ 190.1 et seq., 1239 et seq.; all statutory *****574** references are to this code unless otherwise indicated.)

An information was filed in superior court charging defendant Richard G. Montiel with the following offenses committed on January 13, 1979: count I, the robbery of Eva Mankin (§ 211); count II, the burglary of Ms. Mankin's residence (§ 459); count III, the murder of Gregorio Ante (§ 187); and count IV, the robbery of Mr. Ante. As to count III, it was charged that defendant personally used a knife during commission of the crime (§ 12022, subd. (b)) and three special circumstances were also alleged: the murder was intentional and for financial gain (§ 190.2, subd. (a)(1)); the murder was especially heinous, atrocious and cruel (*id.,* subd. (a)(14)); and the murder occurred during commission of a robbery (*id.,* subd. (a)(17)(i)). As to count IV, defendant was also charged with inflicting great bodily injury (§ 12022.7), with personal use of a deadly weapon (§ 12022, subd. (a)), and with committing an offense against an aged person (§ 1203.09, subds. ****1250** (a), (b)(i), (b)(iii)). In addition, a prior felony conviction was alleged.

Defendant entered pleas of not guilty to each count and denied all other allegations. When the jury trial commenced, defendant admitted the prior conviction outside of the jury's hearing. After trial had started, defendant moved to enter an additional plea of not guilty by reason of insanity, but his motion was denied. The jury found defendant guilty of all counts, and found all allegations to be true except for the special circumstance alleged pursuant to section 190.2, subdivision (a)(14) (the murder was especially heinous etc.).

The ensuing penalty phase trial resulted in a hung jury and the court declared a mistrial. A new penalty trial culminated in a verdict setting the penalty at death. Defendant's subsequent motions for new trial and to modify ***916** the verdict were denied and the court imposed the death penalty as to count III, the murder conviction. This appeal automatically followed.

FACTS

1. *The Prosecution's Case*

On January 13, 1979, defendant was living with his mother. His sister was visiting, accompanied by her two children, ages three and five. Eva Mankin, who resided across the street from the Montiel household, drove up to her home that morning with three grocery bags in her car. She began bringing the groceries into her home, placing one bag on the front porch and setting her keys and purse next to it. She noted a young man whom she identified as defendant accompanied by two small children approaching through her front yard.

As he came closer, defendant offered to help Ms. Mankin put her groceries in the house. She thanked him and refused. He nonetheless repeated himself two more times and the final time spoke in a tone of voice which indicated to Ms. Mankin that defendant “meant it.” At his direction, each child then took a bag and brought it into the Mankin house. The children left, but defendant remained. Ms. Mankin observed that his eyes were “staring” and “glassy.” When defendant did not respond to her requests to leave, Ms. Mankin took him by the shirt and led him out of her house. She returned inside, locking the door.

Defendant then broke the glass in the door and reached in to unlock it. As Ms. Mankin telephoned the police, defendant neared her, asking for her purse. When she told him she had called the police, defendant grabbed her purse and ran, heading across the street. The purse was later found in Ms. Mankin's automobile. Missing were two checkbooks, three bankbooks, a small knife belonging to Mr. Mankin, and $8 in cash. The police officer who responded to Ms. Mankin's call spoke with defendant's sister, who told him she had seen her brother run from the Mankins' carrying a purse. (At trial, she denied this statement.)

Soon after the Mankin incident, around 11 a.m., defendant arrived at the home of *****575** Victor and Maruy Cardova. Also living at the Cardovas' were Maruy's sister, Lisa Davis, and her boyfriend, Tom Stinnett. Stinnett, who had been in the front yard, followed defendant into the house where he helped to dress a cut on defendant's arm. In the process, he removed a piece of defendant's skin with a razor blade, applied alcohol and then bandaged defendant's arm. Defendant appeared jittery and shaky, and seemed to Stinnett to be under the influence of drugs. Defendant told Stinnett and the ***917** others that he "did a purse snatch" and gave a checkbook to Maruy, asking her to cash some checks so he could buy clothing. She refused, and Victor supplied a change of clothes.

According to Maruy, when he arrived, defendant entered without knocking which was unusual. He was rowdier than normal and was "acting mean" and "giving orders," also atypical behavior for him. Lisa Davis testified that defendant "acted a little weird." At one point he started wiping a mole under her eye without explanation, and later suddenly grabbed her arm and ****1251** purse and started telling her to get him a beer.

After a half hour, Victor decided to take defendant by motorcycle to his brother's home. Victor's cycle broke down on King Street, and Victor pushed it towards a gas station while defendant dismounted and started walking up the driveway of a nearby house. Victor called his wife from the gas station, asking her to come pick them up. He then began working on the motorcycle. Approximately 10 minutes later defendant walked up to him and told him "he killed—he just killed a man," and did it "like you do a goat." Victor did not believe defendant and continued his work. Victor refused to comply when defendant told him he had left two beer cans in the murdered man's house and asked Victor to retrieve them. Defendant then left, returning soon thereafter carrying a can of beer and a paper sack.

About 15 minutes later, Maruy arrived with Stinnett and they loaded the motorcycle in the back of the pickup. On the way back to the Cardovas', defendant told Stinnett "that he cut some man's head off" and that "he was the devil and a ride with him would be on top ...." When they arrived, Victor and defendant went into a bedroom where defendant produced several $20 bills, some pennies, and a small three-inch pocket knife. The Cardovas refused his offer of money.

Victor told defendant to leave and telephoned for a taxicab. Defendant continued "flipping out" and saying he was the devil. When no taxicab arrived, Victor drove defendant to a motel. The Cardovas then left without defendant. When Maruy returned home later that day, she discovered Mankin's checkbooks, a large number of pennies, and a 12-inch butcher knife with a broken handle, covered with coagulated blood, in her bedroom. Stinnett and Maruy washed off the knife and threw it into a nearby canal. Lisa Davis saw the remaining items the next day. She kept some of the pennies and later turned them over to the police. Meanwhile, on the night of the 13th, defendant returned to the Cardovas' and inquired about the knife. Victor told him not to worry about it but that the police were looking for him.

***918** The next day, the police contacted Victor. When he saw defendant later that day and asked if he knew what he had done, defendant nodded his head. Defendant then told Victor he was worried that he might have left fingerprints on the telephone. Soon thereafter Victor left California in order to avoid testifying. After he was arrested in Arizona as an accessory, he was returned to California where he was granted immunity in exchange for his testimony.
The victim, Gregorio Ante, was 78 years old and slightly disabled by a stroke. He lived with his wife on King Street, but was alone on the morning of January 13. About 11 a.m., Gregorio's son Henry arrived to help with some repairs. Henry's son and daughter-in-law, the Halls, arrived soon after to buy a piano from Gregorio whom they paid $200. He placed the money in his left shirt pocket. Once the piano *****576** had been loaded onto their truck, the Halls left.

Gregorio then gave Henry $20 to buy parts for a faucet he was fixing. Henry also noticed his father removing some money from his pants pocket. Henry left around 12:10 p.m., leaving the front door unlocked. As he departed, he noticed two men on a motorcycle in front of the house who watched as he drove off.

About five minutes later, David Ante, another grandson of Gregorio, telephoned his grandfather. When there was no answer, he drove to the house, arriving in five to ten minutes. Entering by the unlocked front door, he found Gregorio's body. He at first thought he had suffered a heart attack. The autopsy revealed two superficial wounds on Gregorio's right cheek, two on the side of his neck, one on the lower neck, and one large deep wound mid-neck, probably caused by two separate thrusts. Death occurred because of obstruction of the airways.

When the body was found, the left pocket of Gregorio's pants was pulled out, and $180 was found in his left front inner shirt ****1252** pocket. In his bedroom, the mattress had been moved off the bed, and jars containing the pennies which Gregorio collected were missing.

Defendant was arrested on January 16 and taken to Kern County jail where he shared a cell with Michael Palacio. Palacio testified that defendant told him that when Victor's motorcycle broke down, defendant entered a house to use the telephone. When he hung up the telephone, an old man appeared and asked what he was doing. The man sat in a chair, and defendant saw money in his shirt pocket. He then went to the kitchen, got a knife, and cut the man's throat and took the money to spend on clothing. ***919** In exchange for Palacio's testimony, a felony charge against him for marijuana possession while in prison was dismissed.

During the trial, two experts testified regarding defendant's mental state. The first, Dr. Ronald Siegel, a psychopharmacologist and psychologist, was called by the prosecution. On the basis of the trial testimony, background information on defendant, and interviews with some of the witnesses, Dr. Siegel concluded that defendant was under the influence of PCP on January 13. However, while defendant was intoxicated, Dr. Siegel concluded that the degree was insufficient to diminish his capacity to form the intent to kill or to steal because defendant did not display certain indicia of PCP effect. He relied upon lack of nystagmus, or oscillation of the eyeballs, lack of difficulty in walking or other motor coordination, lack of convulsions or amnesia, ability to follow directions, and the awareness

demonstrated in the statements made to Palacio. He concluded defendant was also able to premeditate and meaningfully reflect upon the consequences of his acts.

2. *Defense Case*

Defendant took the stand in his behalf. While living at his mother's home, he had used three to four PCP cigarettes a day. On the morning of January 13, he bought a six-pack of beer soon after rising at 9 a.m., and smoked a joint of PCP. He remembered something telling him to help when he saw a woman drive up across the street. He generally felt a floating sensation and felt no pain when he put his hand through a window. The woman yelled at him, and he got her purse as she swung it at him. He walked off and dropped the purse and when various items fell out, he picked them up and placed the purse in the car. As he jogged away, he noticed checkbooks in his hand, and decided to return them later.

At the Cardovas', he saw three people, two in white uniforms, in the front yard. After saying to them "So you're waiting for me," defendant entered the house. When his friends cut off the piece of hanging skin from his wound and applied alcohol, he felt no pain. He tried to wipe something off beneath Lisa Davis' eye, not realizing it was a mole.

Before leaving with Victor, defendant bought two cans of beer and then he and Victor smoked another joint of PCP. After *****577** the motorcycle broke down, defendant walked to a house to use the telephone. His feet felt heavy. When he reached the door, he knocked but got no answer. He looked in through a window in the front door, and saw a man lying in blood. He then returned to Victor and told him he had *seen* someone with his throat cut, not that he had cut someone's throat. He told the same version to Stinnett, and did not recall telling anyone that he was the devil.

***920** When Victor asked him if he recalled what he had done, defendant nodded "yes" on the assumption that he was inquiring about cutting his arm. He also told Victor that he did not kill anyone. As to Palacio, while soliciting his advice, defendant merely repeated what was in the police report shown to him by his public defender.

3. *Rebuttal*

On rebuttal, witnesses testified that there was no window in Ante's front door, and that blood on Gregorio's body could not be seen by an observer looking through the window. The public defender also stated he normally would not have supplied defendant with a police report at the time ****1253** indicated, and a police officer described how Palacio's version contained information not in the report. Dr. Siegel also explained that he had not seen defendant personally because defendant was unwilling to talk to him.

4. *Penalty Phase*

We do not describe the evidence presented at the penalty trials because as we will demonstrate retrial of that phase is mandated by previous decisions of this court.

GUILT PHASE

1. *Jury Composition*

Defendant asserts that the removal of persons opposed to the death penalty during the guilt phase of his trial violated his right to a jury composed of a representative cross-section of the community. He presents no arguments which were not considered and rejected in *People v. Fields* (1983) 35 Cal.3d 329, 342–353, 197 Cal.Rptr. 803, 673 P.2d 680. There we held that those who were determined to vote automatically against the death penalty did not constitute a cognizable class under the decisions defining that phrase and that their exclusion from a jury did not render the jury unrepresentative or unconstitutional. We therefore similarly reject the claim made here.

2. *Change of Plea*

On the third day of trial, defendant for the first time moved to enter a plea of not guilty by reason of insanity (hereinafter ngi plea). As grounds for the motion, counsel asserted that a pretrial examination by a psychiatrist appointed by the court at defense request had been inadequate because the examiner did not consider defendant's PCP use on the day of the crime. ***921** Moreover, counsel claimed that the testimony of the Cardovas on the previous days of trial had for the first time alerted him to the possibility that defendant may have been insane at the time the offense was committed. The court denied the motion and defendant now argues that it used an incorrect standard in deciding the issue and abused its discretion.

Section 1016 provides in relevant part that "A defendant who does not plead not guilty by reason of insanity shall be conclusively presumed to have been sane at the time of the commission of the offense charged; provided, that the court may for good cause shown allow a change of plea at any time before the commencement of the trial." As the court observed in *People v. Boyd* (1971) 16 Cal.App.3d 901, 908, 94 Cal.Rptr. 575, changes of plea tendered *after* commencement of trial have long been given consideration to determine whether "good cause" exists to permit entry of the new plea. (See, e.g., *People v. Egan* (1933) 218 Cal. 408, 23 P.2d 755; *In re Kubler* (1975) 53 Cal.App.3d 799, 806, 126 Cal.Rptr. 25.) At issue here is what "good cause" must be shown.

At the time of trial the established standard for reviewing requests to change *****578** pleas once trial had begun included an inquiry into whether "there were reasonable grounds to believe that at the time of the commission of the crime [the defendant] was legally insane ...." (*People v. Morgan* (1935) 9 Cal.App.2d 612, 615, 50 P.2d 1061.) Defendant asserts that the more restrictive standard enunciated in *People v. Lutman* (1980) 104 Cal.App.3d 64, 163 Cal.Rptr. 399, precluding inquiry into the merits of the proposed defense, should be retroactively applied.[1]

[1] On the day after *Lutman* was decided, another Court of Appeal district reapplied the historical test, considering both diligence in bringing the motion *and* reiterating the requirement that the defendant make some showing on the merits. (*People v. Herrera* (1980) 104 Cal.App.3d 167, 173, 163 Cal.Rptr. 435.)

The *Lutman* court held that following our decision in *Prudhomme v. Superior Court* (1970) 2 Cal.3d 320, 85 Cal.Rptr. 129, 466 P.2d 673, the trial court could not consider the merits of an insanity defense

when deciding whether to permit a change of plea. We held in *Prudhomme* that it was a violation of a defendant's right ****1254** against self-incrimination to permit a prosecutor to obtain pretrial disclosure of information which "conceivably might lighten the prosecution's burden of proving its case in chief." (2 Cal.3d at p. 326, 85 Cal.Rptr. 129, 466 P.2d 673; *People v. Lutman,* supra, 104 Cal.App.3d at p. 67, 163 Cal.Rptr. 399.) The Court of Appeal therefore reasoned that it was error to require a defendant wishing to change his plea to make an "additional showing" on the merits of his proposed defense beyond a showing of good cause for delay, because such a requirement would violate the rights at issue in *Prudhomme.*

***922** In *Lutman,* the standard for determining insanity had changed after the defendant entered his plea (see *People v. Drew* (1978) 22 Cal.3d 333, 149 Cal.Rptr. 275, 583 P.2d 1318) and defense counsel sought to add a new ngi plea as soon as he learned of the new standard. The trial court was "satisfied with [defendant's] diligence," but denied the request on the ground that no showing had been made on the merits of the defense. (*People v. Lutman,* supra, 104 Cal.App.3d at p. 67, 163 Cal.Rptr. 399.) The Court of Appeal reversed on the ground that defendant had adequately demonstrated "to the satisfaction of the trial court and to this court" that he had "a plausible reason for delay in tendering [his] plea," and thus had made the only necessary and proper showing to obtain relief under section 1016. (*Id.* at p. 68, 163 Cal.Rptr. 399.)
Defendant here claims that the trial court similarly erroneously denied his motion on the ground that there was an insufficient showing on the merits of his proposed defense. However, his claim must fail even under the *Lutman* standard, because the court also initially considered defendant's diligence in seeking to enter the plea and concluded it was lacking.

The court carefully considered defendant's claim that he had been unaware of any basis for an ngi plea until after the Cardovas' testimony. The judge announced that he had read the preliminary transcript and that the testimony of Tom Stinnett then had been "just as strong as anybody else, he said [defendant] was crazy, he said he was under the influence of a drug in response to a direct question ...." He also observed that defendant never responded to the prosecutor's claim that defense counsel had had copies of Victor Cardova's statements from an early pretrial stage in the case and that these statements were essentially the same as Cardova's trial testimony. Moreover, while defense counsel asserted he had not been able to have his investigator talk with the Cardovas until the day of the trial, he failed to dispute the prosecutor's observation that two appointments had been set up before then which the investigator had failed to keep.

After the court reiterated that the testimony on defendant's mental state could not be a surprise because essentially it had all been revealed in information available pretrial to defense counsel, counsel then shifted emphasis to his claim that the psychiatrist's *****579** examination was inadequate. This examination however was undertaken at the request of *defense counsel* to whom the results were reported. Moreover, the doctor, called to testify *by the defense* during the hearing on the motions, stated that he did not discuss with defendant his PCP use or state of mind on the day of the crime because defendant "indicated that he did not want to discuss what happened that day and that he knew nothing about it ...." This was confirmed by defendant's own testimony during the motion hearing regarding the extent of his conversation with the psychiatrist. Finally, the psychiatrist also testified that ***923** even had he known of defendant's alleged PCP use, it would not have altered his conclusion that "at the time I

examined him [he did not] show any evidence of any mental illness that would cause him to lose a substantial capacity to evaluate his acts or control his acts."

The court ultimately denied the motion on the ground that no showing of any indication of legal insanity had been made. But long before that point, the judge had stated that "There is no question under the **1255 old case law, it seems to me that perhaps you could deny it on the basis that it's untimely and particularly in this case because as I have stated for the record none of this information is new ... there is no surprises [*sic*] here, so it seems to me just on that basis that the motion could be denied." Thus, the court separately considered defendant's lack of diligence, and then turned to whether there was some showing on the merits that, under the circumstances, would still make entry of the plea at that late date appropriate. No such showing was made and the motion was denied on that basis as well. It appears that even under the standard applied in *Lutman,* using the more limited scope of inquiry into diligence alone, no error occurred. The trial court carefully considered the evidence and arguments submitted on behalf of the motion and did not abuse its discretion in denying it (see *People v. Cartwright* (1979) 98 Cal.App.3d 369, 386, 159 Cal.Rptr. 543 [trial court decision should be overturned only upon a showing of abuse of discretion]).

Underlying this contention is the suggestion that trial counsel provided ineffective assistance by not timely advancing an ngi plea at an earlier stage. Such a claim can best be adjudicated in a habeas corpus proceeding where evidence could be produced to show that the asserted failure deprived defendant of a meritorious defense. (See *In re Kubler,* supra, 53 Cal.App.3d 799, 126 Cal.Rptr. 25; see also *People v. Mozingo* (1983) 34 Cal.3d 926, 934, 196 Cal.Rptr. 212, 671 P.2d 363.) Nothing in the record presently before us suggests that defendant was legally insane at the time of the offense, or that counsel's asserted lack of diligence amounted to a denial of effective assistance of counsel. (See *People v. Pope* (1979) 23 Cal.3d 412, 425, 152 Cal.Rptr. 732, 590 P.2d 859.)

3. *Photographs*

Defendant asserts that the trial court failed to exercise its discretion pursuant to Evidence Code section 352 in deciding whether to grant his motion to exclude various photographs from evidence. He further argues that even if this court undertakes the weighing process required under that provision, it should find that the photos' prejudicial effect outweighed their probative value, and they were at best cumulative evidence.

**924 This contention rests on our discussion in *People v. Green* (1980) 27 Cal.3d 1, 24–27, 164 Cal.Rptr. 1, 609 P.2d 468, where we considered whether the trial court had properly weighed the probative value and prejudicial effect of a statement by the victim to which a witness was prepared to testify. We found that the record did not show that the court had "discharge[d] its statutory duty" by performing a balancing test. Instead, it had "simply ruled that it would deny defendant's motion ...." (*Id.* at p. 24, 164 Cal.Rptr. 1, 609 P.2d 468.)

In our case, after defense counsel observed that his motion was "a 352 question," the court responded "Yes, it's a discretionary thing ...." The prosecutor ***580 then briefly argued the photographs' relevancy and the court asked to see them. Following defense counsel's claim that the photographs, showing the victim "cut from ear to ear" and a great deal of blood, were unnecessary, prejudicial, and

not relevant to the extent there was no dispute as to the cause of death, the court stated "motion denied" and went on to consider other matters.

We reiterated in *People v. Green,* supra, that "on a motion invoking [§ 352 grounds] the record must affirmatively show that the trial judge did in fact weigh prejudice against probative value .... [T]he reason for the rule is to furnish the appellate courts with the record necessary for meaningful review of any ensuing claim of abuse of discretion; an additional reason is to ensure that the ruling on the motion 'be the product of a mature and careful reflection on the part of the judge,' ..." (27 Cal.3d at p. 25, 164 Cal.Rptr. 1, 609 P.2d 468.)

Here, there is evidence that the trial court understood and undertook its obligation to perform the weighing function ****1256** prescribed by Evidence Code section 352. The judge expressly referred to his discretion, looked at the photographs before making his decision, and listened to argument. He did not explicitly state the factors and his assessment thereof in making his decision, but under the circumstances, in this pre-*Green* trial, the reflection thus demonstrated was sufficient.

Even if it were not, as in *Green,* "[d]efendant nevertheless fails to demonstrate that the error resulted in a miscarriage of justice. (Cal. Const., art. VI, § 13.)" (27 Cal.3d at p. 26, 164 Cal.Rptr. 1, 609 P.2d 468.) The photographs showed the victim in his residence but were not unusually gruesome; it is indisputable that photographs of a murder victim killed by violent means are likely to be less than pleasant. However, the photographs were not taken at close range, nor was there particular focus on the wounds. As the People argue, the photographs were relevant to demonstrate to the jury the physical surroundings of the crime, as well as the manner in which the wounds were inflicted.[2] ***925** (*People v. Fields* (1983) 35 Cal.3d 329, 372–372, 197 Cal.Rptr. 803, 673 P.2d 680; cf., *People v. Turner* (1984) 37 Cal.3d 302, 320–321, 208 Cal.Rptr. 196, 690 P.2d 669.) Therefore, even if the record is deemed not to reflect sufficiently an adequate weighing process by the court, no basis for reversal appears.

[2] It should be noted that the jury found not to be true the alleged special circumstance that "The murder was especially heinous, atrocious or cruel, ..."

4. *Felony-murder Rule*

Defendant urges abandonment of the felony-murder rule in California. However, we recently reexamined this doctrine in *People v. Dillon* (1983) 34 Cal.3d 441, 450, 194 Cal.Rptr. 390, 668 P.2d 697, and reaffirmed its application, finding it "a creature of statute" which could not be abrogated by the courts and rejecting the various constitutional challenges raised. No reason to alter that conclusion is presented here.

SPECIAL CIRCUMSTANCES

1. *Carlos-Garcia: Intent to Kill*

In *Carlos v. Superior Court* (1983) 35 Cal.3d 131, 197 Cal.Rptr. 79, 672 P.2d 862, we concluded that the felony-murder special circumstance (§ 190.2, subd. (a)(17)) necessarily requires proof that the

defendant intended to kill. In the course of so deciding, this court read subdivision (b) of section 190.2 as "imposing an intent to kill requirement for the accomplice to any felony murder, and by implication such a requirement for the actual killer himself." (P. 142, 197 Cal.Rptr. 79, 672 P.2d 862.)

In the instant case, defendant contends that the jury was not required to find that he intended to kill his victim and that exceptions to the holding in *Carlos,* as enunciated in *People v. Garcia* (1984) 36 Cal.3d 539, 205 Cal.Rptr. 265, 684 P.2d 826, similarly do not apply. He therefore asserts ***581** that the jury's special circumstances findings must be set aside.

In *Garcia,* after holding that *Carlos* applied to all cases not yet final (36 Cal.3d at p. 550, 205 Cal.Rptr. 265, 684 P.2d 826), which would include this case, we described four exceptions which, when present, would obviate the need for reversal when *Carlos* error had occurred. We now consider the application of those exceptions here.

Two of the exceptions to the per se reversal rule of *Carlos* are clearly inapplicable. The failure to instruct on the issue of intent to kill did not arise " 'in connection with an offense for which the defendant was acquitted ...' " nor was it irrelevant to " 'the offense for which he was convicted.' " (*People v. Garcia,* supra, 36 Cal.3d at p. 554, 205 Cal.Rptr. 265, 684 P.2d 826, quoting **926** *Connecticut v. Johnson* (1983) 460 U.S. 73, 103 S.Ct. at 969, at pp. 977–978, 74 L.Ed.2d 823.) Neither did defendant concede the issue of intent. (*Ibid.*)

The third exception is based on our explanation in **1257** *People v. Sedeno* (1974) 10 Cal.3d 703, 721, 112 Cal.Rptr. 1, 518 P.2d 913, that "in some circumstances it is possible to determine that although an instruction ... was erroneously omitted, the factual question posed by the omitted instruction was necessarily resolved adversely to the defendant under other, properly given instructions. In such cases the issue should not be deemed to have been removed from the jury's consideration since it has been resolved in another context, and there can be no prejudice to the defendant ...." (Quoted in *People v. Garcia,* supra, 36 Cal.3d at pp. 554–555, 205 Cal.Rptr. 265, 684 P.2d 826.) The importance of this exception in the context of the 1978 death penalty initiative was stressed in a footnote which explained that "[I]f a correctly instructed jury found intent to kill under some other special circumstance, the failure to instruct on intent to kill under the felony-murder special circumstance might not be reversible error." (*Id.* at p. 555, fn. 11, 205 Cal.Rptr. 265, 684 P.2d 826.) Here, the jury found true the special circumstance that "the murder was intentional and carried out for financial gain." (§ 190.2, subd. (a)(1).)

Petitioner nonetheless claims that under our holding in *People v. Murtishaw* (1981) 29 Cal.3d 733, 175 Cal.Rptr. 738, 631 P.2d 446, the finding that "the *murder* was intentional" was insufficient; the jury still was not required to find that the defendant had an intent to *kill.* In *Murtishaw,* we considered instructions given to a jury asked to adjudge a charge of assault with intent to commit murder. Reiterating that such a charge required proof of intent to kill (pp. 764–765, 175 Cal.Rptr. 738, 631 P.2d 446), we found that the court's instructions were contradictory because they "defined the mental element essential to the crime in two different ways—intent to kill and intent to murder—and by implication defined the latter to include forms of murder not requiring an intent to kill" (p. 763, 175 Cal.Rptr. 738, 631 P.2d 446). We were concerned there with the distinction stressed in *People v. Mize* (1889) 80 Cal. 41, 43, 22 P. 80: " 'To constitute murder, the guilty person need not intend to take life; but to constitute an attempt to murder he must so intend.' [Citation.]" (*Murtishaw,* 29 Cal.3d at p. 764, 175 Cal.Rptr. 738, 631 P.2d 446.)

Here, however, the jury was required to find that "the murder was intentional ...."[3] In other words, it was a murder in which the victim's death was intended. "By implication," the language indicated that certain murders are *un* intentional and that the jury could not find the special circumstance applicable if the murder was of such a nature. This distinction and the ***927** necessity that the jury find a specific intent to kill in order to find that this special circumstance was true was also clearly outlined and emphasized in the prosecutor's *****582** closing argument.[4] Moreover, the instructions given to the jury regarding intention for its use in distinguishing between degrees of homicide were couched solely in terms of *intent to kill.* Unlike the situation in *Murtishaw,* requiring the jury here to find that the murder was intentional directed it to determine whether the defendant intentionally sought the victim's *death;* no other possible distinction can be ****1258** drawn between intentional and unintentional murders in this context.[5]

[3] The list of special circumstances contained in section 190.2, subdivision (a), uses the terms "murder was intentional" and "intentionally killed" without any apparent distinction other than grammatical convenience. Nothing indicates that the use of one phrase rather than the other was intended to have any significance for any purpose.

[4] The prosecutor informed the jury that "There are a number of special circumstances .... One is the charge that the defendant intentionally murdered, the murder was intentional and carried out for financial gain. You can draw that inference I think from the testimony here. The other is that the murder was committed while the defendant was engaged in a robbery. And again that does not require an intent to kill. It is a different statement as to those special circumstances. The first special circumstance is intentional, carried out for financial gain. And the second is that it occurred while the defendant was engaged in a robbery. It does not require a special or specific intent to kill." Defense counsel's argument was primarily directed at the diminished capacity defense and he did not specifically allude in relevant fashion for our purposes to the special circumstances alleged.

[5] The analogous situation in *Murtishaw* would have arisen had the jury been instructed to find an intent to commit *intentional* murder, rather than simply an intent to commit murder.

Because we conclude that the *Sedeno* exception applies, therefore making reversal under *Carlos* unnecessary, we need not consider whether the so-called *Cantrell-Thornton* rule explained in *Garcia,* 36 Cal.3d at pp. 555–556, 205 Cal.Rptr. 265, 684 P.2d 826 may also apply.

2. *Interpreting Section 190.2, Subdivision (a)(1)*

In *People v. Bigelow* (1984) 37 Cal.3d 731, 209 Cal.Rptr. 328, 691 P.2d 994, we considered the application of section 190.2, subdivision (a)(1), the special circumstance requiring a finding that "the murder was intentional and for financial gain." We interpreted our duty as requiring us to construe special circumstances in a manner to avoid duplication and determined that a narrow construction of this provision was required to escape overlap with the felony-murder special circumstance. As a result, we adopted "a limiting construction under which the financial gain special circumstance applies only when the victim's death is an essential prerequisite to the financial gain sought by the defendant." (P. 751, 209 Cal.Rptr. 328, 691 P.2d 994.)

As in *Bigelow,* this narrow construction precludes application of this special circumstance here, leading us to hold that the trial court erred in submitting it to the jury. The *Bigelow* court did not consider how prejudice from this error should be assessed, and we intend to follow the same course because the penalty judgment must be reversed on other grounds. This holding ***928** does not, however, detract from our previous discussion where we relied upon this provision in applying *Carlos-Garcia* here. The defect in the use of this special circumstance found in *Bigelow* does not nullify the validity of the finding that "the murder was intentional."

PENALTY PHASE[6]

[6] My own views regarding the bases for reversal of the penalty judgment are consistent with the dissents in the relevant cases. However, the current majority view is to the contrary and controls the disposition here.

1. *The Briggs Instruction*

The penalty jury was instructed that the "Governor is empowered to grant a reprieve, pardon or commutation after sentence following conviction of a crime. Under this power, a Governor may in the future commute or modify a sentence of life in prison without the possibility of parole to a lesser sentence that would include the possibility of parole." In *People v. Ramos* (1984) 37 Cal.3d 136, 207 Cal.Rptr. 800, 689 P.2d 430 (*Ramos II*), upon remand from the United States Supreme Court, we held that under the California Constitution, this instruction, known as the Briggs Instruction, was so misleading as to constitute a denial of due process.

*****583** In this case, the Briggs Instruction was given without qualification. Under compulsion of the decision in *Ramos II,* we therefore hold that the penalty judgment must be reversed and that a new penalty trial must be held during which the instruction should not be given. (37 Cal.3d at p. 159, 207 Cal.Rptr. 800, 689 P.2d 430.)

2. *Sympathy Instruction*

The jury was instructed at the penalty trial pursuant to CALJIC No. 1.00 (1979 Rev.) that "You must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling." Identical language was used to instruct the jury in *People v. Easley* (1983) 34 Cal.3d 858, 875, 196 Cal.Rptr. 309, 671 P.2d 813, and *People v. Lanphear* (1984) 36 Cal.3d 163, 165, 203 Cal.Rptr. 122, 680 P.2d 1081. In both of those cases, this court held that giving the instructions constituted error because to do so denied the defendant the right to have the jury consider any relevant "sympathy factor" in his behalf. Nor was the problem cured by the instructions regarding mitigating factors. In *Lanphear,* the majority expressly concluded ****1259** that retrial was constitutionally mandated because of the potential ambiguity engendered by the instruction. (36 Cal.3d at p. 169, 203 Cal.Rptr. 122, 680 P.2d 1081.) Retrial therefore is required here.

***929** 3. *Predictions of Future Violence*

Dr. Siegel testified during the penalty phase that the prognosis of defendant's future conduct were he to be released from prison "would not be good. I see no indication of any improvement over the years with the defendant's problems and his perceptions of them. He shows relatively poor insight into them, [and] has strong denial for a lot of his behavior. I see no indication, nor do I know of any rehabilitative efforts that would be successful in correcting this personality of violent and impulsive behavior."

In *People v. Murtishaw,* supra, 29 Cal.3d at page 767, 175 Cal.Rptr. 738, 631 P.2d 446, we concluded that a similar prediction of future conduct by the same expert witness was unreliable and should not have been permitted over objection. We found admission of the testimony prejudicial under any standard because it composed "the principal prosecution penalty phase evidence." (P. 775, 175 Cal.Rptr. 738, 631 P.2d 446.) Defendant's situation differs from that in *Murtishaw* because he failed to object to introduction of Siegel's statement and because this evidence did not form the major thrust of the prosecutor's case at the penalty phase.

Our critique of such evidence in *Murtishaw* as being unreliable and "probably wrong," appears to apply; under the circumstances, however, in the absence of an objection, reversal on this basis might not be warranted. Nonetheless, we need not further consider this issue because reversal is already required on alternate grounds.

4. *Additional Claims*

Defendant raises several additional grounds for reversal, most of which involve conduct or rulings which will not necessarily recur at retrial and we therefore do not address them.

CONCLUSION

The judgment of guilt is affirmed as to all counts, the special circumstances finding pursuant to section 190.2, subdivision (a)(1), is set aside, and the judgment as to penalty is reversed. The cause is remanded to the superior court for a retrial of the penalty phase in accordance with the views expressed herein.

MOSK, BROUSSARD, REYNOSO and GRODIN, JJ., concur.

KAUS, Justice, concurring.

I concur. I agree that it is appropriate to apply the *Sedeno* exception in this case to "cure" the *Carlos* error. There may, however, be other situations in which application of *Sedeno* would be inappropriate. In ***930** a capital case the defendant's paramount concern is, of course, to avoid a death sentence. Thus there may well be *****584** instances in which the record shows that as a result of the defendant's pre-*Carlos* impression that the People need not prove intent to kill as an element of a felony-murder special circumstance, the defendant decided to forego any attempt at raising a reasonable doubt on intent to kill in connection with some other charge, believing that his only chance to escape a death sentence lay in avoiding the felony-murder charge altogether. There may also be cases in which it appears that the defendant decided against contesting intent to kill as a result of an erroneous trial court ruling. (See, e.g.,

People v. Ramos (1984) 37 Cal.3d 136 at pp. 147–148, fn. 2, 207 Cal.Rptr. 800, 689 P.2d 430.) When the record thus establishes that the defendant did not present relevant evidence on intent because of a mistake as to the applicable legal principles, it would, of course, be inappropriate to apply *Sedeno.*

In this case, however, there is no indication in the record that defendant failed to contest the intent-to-kill issue because of his mistaken belief that the robbery-murder special circumstance would trigger a ****1260** penalty trial in any event. If defendant has evidence which he withheld because he was misled on the significance of the intent-to-kill issue, he may, of course, seek to present it in a habeas corpus proceeding.

BIRD, C.J., and BROUSSARD and REYNOSO, JJ., concur.

All Citations

39 Cal.3d 910, 705 P.2d 1248, 218 Cal.Rptr. 572

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5 Cal.4th 877
Supreme Court of California,
In Bank.

The PEOPLE, Plaintiff and Respondent,
v.
Richard Galvan MONTIEL, Defendant and Appellant.

No. S004756.
|
Aug. 12, 1993.
|
As Modified on Denial of Rehearing Oct. 27, 1993.

Synopsis
Defendant's convictions for first-degree murder, robbery, and burglary were affirmed, but sentence of death was vacated, by the Supreme Court, 218 Cal.Rptr. 572, 705 P.2d 1248. On remand, defendant was again sentenced to death by a jury of the Superior Court, Kern County, No. 19948, Marvin E. Ferguson, J. On automatic appeal, the Supreme Court, Baxter, J., held that: (1) prosecutor established nondiscriminatory basis for exercise of peremptory challenges; (2) any errors in instructions or omission of evidence were harmless; (3) record did not facially show that counsel was incompetent; (4) cumulative effect of errors did not require reversal; and (5) trial court properly considered automatic motion for modification of the verdict.

Affirmed.

Mosk, J., dissented and filed an opinion.

Attorneys and Law Firms

*****712 *897 **1284** Gary M. Sirbu, Oakland, under appointment by the Supreme Court, for defendant and appellant.

Daniel E. Lungren, Atty. Gen., George Williamson, Chief Asst. Atty. Gen., Robert R. Anderson, Asst. Atty. Gen., J. Robert Jibson and William G. Prahl, Deputy Attys. Gen., for plaintiff and respondent.

Opinion

*****713 **1285** BAXTER, Justice.

In 1979, a jury convicted defendant Richard Galvan Montiel of the first degree murder (Pen.Code, §§ 187, 189)[1] and robbery (§ 211) of Gregorio Ante, the robbery of Eva Mankin, and the burglary (§ 459) of Ms. Mankin's residence. Both the Mankin and Ante episodes occurred on January 13, 1979. With respect to the Ante crimes, the jury found true allegations that defendant personally used a deadly weapon, a knife, in the murder (§ 12022, subd. (b)) and that the robbery was committed against an aged

person (§ 1203.09, subds. (a), (b)(i), (iii)), with great bodily injury (§ 12022.7), and by personal use of a deadly weapon. Under the 1978 death penalty law, the jury also sustained special circumstance allegations that the murder was committed in the course of a robbery (§ 190.2, subd. (a)(17)(i)) and intentionally for financial gain (*id.,* subd. (a)(1)).

[1] All further statutory references are to the Penal Code unless otherwise indicated.

When the jury was unable to reach a penalty verdict, a penalty mistrial was declared, a new jury was empanelled, and the issue of penalty was retried. The second jury sentenced defendant to death.

***898** We affirmed the guilt judgment, the various enhancements, and the robbery-murder special-circumstance finding. However, we set aside the financial-gain special circumstance and, for unrelated reasons, we reversed the penalty judgment. (*People v. Montiel* (1985) 39 Cal.3d 910, 218 Cal.Rptr. 572, 705 P.2d 1248 (*Montiel I*).)

A third penalty trial took place in 1986, and defendant again received a death sentence. His automatic motion for modification of the verdict (§ 190.4, subd. (e) (hereafter § 190.4(e)) was denied. This appeal is automatic.

Though errors occurred below, they were individually and cumulatively harmless by any applicable standard. (See *Chapman v. California* (1967) 386 U.S. 18, 23, 87 S.Ct. 824, 827, 17 L.Ed.2d 705; *People v. Brown* (1988) 46 Cal.3d 432, 446–449, 250 Cal.Rptr. 604, 758 P.2d 1135; see also *Strickland v. Washington* (1984) 466 U.S. 668, 694–695, 104 S.Ct. 2052, 2068–2069, 80 L.Ed.2d 674.) We will therefore affirm the death judgment.

FACTS

1. *Crimes of January 13, 1979.*

a. *Robbery of Eva Mankin.* The prosecution presented the following undisputed evidence:[2] On January 13, 1979, defendant was living at his parents' home in Bakersfield. A neighbor, 74–year–old Eva Mankin, returned to her residence that morning with several bags of groceries. She placed her purse and keys on her front porch and began transferring the grocery bags from her car to the porch. As she did so, defendant approached with two small children and announced his intent to put away her groceries for her. Ms. Mankin declined help, but defendant insisted. She knew "something was wrong," because his eyes were "stary and glary." She unlocked the door and allowed defendant and the two children each to carry a bag into the house. The children emerged but defendant remained inside. Feigning calm, Ms. Mankin thanked him and gently told him he had to leave. She touched his shirt, led him out of the house, then closed and locked the door behind him.

[2] Ms. Mankin was deceased at the time of the second penalty retrial in 1986. Her testimony from the 1979 trial was read to the jury. (Evid.Code, §§ 240, 1291.)

Defendant began banging on the door. Ms. Mankin telephoned the emergency operator and called to defendant that she was summoning the police. ***899** Nonetheless, he smashed the glass in the front door, reached in, unlocked the door from the inside, and entered the house. Ms. Mankin continued to protest that she had called the police, but defendant demanded her purse "two or three times," then grabbed it and fled. She later recovered the purse from her front yard, but a checkbook, several bank books, her husband's knife, and some cash were missing. She identified several of these items at trial.

*****714 **1286** b. *Murder of Gregorio Ante.* The People introduced evidence that Gregorio Ante, a 78–year–old Bakersfield resident, was killed in his South King Street home around midday on January 13, 1979. The cause of death was a deep slash wound to the throat, which severed Gregorio's carotid arteries and blocked his breathing passage.

Moments before his death, Gregorio had received $200 in cash from his grandson Dennis Hall for the sale of a piano. Gregorio placed this money in the pocket of his T-shirt, over which he was wearing a Pendleton shirt. Gregorio then gave his son, Henry, $20 from that pocket to buy parts for a faucet repair. As Henry left to purchase the parts, he saw two men with a motorcycle in front of the house.[3]

[3] Henry was deceased at the time of the 1986 penalty retrial, and his testimony from the 1979 trial was read to the jury.

Soon thereafter, David Ante, another of Gregorio's grandsons, telephoned Gregorio and received no response. David immediately went to Gregorio's residence and found his grandfather's body. There was $180 in cash in Gregorio's T-shirt pocket, but money was missing from his pants pockets, the living room and master bedroom had been ransacked, and a container of coins was missing from the house.

Further evidence about this incident was presented by defense witness Victor Cordova. Victor, a seller and user of phencyclidene (PCP), testified as follows: Defendant arrived at the Cordova home during the morning of January 13. Also present were Victor's wife Maury, and Maury's mother and sister, Kathy and Lisa Davis. Defendant's hands and arms were scratched and cut, and his shirt was bloody. His appearance, behavior, and incoherent speech indicated he was "loaded" on PCP. Victor cut a piece of dangling flesh from a deep wound on defendant's left arm. Defendant registered no pain. Victor dressed the wound and gave defendant a fresh shirt. Defendant smoked part of a PCP cigarette furnished by Victor and continued his bizarre behavior and speech. He made advances to Kathy Davis, kept trying to wipe a mole from Lisa Davis's face, and challenged Victor to "deck [him] ... out."

***900** Unwilling to cope with defendant in his intoxicated state, Victor decided to transport defendant to the home of defendant's brother. The two men proceeded in that direction on Victor's motorcycle. Near the intersection of Brundage and South King Streets, the motorcycle's chain came off the sprocket. Victor pushed the disabled cycle to a nearby garage and telephoned his wife Maury for rescue. Meantime, defendant, who was carrying a can of beer in a sack, walked off briskly toward a nearby home on South King Street.

Two or three minutes later, defendant returned and announced he had just "killed a guy." Defendant seemed "concerned" about a beer can he had left in the victim's house, and he demanded that Victor retrieve the can for him. When Victor refused, defendant reentered the house himself and soon returned

holding the can. Using throat-slitting gestures to demonstrate his point, he then told Victor he had killed a man "like you would do a goat."

Maury soon arrived in the Cordovas' pickup truck. With her were Tommy Stinnett and "Marlene," defendant's girlfriend. As the motorcycle was placed in the truck, defendant boasted to the others about the homicide; his tone was loud and "mean." The boasting resumed after the group arrived back at the Cordova home. Victor and Maury took defendant into the bedroom and asked him what had happened. In response, defendant removed a sack from his pocket. The sack contained coins, some cash, and a bloody knife. Frightened, Victor took the knife and threw it into a nearby canal.

Defendant continued to say and do things that made no sense. He squatted in a corner, staring blankly. When Maury used the phrase "Jesus Christ," he told her sharply not to mention that name around him because he was the devil. Victor drove defendant and Marlene to a motel, ***715 **1287 registered in his own name, and left the couple in a room.

Later that evening, Victor encountered defendant, still "loaded," at the home of a mutual acquaintance. Victor asked defendant if he realized what he had done and advised defendant to flee to Mexico. Defendant gave Victor a penetrating look and nodded.

On cross-examination, Victor admitted that several weeks before the 1986 retrial, he had encountered defendant in the Kern County jail. Defendant asked Victor to lie about the amount of PCP he had consumed on the day of the murder.

2. *Mental state/intoxication evidence.*

Both parties introduced extensive evidence about defendant's mental state and degree of intoxication during the Mankin and Ante crimes. As in 1979, ***901** the People presented Dr. Ronald Siegel, a psychopharmacologist with particular expertise in the effects of PCP. In preparation for his 1979 testimony, Dr. Siegel had interviewed defendant and obtained defendant's detailed accounts of his long-term drug history, his alcohol and drug consumption immediately before the crimes, and the crimes themselves. Dr. Siegel had also interviewed Victor and Maury Cordova, Lisa Davis, and Tommy Stinnett; further, he had reviewed certain 1979 trial testimony and examined police reports.

Based on this previously obtained information, Dr. Siegel conceded in 1986 that defendant was "grossly intoxicated" by PCP and alcohol on January 13, 1979, and that defendant's motor functions and judgment were somewhat impaired as a result. Dr. Siegel acknowledged that PCP had unpredictable effects, and that it can reduce impulse control, cause distorted perception, produce episodic partial amnesia, and exaggerate aggressive or violent tendencies. He further recognized that extended use of PCP can lead to a chronic mental disorder which includes momentary delusional episodes. Nonetheless, Dr. Siegel opined that on the day and at the time of the murder, defendant was not hallucinating, was "capable of some goal direction activity," and "knew what he was doing." Among other things, Dr. Siegel stressed defendant's successful efforts to find and take money from Gregorio's house, his immediate concerns about covering up his crime, and his relatively clear memory of the events.

Defendant presented further evidence about his drug history, and about his alcohol and PCP consumption immediately preceding the January 1979 crimes. His parents recounted a pattern of

substance abuse beginning with teenage glue sniffing and progressing to regular alcohol and PCP use during adulthood. His sister Irene testified that he had ingested large quantities of PCP on or about January 13, 1979. Other family members disclosed that he had been hallucinating and talking incoherently for several weeks before that date.

Defendant also introduced the expert testimony of Dr. Louis Nuernberger, a psychiatrist formerly employed by the Department of Corrections. Between 1977 and 1981, Dr. Nuernberger had responsibility for inmate mental health concerns at San Quentin. He was assigned to evaluate defendant's mental condition when defendant arrived on death row in 1979. In cooperation with a psychologist, Dr. Nuernberger interviewed defendant and reviewed his prison "central file," and psychological tests. Dr. Nuernberger had no specific background in psychopharmacology, but his prison duties made him familiar with the drug and criminal histories of defendant and numerous other inmates.

***902** Dr. Nuernberger opined that chronic drug abuse is both a cause and a result of deep lifelong alienation and depression. He conceded that defendant is legally "sane" and has no gross mental disorder apart from drug-induced "toxic dementia." However, Dr. Nuernberger concluded that defendant's "extended intoxication with PCP and alcohol" eroded his self-control and judgment, fragmented his personality and consciousness, and exaggerated his violent tendencies, so as to be "directly responsible for the homicide." Dr. Nuernberger emphasized defendant's cooperative *****716 **1288** and nonviolent behavior in the drug-free prison setting.

3. *Other crimes.*

The prosecution presented evidence of five other violent episodes, one of which resulted in a felony conviction. Called as prosecution witnesses, defendant's mother Hortencia, his father Richard, Sr., and his brother Antonio confirmed a 1968 scuffle between defendant and Antonio, in which Antonio received a three- to four-inch cut on his chest. However, Richard, Sr., and Hortencia claimed they had little recollection of the incident. They denied seeing defendant with a knife and denied telling responding deputies he had stabbed Antonio. Both denied any memory of violence by defendant toward Richard, Sr. Hortencia denied telling deputies the scuffle began when defendant tried to hit her with a telephone. Antonio denied knowing or believing that defendant had stabbed him.

Deputy Sheriffs Leavell and Fowler then testified that they responded to the 1968 scuffle. At the scene, Hortencia and Richard, Sr., told the following story: During an argument at the home of defendant's parents, defendant tried to hit Hortencia with a telephone. Antonio intervened, and the two brothers went outside to fight. Defendant carried a butcher knife with him. Shortly thereafter, Hortencia tried to separate the combatants and felt blood on Antonio's shirt. Richard, Sr., stated defendant had cut Antonio and also said he himself had been beaten by defendant in the past. After the fight with Antonio ended, defendant's parents reported, defendant had left the scene in a yellow or cream-colored 1957 Chevrolet. According to the deputies, they subsequently seized a butcher knife from a car matching that description which was parked near defendant's residence.

Rachel Montiel, defendant's separated wife, confirmed a 1969 argument involving defendant, Rachel, and Rachel's sister Yolanda Estrada. However, Rachel denied seeing defendant deliver a blow to the abdomen of Yolanda, who was then six months pregnant. Rachel insisted Yolanda attacked defendant and, though her testimony on the point is not entirely clear, appeared to ***903** state that defendant never

struck back.[4] Retired Deputy Sheriff Shell then testified that when he responded to the 1969 argument, Rachel told him defendant had struck both women and had hit Yolanda in the stomach.

[4] The following exchange occurred: "Q[.] [By the prosecutor] And during this argument, did the defendant strike [Yolanda] in the stomach? [¶] A[.] No. My sister struck him first. [¶] Q[.] After you say she struck him, then did the defendant strike her in the stomach? [¶] A [.] No, uh-uh. She was just defending me. [¶] ... [¶] Q[.] Are you saying that the defendant here never struck her at all on that day? [¶] A [.] No." Rachel's trial claim that Yolanda was the physical aggressor, and that defendant did not retaliate, was essentially corroborated by Yolanda's mother, Helen Pacheco, who testified for the defense.

Deputy Leavell testified about a 1971 incident which occurred while he and Deputy Williams were on duty at the Kern County Fair. According to Leavell, he and Williams assumed custody of defendant after defendant's arrest by other officers who had seen him wrestle a stuffed bear from an elderly woman. Defendant broke loose and ran; Leavell gave chase, tackled defendant, and handcuffed him after a "short fight." Struggling all the way to the sheriff's trailer, defendant threatened to kill the deputies' wives and children and burn their homes.

Two employees of a Foster Freeze restaurant testified that in 1972 defendant entered, brandished a small handgun, demanded money, and was given $30. One employee, Denise Brown, thought the gun "looked real," but the other, Ronald Jones, said it looked like a starter pistol. When Jones chased defendant down an alley, defendant turned and fired twice. Jones ducked and was not hit. He heard no bullets. The abstract of judgment indicated that defendant pled guilty to second degree robbery for this incident, without enhancements for firearm or weapon use.

Anthony Ramirez testified that he returned home one evening in 1973 to find defendant removing a television set from *****717 **1289** Ramirez's apartment. Ramirez chased defendant, who turned and displayed a knife. The prosecution introduced evidence that defendant pled guilty to a misdemeanor charge of burglary.

4. *Other mitigating and rebuttal evidence.*

Various members of defendant's family testified that the Montiels' family life was happy, and that defendant was well behaved and a good student until he chose the wrong friends and became involved with drugs and alcohol in high school. These witnesses indicated that defendant was always respectful and nonviolent toward his parents, that family members visited and wrote him in jail and prison, and that they loved him. Richard, Sr., and Hortencia specifically denied that defendant had been violent toward them. ***904** Rachel admitted that defendant had a drinking problem during their marriage, and that defendant sometimes became violent when drunk.

Defendant presented evidence of his rehabilitation on death row. Harry Howard, a prison chaplain, testified that defendant regularly attended voluntary religious services. Salvatore Russo, a prison teacher, said defendant tried to improve his reading, writing, and mathematics skills and made progress in these areas. Norman Davis, a guard supervisor, testified that defendant presented no behavioral problems in San Quentin. Emanuel Edward, a jail guard, gave similar evidence about defendant's conduct in the Kern County jail.

Defendant testified in his own behalf. He described the confined life of a condemned inmate but indicated his good behavior had qualified him for maximum death row privileges. He confirmed the religious, educational, and artistic interests he had developed in prison, and a painting he had done was admitted into evidence. Defendant indicated that, over time, he had developed empathy and remorse about Gregorio's murder, saying he knew "what it is to lose a loved one." Defendant indicated he would give his life to bring the victim back to life if that were possible. However, he admitted on cross-examination that his Christian principles did not include full literal agreement with the maxim "an eye for an eye."

PRETRIAL AND JURY SELECTION ISSUES

1. *Court's ex parte meeting with cocounsel Fuller.*

On the morning of October 21, 1986, just before the second day of jury selection began, a chambers conference took place on the record, in defendant's presence, among appointed lead defense counsel Robert Birchfield, appointed cocounsel Peggy Fuller, the prosecutor, and the court. Birchfield said he and Fuller had decided, with defendant's concurrence, that for reasons of efficiency Birchfield should be "primarily involved in the courtroom presentation" while Fuller undertook research and coordination duties outside the courtroom. Fuller confirmed these points. The court commented that the proposed division of labor "made sense" and suggested that Birchfield ask prospective jurors whether they would be influenced by Fuller's periodic absences from court.

Earlier the same morning, Fuller had met ex parte with Judge Ferguson, who was presiding at defendant's trial. In April 1990, an evidentiary hearing was held before Judge King to settle what occurred during this unreported meeting.

***905** The resulting settled statement declares in substance as follows: About 8:30 a.m. on October 21, 1986, Fuller asked to see Judge Ferguson on a "personal matter." In a "very brief" meeting, Fuller told him she was "concerned about the general manner in which [Birchfield] was handling the case and ... did not know what to do." "As a solution," she and Judge Ferguson "discussed the possibility that in the future, [she] could do legal research for the defense outside of the courtroom rather than participating personally in the courtroom proceedings." She had previously discussed with Birchfield this change in her role.

*****718 **1290** Defendant argues from these facts that he was denied his state and federal constitutional right to effective, conflict-free representation. He reasons as follows: By disclosing uncertainty how to handle her reservations about Birchfield's performance, Fuller revealed a "conflict" between her representational duties, on the one hand, and her concerns for her own professional reputation and her desire not to embarrass Birchfield, on the other. The court violated its duty to pursue and resolve a potential conflict brought to its attention, and defendant was given no opportunity to waive the conflict with full knowledge. (See *People v. Bonin* (1989) 47 Cal.3d 808, 836–837, 254 Cal.Rptr. 298, 765 P.2d 460.) Hence, reversal is required, because the record shows (see *Wood v. Georgia* (1981) 450 U.S. 261, 272–274, 101 S.Ct. 1097, 1104–1105, 67 L.Ed.2d 220; *Bonin, supra,* 47 Cal.3d at pp. 837–838, 254

Cal.Rptr. 298, 765 P.2d 460), or at least permits informed speculation (see *Holloway v. Arkansas* (1978) 435 U.S. 475, 484–491, 98 S.Ct. 1173, 1178–1182, 55 L.Ed.2d 426; *People v. Mroczko* (1983) 35 Cal.3d 86, 105, 197 Cal.Rptr. 52, 672 P.2d 835), that the conflict prevented Fuller from seeking Birchfield's removal, withdrawing, or participating fully at trial, and thus adversely affected her performance.

However, the record does not support defendant's elaborate claims of a constitutional "conflict." At most, the evidence indicates that at a particular moment, Fuller had unspecified disagreements with lead counsel's conduct of the case, briefly sought Judge Ferguson's advice about how to proceed, and ultimately confined herself to noncourtroom activities.

There is no indication that Fuller was motivated by anything except her sense of professional obligation. (Compare *Bonin, supra,* 47 Cal.3d 808, 254 Cal.Rptr. 298, 765 P.2d 460 ["book rights" fee arrangement; counsel's prior relationship with accomplice]; *People v. Singer* (1990) 226 Cal.App.3d 23, 275 Cal.Rptr. 911 [counsel secretly dated defendant's wife]; *People v. Jackson* (1985) 167 Cal.App.3d 829, 213 Cal.Rptr. 521 [counsel secretly dated prosecutor].) Good faith tactical differences among cocounsel are not uncommon, and they do not create a "conflict of interest" in the constitutional sense. The state and federal Constitutions do not demand complete compatibility among appointed cocounsel (cf. ***906** *Morris v. Slappy* (1981) 461 U.S. 1, 14, 103 S.Ct. 1610, 1617, 75 L.Ed.2d 610 [Sixth Amendment does not guarantee "meaningful relationship" between accused and appointed counsel]), require judicial inquiry into any and all signs of disagreement, or mandate particular working relationships within the defense team.

The instant record discloses no "fundamental" breakdown among defendant, Birchfield, and Fuller (cf., e.g., *People v. Hamilton* (1989) 48 Cal.3d 1142, 1163–1164, 259 Cal.Rptr. 701 [dispute between defendant and counsel not so "fundamental" as to "substantially impair" right to effective counsel]), nor does it indicate that the logical division of attorney responsibility endorsed by the trial court had the slightest adverse effect on the defense. No basis appears for a finding of reversible conflict.[5]

[5] Defendant suggests he had a constitutional "right" to the full courtroom presence of both cocounsel. Hence, he reasons, Fuller's sudden decision to absent herself from trial was an "abandonment" of her representational duties. According to defendant, his silent acquiescence when advised of Fuller's limited future role was not a knowing and voluntary waiver of his rights, since he was not told on the record the true reason for the new arrangement. As defendant concedes, however, there is no authority for the proposition that a capital defendant has the right to the courtroom presence of both appointed cocounsel. We decline to announce such a rule here. Nor does the record give any indication that Fuller abandoned defendant. Indeed, she filed an evidentiary motion *in limine* two days after the chambers conferences at issue here.
Finally, defendant asserts that even if no actual effect on the defense can be discerned, Fuller's actions and concerns create an "appearance of impropriety" which warrants reversal. We are not persuaded.

For similar reasons, we also reject defendant's suggestion that Judge Ferguson erred by failing to inquire sua sponte into the possibility that Birchfield should be *****719 **1291** replaced for incompetence. Of course, the court must allow the *accused* to give *specific reasons* why he wishes replacement of his appointed counsel (*People v. Marsden* (1970) 2 Cal.3d 118, 84 Cal.Rptr. 156), but no

request for substitution and no specification of reasons was then forthcoming from either defendant or Fuller. Fuller's brief, general, and very tardy complaint that she was "concerned" about the "general manner" in which Birchfield was "handling the case" but "did not know what to do" was not sufficient to trigger further judicial inquiry.[6]

[6] Defendant claims the settled statement of the unreported conversation between Fuller and Judge Ferguson is inaccurate in material respects. According to "undisputed" evidence adduced at the April 1990 settlement hearing, he contends, Fuller revealed a clear conflict to Judge Ferguson and gave sufficient information to trigger an inquiry about Birchfield's competence. In 1991, we denied defendant's motion to "correct" the settled statement.
Nonetheless, defendant seeks to buttress his current claims with testimony given by Fuller at the settlement hearing. There Fuller said, among other things, that she reminded Judge Ferguson of a *Marsden* motion defendant had filed against Birchfield, but had then withdrawn, in August 1986. According to Fuller, she indicated to Judge Ferguson, but without elaboration, that she believed the earlier *Marsden* motion had merit. Fuller further testified that Judge Ferguson told her she could "protect" herself by limiting herself to research duties.
However, these claims were not corroborated by Judge Ferguson, who also testified at the settlement hearing. As we earlier concluded, the settled statement's resolution of the factual issues is supported by substantial evidence. Thus the statement, not any arguably contrary testimony at the settlement hearing, constitutes the binding appellate record. (See *People v. Hawthorne* (1992) 4 Cal.4th 43, 65–66, 14 Cal.Rptr.2d 133, 841 P.2d 118.)
Fuller also explained at the settlement hearing that when she spoke to Judge Ferguson, she was particularly concerned about Birchfield's failure to pursue a petition for habeas corpus challenging the competency of counsel at the 1979 guilt trial. She also indicated she did not tell defendant the true reason for her desire to limit her trial role. But Fuller did not claim she communicated these facts to Judge Ferguson. Thus, they are irrelevant on appeal as beyond the scope of the unreported court proceeding subject to settlement. The appellate record cannot be augmented in this fashion. (See *People v. Tuilaepa* (1992) 4 Cal.4th 569, 585–586, 15 Cal.Rptr.2d 382, 842 P.2d 1142.)
In any event, even if we credited Fuller's claims, they would not alter our conclusions that no reversible conflict of interest occurred, and that no further *Marsden* inquiry was required.

***907** 2. *Wheeler motion.*
Defendant argues that the trial court erred by rejecting his claim that the prosecutor improperly used a peremptory challenge to excuse prospective juror Sonia Gomez for the sole reason that she was Hispanic. (E.g., *People v. Wheeler* (1978) 22 Cal.3d 258, 148 Cal.Rptr. 890, 583 P.2d 748; see *Batson v. Kentucky* (1986) 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69; see also *Powers v. Ohio* (1991) 499 U.S. 400 [111 S.Ct. 1364, 113 L.Ed.2d 411].) We disagree.

Defense counsel made no objection when the prosecutor used his fourth peremptory challenge to excuse prospective juror Elizabeth Gutierrez. However, when the prosecutor used his ninth peremptory challenge to excuse Gomez, defense counsel raised an immediate protest, noting that both Gomez and Gutierrez "appear[ed] to be of Mexican–American descent."

The court responded that it could "see a reason for [challenging] Gutierrez" but that the basis for excusing Gomez was "much less clear." The court then asked the prosecutor whether he "want[ed] to state some reason for your peremptory."

A rambling discussion ensued among court and counsel. The prosecutor indicated his excusal of Gomez stemmed from her statements that she had no "strong feelings" on the death penalty, had "never thought about it," and "didn't seem to know if there's any social purpose to it." Under these circumstances, the prosecutor explained, "I just wasn't sure she would be able to impose the death penalty." The court cautioned that it was required to determine whether the prosecutor was "making a systematic exclusion [of] ... a certain class of people." The prosecutor responded that he was "systematically excluding people not strong in the death penalty."

***908** In support of his position, the prosecutor sought to compare Gomez's views with *****720 **1292** those of Gutierrez and of prospective jurors Duane Nelson (who had not yet been challenged, but was later excused by the People) and Pamela Guimarra (who sat on the jury). The court indicated its recollection that Gomez's death penalty opinions were "right in the middle" and that "about 11 [other prospective jurors]" had expressed similar views. Again invoking its "duty" to prevent a systematic class exclusion, the court remarked that the prosecutor was "treading on dangerous ground."

After further dialogue, the court stated its concern that mere neutrality on the death penalty was not a "specific bias" which would justify a peremptory excusal over a *Wheeler* challenge. On the other hand, though expressing its determination to avoid the "ridiculous" situation of "built-in ... [pretrial] reversible error," the court indicated a tentative view that there was no "systematic" exclusion of Hispanic jurors.

To test this latter assumption, the court invited the prosecutor to state his reasons for excusing Gutierrez, but then briefly recessed to reread *Wheeler.* When proceedings resumed, the court announced it was "sure" that defense counsel "[had] ... not shown a systematic exclusion of [H]ispanics" but had merely "[raised] the issue," and that "the burden [was] ... on him" to show the prosecutor's systematic misuse of challenges. By "taking up this point," the court cautioned, it had not intended to suggest otherwise.

With the court's permission, the prosecutor then returned to the issue of Gutierrez's excusal. The prosecutor indicated that Gutierrez had been challenged because of defense counsel's off-the-record disclosure that he had represented Gutierrez's brother-in-law in a drug case.

The prosecutor reminded the court that because the instant case involved a "Chicano victim" (Gregorio) and a "Chicano witness" (Gregorio's grandson David), he would "just as soon" have jurors from "[that] community," but "I have other factors to take into account." Defense counsel confirmed that he was not "including [Gutierrez] within the motion that there's some systematic exclusions."

The court then stated its continuing concern that death penalty neutrality was not a "specific bias" which justified peremptory excusal of members of a particular class, but also found that the prosecutor had "certainly shown" a valid reason for Gutierrez's removal. Though "Gomez is a little fuzzier," the court ruled, "at least [the prosecutor] had a reason ... other than ... race [for excusing Gomez]." The court again indicated to defense counsel that "I don't think you've shown" systematic exclusion. On this basis, the court denied defendant's *Wheeler* objection.

***909** The prosecutor ultimately exercised 13 peremptory challenges, as did the defense. No other Hispanic-surnamed juror was excused peremptorily by the prosecution, and defendant's counsel did not challenge any later excusal. At least one Hispanic-surnamed person, Rubin Sanchez, sat on the jury.[7]

[7] The People claim on appeal that the final jury included no fewer than six Hispanic members. Though no record was made on the issue, it appears the jury contained no more than three jurors besides Sanchez with possibly Hispanic surnames: Carolyn Boado, Pamela Guimarra, and Diane Vallicella.

The California Constitution forbids the use of peremptory challenges to discriminate against members of a "cognizable" racial, religious, ethnic, or other identifiable group. (*Wheeler, supra,* 22 Cal.3d 258, 148 Cal.Rptr. 890, 583 P.2d 748.) The federal Constitution similarly proscribes discriminatory challenges on the basis of race. (*Powers, supra,* 499 U.S. 400 [111 S.Ct. 1364]; *Batson, supra,* 476 U.S. 79, 106 S.Ct. 1712.) A party who suspects improper use of peremptory challenges must raise a timely objection and make a prima facie showing of strong likelihood that the opponent has excluded one or more jurors on the basis of group or racial identity. The burden then shifts to the opponent to show that he or she had genuine nondiscriminatory reasons for the challenges at issue. (*People v. Fuentes* (1991) 54 Cal.3d 707, 714, 286 Cal.Rptr. 792, 818 P.2d 75; *****721 **1293** *Wheeler, supra,* 22 Cal.3d at pp. 280–281, 148 Cal.Rptr. 890, 583 P.2d 748; see *Batson, supra,* 476 U.S. at pp. 96–98, 106 S.Ct. at pp. 1722–1724.)

If the trial court makes a "sincere and reasoned effort" to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal. In such circumstances, an appellate court will not reassess good faith by conducting its own comparative juror analysis. Such an approach would undermine the trial court's credibility determinations and would discount " 'the variety of [subjective] factors and considerations,' " including "prospective jurors' body language or manner of answering questions," which legitimately inform a trial lawyer's decision to exercise peremptory challenges. (*Fuentes, supra,* 54 Cal.3d at pp. 714–715, 286 Cal.Rptr. 792, 818 P.2d 75; *People v. Johnson* (1989) 47 Cal.3d 1194, 1216–1221, 255 Cal.Rptr. 569, 767 P.2d 1047, disapproving *People v. Trevino* (1985) 39 Cal.3d 667, 217 Cal.Rptr. 652, 704 P.2d 719; see *Batson, supra,* 476 U.S. at p. 98, fn. 21, 106 S.Ct. at p. 1724, fn. 21.)

As the People now appear to concede, the trial court was mistaken in its belief that only multiple, "systematic" discriminatory exclusions are forbidden. California law makes clear that a constitutional violation may arise even when only one of several members of a "cognizable" group was improperly excluded. (*Fuentes, supra,* 54 Cal.3d at pp. 714–715, fn. 4, 286 Cal.Rptr. 792, 818 P.2d 75.) Federal authority also suggests that individual exclusions on racial grounds may be improper. (*Id.,* at p. 715, 286 Cal.Rptr. 792, 818 P.2d 75, and authorities cited.)

***910** However, even if the prosecutor was required to justify, and the trial court to evaluate, his excusal of Gomez alone,[8] we may properly uphold the court's ultimate denial of defendant's motion. As we have seen, the court mistakenly believed that discriminatory excusal of a single juror was not forbidden (see discussion, *ante*); on the other hand, it had the equally mistaken impression that the reason given for excusing Gomez, even if genuine, did not demonstrate a "specific [juror] bias" necessary to rebut a group-bias challenge.[9] Nonetheless, contrary to defendant's contention, it appears that the court correctly resolved the true issue. The record could and should be clearer, but read as a whole, it indicates that the

court credited the prosecutor's nondiscriminatory explanation after making a "sincere and reasoned effort" to evaluate his good faith.

[8] We have suggested that the trial court's express or implied finding of a prima facie case is conclusive, that the court makes such a finding implicitly when it "inquires about [a party's] justifications" for challenged excusals, that its subsequent attempts to disclaim a prima facie finding are of no effect, and that the only remaining issue is whether the justifications offered were satisfactory. (*Fuentes, supra,* 54 Cal.3d at pp. 716–717, 286 Cal.Rptr. 792, 818 P.2d 75.) To avoid confusion on these issues, we have emphasized that trial courts "should in every instance make an express determination whether or not the prima facie showing requirement has been met." (*Id.,* at pp. 716–717, fn. 5, 286 Cal.Rptr. 792, 818 P.2d 75.) We do so again.

[9] The trial court apparently believed that a group-bias objection can be rebutted only by a showing that the juror in question expressed some *positive prejudice or bias* unfavorable to the excusing party. However, though *Wheeler* distinguished the "specific bias" which justifies excusal from the "group bias" which does not, neither *Wheeler* nor *Batson* overturned the traditional rule that peremptory challenges are available against individual jurors whom counsel suspects even for trivial reasons. (*Johnson, supra,* 47 Cal.3d at pp. 1218–1219, 255 Cal.Rptr. 569, 767 P.2d 1047.) To rebut a race- or group-bias challenge, counsel need only give a *nondiscriminatory* reason which, under all the circumstances, including logical relevance to the case, appears *genuine* and thus supports the conclusion that race or group prejudice *alone* was not the basis for excusing the juror. (See *People v. Hall* (1983) 35 Cal.3d 161, 167–168, 197 Cal.Rptr. 71, 672 P.2d 854; *Wheeler, supra,* 22 Cal.3d at pp. 274–276, 278–282, 148 Cal.Rptr. 890, 583 P.2d 748; see also *Batson, supra,* 476 U.S. at pp. 97–98, 106 S.Ct. at pp. 1724–25.) Here, if Gomez's indifference to the death penalty was a genuine basis for her excusal, it was a permissible one.

Thus, the court did not simply accept the prosecutor's reason at face value; at the outset, the court noted skeptically that other prospective jurors not yet excused had expressed death penalty views similar to those of Gomez. The prosecutor *****722 **1294** gave a vigorous defense of his good faith, compared Gomez's responses to those of other specific prospective jurors, reiterated his view that Gomez's opinions were particularly vague, and offered to reveal his evaluations of all persons thus far challenged. The court specifically asked the prosecutor to justify his prior excusal of another prospective Hispanic juror, Gutierrez. During this discussion, the court apparently came to accept that the reason given by the prosecutor for Gomez's excusal was genuine, and the court's concern then turned to the legal sufficiency of the reason. The court's ultimate acceptance of the prosecutor's sincerity is further shown by its comment, in denying defendant's motion, that "at least ***911** [the prosecutor] *has* a reason other than ... race" for excusing Gomez. (Italics added.)

The trial court thus met its obligation to determine that the prosecutor's excusal of Gomez did not stem solely from her racial or ethnic identity. The court's negative finding on that issue is substantially supported and must therefore be accepted on appeal. Accordingly, we reject defendant's claim that his challenge to Gomez's excusal was erroneously denied.

3. *Failure to challenge and excuse Juror Binns.*

During voir dire, Patricia Binns, who sat on the jury, expressed the "adamant" view that "if you make the choice to use [drugs] ..., then you're totally responsible for that choice you made." Because of this statement, defendant claims his trial counsel was constitutionally ineffective for failing to exercise a peremptory challenge against Binns. The record does not support his contention.

A claim of ineffective assistance will not be accepted on direct appeal unless the appellate record makes clear that the challenged act or omission was a mistake beyond the range of reasonable competence. (E.g., *People v. Wilson* (1992) 3 Cal.4th 926, 936, 13 Cal.Rptr.2d 259, 838 P.2d 1212; *People v. Pope* (1979) 23 Cal.3d 412, 426–427, 152 Cal.Rptr. 732, 590 P.2d 859.) Because the use of peremptory challenges is inherently subjective and intuitive, an appellate record will rarely disclose reversible incompetence in this process.

The overall tenor of Binns's voir dire established her ability and desire to be fair on the issue of penalty. She professed that she could "follow the law," "go either way" based on the guidelines given to her, "evaluate [the evidence] and make a choice," judge expert psychiatric evidence, and use her common sense. While she stated that persons were "responsible" for the consequences of their choice to use drugs, she never indicated that a defendant's voluntary drug ingestion would prevent her from choosing life without parole, rather than death, as the appropriate punishment for a capital crime.

Under these circumstances, the record discloses no manifest incompetence in counsel's decision to retain Binns, which was presumably based on his overall impression of her personality and values. Defendant's claim of ineffective assistance must be dismissed.

4. *Voir dire comments that evidence and issues would be limited.*

During both the death qualification and general voir dires, the prosecutor often reminded panelists that defendant had already been found guilty ***912** of first degree murder with special circumstances, that the law limited the current trial to penalty issues only, and that jurors would thus not hear all the guilt evidence which had previously been presented. The prosecutor asked if these limitations would make it more difficult to impose the death penalty. Specific inquiries of this type were made to Jurors Hillis, Reinelt, and Guimarra.

Defendant argues that this was misconduct which prejudiced his Eighth Amendment right to a penalty jury fully aware of its sentencing responsibilities. (Citing *Caldwell v. Mississippi* (1985) 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231.) Defendant also asserts that the prosecutor's improper comments prejudiced his mitigating case of mental impairment and intoxication (§ 190.3, factor (h)) and precluded the affected *****723 **1295** jurors from considering lingering doubt of his guilt in mitigation (see *People v. Terry* (1964) 61 Cal.2d 137, 145–147, 37 Cal.Rptr. 605, 390 P.2d 381).

At the outset, defense counsel's failure to object and request appropriate admonitions waives the direct claim of misconduct. (*People v. Green* (1980) 27 Cal.3d 1, 34, 164 Cal.Rptr. 1, 609 P.2d 468.) In any event, defendant has shown no basis for disturbing the penalty judgment.

By reminding prospective jurors that guilt of capital murder had already been determined, and that the proper penalty was the only remaining issue, the prosecutor did nothing improper. In its opening comments to the entire panel, the court itself had made the same true and obvious point. We have

consistently held that accurate reminders of a separate penalty jury's limited role do not eliminate the defendant's ability to litigate lingering doubt. (See *People v. DeSantis* (1992) 2 Cal.4th 1198, 1238–1239, 9 Cal.Rptr.2d 628, 831 P.2d 1210; *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1234–1235, 275 Cal.Rptr. 729, 800 P.2d 1159.) Nor are we persuaded that a penalty jury's sense of *sentencing* responsibility is necessarily diminished by the knowledge that another jury has already rendered a conclusive judgment of *guilt.*

Under the circumstances of this case, we reach a similar conclusion about the prosecutor's suggestions that "all" the guilt evidence would not be reintroduced. In general, of course, the prosecutor should not allude to additional evidence he cannot or will not present, thus leaving jurors to speculate that the People have, or a prior jury heard, a stronger case. Moreover, a "tension" may arise between a penalty defendant's right to exploit lingering doubt and the preference not to reproduce all the guilt evidence at a second penalty trial. (*DeSantis, supra,* 2 Cal.4th at p. 1239, 9 Cal.Rptr.2d 628, 831 P.2d 1210.)

Here, however, the jury could not reasonably have understood the prosecutor's remarks to undermine any lingering doubt or other penalty issue that ***913** defendant actually sought to exploit. Because defendant's *identity* as Gregorio's robber and killer was beyond dispute, defendant expressly conceded that point.[10] The only remaining guilt issues on which the penalty jury might exercise lingering doubt were whether defendant formed the specific mental states, such as premeditation and intent to rob, which supported the charges of capital robbery-murder.

[10] For example, counsel asked defendant on the stand whether "while you were at San Quentin, your thoughts ever turn[ed] towards the person that you murdered in the early part of 1979." Defendant answered, "Yes, [they] did." Counsel then questioned defendant at some length about his remorse for the killing.

But highly similar mental-state issues were the heart of both the prosecution and defense cases on penalty. The defense strategy was to focus on whether defendant's intoxication at the time of the murder made the crime less heinous and suggested leniency. Both prosecution and defense presented full-dress cases on that issue. Each offered extensive evidence and argument on whether defendant was so intoxicated that he could not have understood, intended, premeditated, or controlled his acts.[11] The jury was specifically instructed to consider "[w]hether ... the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, or the effects of intoxication." (§ 190.3, factor (h).)

[11] For example, defense counsel's closing argument broke defendant's life down into three phases, his childhood and youth, "the time that he murdered Mr. Ante," and his life in prison. Counsel asserted that the issue was "what was or was not in Mr. Montiel's brain at the time Mr. Ante was murdered." He stressed that defendant went into the victim's house without a weapon and missed a substantial sum of money in the victim's pocket even after ransacking the house. "We're talking about simply this," counsel said, "Did these drugs have an effect on Mr. Montiel, his behavior and the actions that he performed, and if so, what is the extent of that problem caused by drugs[?]"

The jurors were not likely to infer that because of their limited penalty role, the prosecutor was withholding significant evidence *****724 **1296** on this crucial question. Instead, a reasonable juror would assume that while defendant's *identity* as Gregorio's robber and killer need not be fully relitigated,

all evidence about the offense and offender which bore on the appropriate penalty would be fully presented. We see no reasonable likelihood that any juror believed the prosecution was omitting mental-state evidence adverse to defendant.[12] Hence, we cannot conclude that the prosecutor's remarks impaired the jury's ability to entertain lingering doubt, or to consider defendant's claim that his intoxication extenuated his crime.

[12] We are not persuaded otherwise by the fact that on a single occasion during voir dire, the prosecutor questioned the entire panel as follows: "As I told you before, I asked the fact that you had not considered and heard the previous case where guilt was decided if it would prevent you from imposing a death penalty. [¶] Let me ask, the fact that you won't be hearing all the evidence that the previous jury heard *about the death penalty*—we're limited to only go to what the proper penalty for this trial [is]. [¶] The fact that you won't hear all that other evidence, is that going to make it difficult for someone to impose the death penalty situation in this case?" (Italics added.) It appears clear in context that the prosecutor realized he had misspoken and immediately made clear that he was not withholding penalty evidence, but rather was limited to evidence on penalty issues.

***914** 5. *Voir dire comments about defendant's neat courtroom appearance and victim's absence.* During general voir dire of a panel which included Jurors Barnett, Renz, Boado, Reinelt, and Sanchez, the prosecutor remarked that it would be proper to consider "sympathetic factors" in defendant's favor, but that defendant would be appearing in court "dressed up and decent" and had "over six years to get ready for today." The prosecutor continued in a similar vein that "[w]hat you're not going to have is ... the victim appear[ing] in court, and it's easy to lose—." At this point, defense counsel interrupted with an objection, which was sustained. Counsel did not request an admonition, however, and none was given.

Defendant asserts that these comments were misconduct calculated to inflame the jurors, dispel sympathy generated by defendant's respectful courtroom appearance, call attention to a nonstatutory aggravating factor (i.e., the homicide victim's death), imply defendant's connivance against the judicial system, and penalize his exercise of his constitutional jury trial rights.

The contention is barred. As defendant concedes, trial counsel failed to preserve a direct claim of misconduct because, although he objected to the prosecutor's remarks, he did not also request an admonition that would clearly have cured any harm. (*People v. Bonin* (1988) 46 Cal.3d 659, 689, 250 Cal.Rptr. 687, 758 P.2d 1217; *People v. Beivelman* (1968) 70 Cal.2d 60, 75, 73 Cal.Rptr. 521, 447 P.2d 913; see *People v. Green, supra,* 27 Cal.3d 1, 34, 164 Cal.Rptr. 1, 609 P.2d 468.)

Defendant asserts that the trial court should have intervened sua sponte to prevent or cure misconduct by the prosecutor. Our cases hold the contrary (*People v. Carrera* (1989) 49 Cal.3d 291, 321, 261 Cal.Rptr. 348, 777 P.2d 121; *People v. Poggi* (1988) 45 Cal.3d 306, 335–336, 246 Cal.Rptr. 886, 753 P.2d 1082), and defendant offers no persuasive reason to reconsider them.

Defendant also suggests the claim is cognizable in the context of ineffective assistance of counsel. However, the appellate record does not eliminate the possibility that counsel's omission was tactical. (See *People v. Pope, supra,* 23 Cal.3d 412, 425–426, 152 Cal.Rptr. 732, 590 P.2d 859.) For all that

appears, counsel may have been ***915** willing to forgo an appellate claim in hopes that a successful objection alone would ameliorate the prosecutor's remarks without highlighting them further.[13]

[13] Indeed, the jury received general instructions not to speculate about the reasons for objections or the answers to questions as to which objections had been sustained, and to disregard any "evidence" that was "stricken out" by the court or any "offer of evidence" that was "rejected."

In any event, the prosecutor's comments, brief in duration, did not call attention to anything jurors would not readily infer ****1297** in *****725** any event. The jurors already well knew that the victim was dead and that the murder had taken place several years previously. They would certainly assume that defendant would groom neatly for court and that his appearance had changed since the crime was committed.[14] By sustaining defense counsel's objection, the court immediately signalled that the prosecutor's remarks were improper. The incident occurred at the outset of trial proceedings, long before deliberations began. Just before the jury retired, it received instructions, among others, to disregard "evidence" that had been "stricken," and to avoid speculation about gaps caused by successful objections. For these reasons, any omission by counsel does not undermine confidence in the penalty judgment. (*Strickland v. Washington, supra,* 466 U.S. 668, 694, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674; see *People v. Fosselman* (1983) 33 Cal.3d 572, 584, 189 Cal.Rptr. 855, 659 P.2d 1144.) Hence, there is no basis for reversal.

[14] Indeed, while the prosecutor may have acted improperly by attempting to influence prospective jurors during the voir dire process, the contents of his remarks might not have been improper in all contexts. We have held that the prosecutor, during appropriate argument to the jury, may urge it not to consider "free-floating" emotional responses which are not connected to the penalty evidence. (*People v. Gonzalez, supra,* 51 Cal.3d 1179, 1226, 275 Cal.Rptr. 729, 800 P.2d 1159.)

TRIAL ISSUES

1. *1971 county fair arrest.*

Defendant claims his state and federal rights to due process, a fair trial, and a reliable penalty determination were violated by admission of evidence of his resistance to arrest at the Kern County Fair in 1971. In essence, defendant contends that the evidence was insufficient to show "violent" criminal activity in aggravation (§ 190.3, factor (b) (hereafter factor (b))) because it failed to establish all the elements of a criminal assault. (§ 241, subds. (a), (b).) In defendant's view, Deputy Leavell's testimony about their scuffle was "ambiguous," did not indicate that defendant was the "aggressor," and suggested a mere struggle to escape without any "attempt ... to commit ... violent injury...." (§ 240.)

The jury was carefully instructed on the elements of assault stemming from violent resistance to arrest, and we find ample evidence from which it ***916** could infer violent criminal activity. If one knows or should know he is being arrested by a peace officer, he has a duty to refrain from forcible resistance. (§ 834a; see also § 148 [resisting peace officer in exercise of "duty" is misdemeanor].) The use of violence to overcome reasonable force employed in a lawful arrest is an assault. (See *People v. Gonzalez, supra,* 51 Cal.3d 1179, 1219, 275 Cal.Rptr. 729, 800 P.2d 1159.)

Leavell testified that he assumed custody of defendant after other officers saw defendant commit an apparent theft and arrested him. According to Leavell, defendant then escaped, but, after a short chase, he caught up with defendant; Leavell's momentum caused both men to fall to the ground; a short "fight" then occurred, of which Leavell was the "winner," and defendant was handcuffed.

This evidence readily supports the inference that defendant knew or should have known he was being arrested by a peace officer, responded forcibly to Leavell's reasonable and lawful efforts to subdue him, and thus committed an assault. Since defendant had no privilege of self-defense against Leavell's use of reasonable force, concerns about who was the "aggressor" (compare *People v. Tuilaepa, supra,* 4 Cal.4th 569, 587–588, 15 Cal.Rptr.2d 382, 842 P.2d 1142; *People v. Lucky* (1988) 45 Cal.3d 259, 291, 247 Cal.Rptr. 1, 753 P.2d 1052) are irrelevant.

Defendant also contends that evidence about his threats to arresting Officers Leavell and Williams were inadmissible nonstatutory aggravating evidence. (See *People v. Boyd* (1985) 38 Cal.3d 762, 777–778, 215 Cal.Rptr. 1, 700 P.2d 782.) He makes the novel additional contention that the use, in aggravation, of these ineffectual, *****726** merely ****1298** "obnoxious" utterances violated his state and federal free speech rights.

Counsel's failure to object bars these contentions as direct appellate issues. Furthermore, because the "threat" evidence was admissible, the record does not demonstrate counsel's incompetence.

Defendant argues that his menacing statements were not "actual crimes" involving the "threat [of] ... violence" (factor (b); see *People v. Phillips* (1985) 41 Cal.3d 29, 70–72, 222 Cal.Rptr. 127, 711 P.2d 423) because there was no showing he spoke with intent to prevent his arrest and with the apparent ability to carry out his threats. (See § 71 [threatening public official].) However, it is well settled that an "actual" violent crime admissible under factor (b) may be shown in full context. (*People v. Melton* (1988) 44 Cal.3d 713, 757, 244 Cal.Rptr. 867, 750 P.2d 741.)

Even if defendant's threats were not themselves crimes, they occurred in the course of a violent, criminal resistance to arrest (see discussion, *ante,* pp. 725–726 of 21 Cal.Rptr.2d, pp. 1297–1298 of 855 P.2d), ***917** and they were thus admissible under factor (b) to demonstrate the aggravated nature of defendant's unlawful conduct. (See *People v. Tuilaepa, supra,* 4 Cal.4th at pp. 587–588, 15 Cal.Rptr.2d 382, 842 P.2d 1142.) Nor were defendant's constitutional rights infringed by the evidentiary use of his "obnoxious" speech for this purpose.

2. *Foster Freeze firearm.*

Defendant claims there was legally insufficient evidence he used a lethal handgun, rather than a harmless starter pistol, during the 1972 Foster Freeze robbery. Hence, he urges, the jury should not have been instructed on the crime of assault with a deadly weapon (§ 245) in connection with that aggravating incident. He further insists the prosecution committed prejudicial bad faith, amounting to a due process violation, by attempting to show use of a true firearm.

The evidence of firearm use was sufficient. Defendant brandished a handgun at Denise Brown, who said it "looked real." When fleeing the scene, he actually fired the weapon at Ronald Jones, who heard two

shots and ducked. Evidence that Jones suspected the gun was a starter pistol, and that he heard no bullets, hardly compels the inference that the gun was not real.[15]

[15] Defendant suggests his own counsel was prejudicially ineffective when, while cross-examining Jones about the shots fired by defendant, he asked whether Jones had fallen down "[i]n order to duck the bullets." Jones replied, "Yes." Defendant argues counsel thus assumed adverse facts about the existence of "bullets" that were not in evidence. However, in context, this brief exchange suggested only that Jones had ducked reflexively because of the chance that the gun might be real. Defendant also cites counsel for failing to highlight Jones's 1979 testimony that no bullet holes were found in the area. However, the omission had only marginal effect on the strength of the prosecution evidence.

Moreover, the 1986 trial record demonstrates no bad faith on the prosecution's part. The 1972 abstract of judgment demonstrates at most that defendant pled guilty to a second degree robbery in connection with the Foster Freeze incident, and that weapon and firearm enhancements were not included. It is well-settled that the charges to which defendant pled guilty in a prior case do not limit the aggravating evidence the prosecution may present in a subsequent capital trial. (*People v. Melton, supra,* 44 Cal.3d 713, 755–756, 244 Cal.Rptr. 867, 750 P.2d 741.)[16]

[16] The printed judgment form included provision for indicating whether the pleading defendant "was or was not" armed or "used or did not use" a firearm in his commission of the offense. The relevant blanks were filled in with the words "was not" and "did not use." However, contrary to defendant's inference, these statements did not constitute formal "acquittals" on the weapon and firearm issues. (See § 190.3, par. 3.) They merely indicated enhancements that *were not included* in the plea. (Cf., *Melton, supra,* 44 Cal.3d at p. 755, 244 Cal.Rptr. 867, 750 P.2d 741.)

***918** To support his claim of bad faith, defendant points to comments by the prosecutor during the first 1979 penalty trial that the 1972 offense "appeared" to involve a starter pistol, that no bullet holes *****727** were ****1299** found, and that "the presumption was that [the robbery] was a second degree, [which] ... is what he pleaded to." But nothing in these remarks precluded the prosecution from reevaluating the strength of its aggravating evidence between 1979 and 1986.

In any event, the potential for prejudice was minimal at most. The jury could evaluate the relative weakness of the handgun evidence. Moreover, as defendant concedes, even if he used only a starter pistol, he brandished and fired it to facilitate a robbery, thus committing a serious offense involving "violence or the express or implied threat [of] ... violence." (§ 190.3, factor (b).) Under these circumstances, any inference that the gun was not real would make the incident only marginally less aggravating. Given the brutal nature of the capital murder and the other evidence of defendant's violence and recidivism, admission of "real gun" evidence thus cannot have affected the penalty outcome.

3. *Siegel testimony.*

Defendant complains that his confrontation, due process, fair trial, and reliable-penalty rights were violated when Dr. Siegel, the prosecution drug expert, disclosed prejudicial hearsay information while explaining his conclusions on direct examination. Defendant accuses the prosecutor of using Dr. Siegel

as an improper means of introducing hearsay for truth. Defendant blames the court and his trial counsel for failing to intervene.

However, the trial court had no sua sponte duty to exclude evidence, remedy misconduct, or instruct the jury on specific evidentiary limitations. (See discussion, *ante,* pp. 724–725 of 21 Cal.Rptr.2d, pp. 1296–1297 of 855 P.2d; see also *People v. Clark* (1992) 3 Cal.4th 41, 130–131, 10 Cal.Rptr.2d 554, 833 P.2d 561; *People v. Collie* (1981) 30 Cal.3d 43, 64, 177 Cal.Rptr. 458, 634 P.2d 534.) Thus, counsel's failure to act waived direct claims of error. On the other hand, we find no incompetence warranting reversal.

An expert may generally base his opinion on any "matter" known to him, including hearsay not otherwise admissible, which may "reasonably ... be relied upon" for that purpose. (Evid.Code, § 801, subd. (b); *In re Fields* (1990) 51 Cal.3d 1063, 1070, 275 Cal.Rptr. 384, 800 P.2d 862.) On direct examination, the expert may explain the reasons for his opinions, including the matters he considered in forming them. However, prejudice may arise if, " 'under the guise of reasons,' " the expert's detailed explanation " '[brings] before the jury incompetent hearsay evidence.' " (*People v.* ***919** *Nicolaus* (1991) 54 Cal.3d 551, 583, 286 Cal.Rptr. 628, 817 P.2d 893, quoting *People v. Coleman* (1985) 38 Cal.3d 69, 92, 211 Cal.Rptr. 102, 695 P.2d 189.)

Because an expert's need to consider extrajudicial matters, and a jury's need for information sufficient to evaluate an expert opinion, may conflict with an accused's interest in avoiding substantive use of unreliable hearsay, disputes in this area must generally be left to the trial court's sound judgment. (*Nicolaus, supra,* 54 Cal.3d at p. 582, 286 Cal.Rptr. 628, 817 P.2d 893; see *People v. Cole* (1956) 47 Cal.2d 99, 105, 301 P.2d 854.) Most often, hearsay problems will be cured by an instruction that matters admitted through an expert go only to the basis of his opinion and should not be considered for their truth. (*Coleman, supra,* 38 Cal.3d at p. 92, 211 Cal.Rptr. 102, 695 P.2d 189.)

Sometimes a limiting instruction may not be enough. In such cases, Evidence Code section 352 authorizes the court to exclude from an expert's testimony any hearsay matter whose irrelevance, unreliability, or potential for prejudice outweighs its proper probative value. (*Coleman, supra,* 38 Cal.3d at pp. 91–93, 211 Cal.Rptr. 102, 695 P.2d 189.)

Here, the jury received CALJIC No. 2.07, which instructed that some evidence had been admitted for a limited purpose and must be considered accordingly. However, this instruction was never tied to particular evidence, and the jury's attention was never drawn to specific hearsay information disclosed by expert witnesses which should only be considered as a basis for evaluating *****728 **1300** their opinions. With this background in mind, we proceed to defendant's individual claims.

a. *Use and sale of other drugs.* In response to the prosecutor's questions, Dr. Siegel recited the extensive drug history defendant, then age 31, had given him in 1979. Dr. Siegel stated that at various times since age 13, defendant had used or experimented with glue, alcohol, LSD, amphetamines, cocaine, barbiturates, marijuana, Quaaludes, heroin, and PCP. When the prosecutor asked, "What else did he tell you about this PCP?", Dr. Siegel replied that at age 29, defendant was smoking several PCP-laced "joints" per day and using heroin when it was around; "[defendant] also said ... he [would sell] slam and then he would use the dust."

Defendant has no valid hearsay complaint about this evidence. As his own extrajudicial statement, it fell within the hearsay exception for admissions by a party. (Evid.Code, § 1220.)

***920** Defendant also claims, however, that the references to drugs other than alcohol and PCP, and the assertion that he "sold slam," were irrelevant to Dr. Siegel's ultimate opinion about the effects of PCP and alcohol ingestion on defendant's mental state when he killed Gregorio. These disclosures, he urges, constituted nonstatutory aggravating evidence (see *People v. Boyd, supra,* 38 Cal.3d 762, 777–778, 215 Cal.Rptr. 1, 700 P.2d 782) that he was a seller and "hedonistic" abuser of drugs.

However, Dr. Siegel was entitled to place his conclusions in the context of defendant's overall pattern of drug use. When the prosecutor asked whether "someone who starts out in this kind of lifestyle" might ultimately require more PCP or alcohol to become intoxicated, Dr. Siegel confirmed that defendant's "whole history" was relevant; a "chronic drug user" who was "trying to maintain a chronic state of intoxication" might need more or less of a particular drug to achieve certain toxic effects.

Dr. Siegel's reference to defendant's use of other drugs was thus not improper. Moreover, there was little danger that, by considering this evidence for its truth, the jury would come to irrelevant but prejudicial conclusions about his "hedonistic" drug abuse. The central theory of both defense and prosecution cases was that defendant was a lifelong abuser of drugs. The only dispute was the impact of this chronic abuse on his state of mind at the time of the capital crime.

Similar considerations rebut defendant's claim that the disclosure about selling "slam" was prejudicial. Dr. Siegel's revelation on this subject may have been both nonresponsive and irrelevant, but the remark was brief, and the information it disclosed could hardly have come as a surprise to jurors already aware of defendant's drug-centered lifestyle. Hence, admission of evidence about defendant's drug history, even without a limiting instruction, does not undermine confidence in the penalty judgment.

b. *References to 1979 informant testimony.* Dr. Siegel testified at length about the descriptions defendant, Victor Cordova, and others had given him of events on the day of Gregorio's murder. The prosecutor asked whether Dr. Siegel also considered how these versions might "contrast" with what defendant told Michael Palacio, his jail cellmate. Dr. Siegel confirmed he had considered Palacio's 1979 trial testimony.

As Dr. Siegel told it, Palacio gave the following account of defendant's statements: Defendant entered Gregorio's home to use the telephone and saw ***921** money sticking out of Gregorio's pocket. Defendant then formed the intent to kill Gregorio for the cash and went to the kitchen to get a knife. After leaving the house, defendant asked Victor to go back and retrieve his beer, then did so himself after Victor declined. Defendant returned a second time with the beer and a "bulging" pocketful of coins he had not taken before.

Dr. Siegel said this information "tells me that while ... [defendant] ... [was] ... obviously grossly intoxicated, he also [was] ... capable of some goal direction activity...." In his closing argument, the prosecutor again noted Palacio's claim that defendant *****729 **1301** admitted forming the intent to rob and kill.

Even so, counsel's failure to pursue a hearsay objection was not facially incompetent. As counsel must have known, a successful objection probably would not have prevented Palacio's account from reaching the jury. In that event, the People could, and likely would, have chosen to present Palacio in person, or if he was unavailable, to introduce his 1979 testimony directly under the unavailable-witness exception to the hearsay rule. (Evid.Code, § 1291, subd. (a)(2).) Either alternative would only have emphasized Palacio's claim that defendant committed a premeditated killing. Given these tactical considerations, the record fails to demonstrate that counsel's silence in the face of Dr. Siegel's hearsay report constituted ineffective assistance.

Moreover, even if counsel should have objected, reversal is not warranted. While Palacio's assertions were the only direct evidence that defendant consciously formed a criminal intent before he killed Gregorio, the valid circumstantial evidence that defendant knew what he was doing was extremely strong.

The manner of killing suggested calculation and awareness. It was also clear that defendant had ransacked Gregorio's residence and taken money. Moreover, Victor testified that moments after the crime, defendant described it several times in graphic and coherent terms. Victor also indicated that defendant carried away the murder weapon and immediately returned to the house to retrieve other evidence which might link him to the homicide. Defendant continued to boast about the killing as he was driven away from the scene. He later asked Victor to lie about the extent of his intoxication. Under these circumstances, admission of the Palacio evidence without a limiting instruction does not undermine confidence in the judgment.[17]

[17] Defendant raises the novel contention that because defendant's 1979 "confession" to Palacio was erroneously admitted, the penalty judgment is reversible per se. He urges that the new harmless error rule of *Arizona v. Fulminante* (1991) 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d 302 (see also *People v. Cahill* (1993) 5 Cal.4th 478, 500–510, 20 Cal.Rptr.2d 582, 853 P.2d 1037) should not apply "retroactively." The claim is meritless. Even if the former per se rule applied to statements not obtained by improper police conduct, and even if it applied in the context of ineffective assistance of counsel—both highly dubious propositions for which defendant cites no authority—his substantive rights are not compromised by invoking new rules of harmless error here. (See, e.g., *Cahill, supra,* 5 Cal.4th at p. 510, 20 Cal.Rptr.2d 582, 853 P.2d 1037; *People v. Sims* (1993) 5 Cal.4th 405, 447–448, 20 Cal.Rptr.2d 537, 853 P.2d 992.)

***922** c. *Psychiatric reports.* We reach similar conclusions about defendant's complaint that the prosecutor wrongly elicited from Dr. Siegel the hearsay details of prior unfavorable psychological reports. When the prosecutor asked Dr. Siegel whether he considered "any prior psychological evaluations," the witness replied that he was provided with several psychological assessments of defendant between 1972 and 1978. According to Dr. Siegel, these reports "talked words such as potential for violence" and suggested that defendant demonstrated "bravado, manipulation, and aggression." "Apparently," Dr. Siegel suggested, "[defendant] had a long history [during these years] with descriptors like that being used."

Even if counsel should have sought to prevent independent consideration of these hearsay matters (see, e.g., *Whitfield v. Roth* (1974) 10 Cal.3d 874, 894–895, 112 Cal.Rptr. 540, 519 P.2d 588), his omission is not grounds for reversal. According to Dr. Siegel, defendant himself described "fights he had gotten

into" and "wasn't denying" that he was prone to violence, whether or not intoxicated. Dr. Siegel indicated that the only dispute was about interpretation; defendant's view was "that he only did it when he was provoked or when he needed to put some dude in line." The generalities contained in the psychological evaluations, as described by Dr. Siegel, were not inconsistent with defendant's own admissions. Thus, revelation of these matters does not undermine confidence in the penalty judgment.[18]

[18] Similar considerations dispose of defendant's claim that his counsel was ineffective for failing to challenge or limit Dr. Siegel's disclosure that within days before the murder, defendant had "punch[ed] out" the window of a relative's residence to gain entry to the premises. In Dr. Siegel's view, this physical response to small frustrations was just another example of "the way [defendant] was at that time." The information, supplied by defendant himself, was an appropriate foundation for Dr. Siegel's opinion that defendant was prone to violence whether or not intoxicated. The jury was not cautioned to avoid considering the incident as independent nonstatutory aggravating evidence, but no basis for reversal arises in view of the brevity and collateral nature of the evidence.

More generally, defendant claims that admission of expert evidence about his "potential for violence" contravened our holding in *People v. Murtishaw* (1981) 29 Cal.3d 733, 175 Cal.Rptr. 738, 631 P.2d 446. There we concluded that psychiatric predictions about *future* dangerousness are not admissible as evidence directly bearing on the appropriate penalty in a capital case. (*Id.,* at pp. 767–775, 175 Cal.Rptr. 738, 631 P.2d 446.) However, nothing in *Murtishaw* prevents an expert witness from using *past* indicators of the defendant's violent character to support an opinion about his mental state *at the time of the capital crime.*

*****730 *923 **1302** 4. *Nuernberger testimony.*

In a similar vein, defendant complains that through cross-examination of the defense psychiatric expert, Dr. Nuernberger, the prosecutor improperly introduced, for their truth, the unfavorable hearsay details of 1979 testimony by another defense expert, Dr. Cutting. Defendant claims a violation of his confrontation rights, and also asserts that the prosecutor made wrongful use of privileged information. All these contentions must be rejected.

Prior to the 1979 trials, Dr. Cutting had been appointed at defense request to evaluate mental issues. Defendant called Dr. Cutting as a witness at his 1979 insanity trial, purporting to waive his psychotherapist-patient privilege (Evid.Code, § 1014) only for that purpose. Dr. Cutting then testified that, at the time he examined defendant, he found no mental disease or defects which would substantially impair defendant's capacity to evaluate or control his behavior. Dr. Cutting also said that evidence of defendant's intoxication on the day of the murder would not change his opinion.

While cross-examining Dr. Nuernberger at the 1986 trial, the prosecutor asked if he had reviewed any report or testimony of Dr. Cutting. When Dr. Nuernberger said he had not, the prosecutor described Dr. Cutting's 1979 testimony and asked whether Dr. Nuernberger would consider Dr. Cutting's assessment, based on an examination undertaken within two months of the murder, in forming his own opinion. Dr. Nuernberger replied he would "consider" the earlier view but not be bound by it. In his closing argument, the prosecutor made significant reference to the 1979 testimony of "defense witness" Cutting, "ignored by Dr. [Nuernberger]," in an effort to undermine the latter's credibility.

Defendant raised no hearsay or privilege objections at trial. Hence, he argues that his counsel was ineffective, and that the trial court had a duty to intervene sua sponte. His contentions lack merit.

Of course, Dr. Cutting's testimony would not have been subject to exclusion on grounds of privilege. Both parties understood that defendant's case in mitigation was primarily based on claims of his impaired mental condition at the time of the capital crime. By placing his mental state in issue at the penalty trial, defendant waived his psychotherapist-patient privilege. (Evid.Code, § 1016.)

Nor are defendant's hearsay and confrontation-clause arguments persuasive. "The courts have traditionally given both parties wide latitude ***924** in the cross-examination of experts in order to test their credibility. [Citations.] Thus, a broader range of evidence may be properly used on cross-examination to test and diminish the weight to be given the expert opinion than is admissible on direct examination to fortify the opinion. [Citation.]" (*People v. Coleman, supra,* 38 Cal.3d 69, 92, 211 Cal.Rptr. 102, 695 P.2d 189.)

It is common practice to challenge an expert by inquiring in good faith about relevant information, including hearsay, which he may have overlooked or ignored. Use of Dr. Cutting's testimony to attack Dr. Nuernberger's credibility was not improper cross-examination.

*****731 **1303** Of course, defendant failed to request, and the jury therefore did not receive, an instruction limiting its consideration of this evidence. However, we find the omission harmless. Contrary to defendant's claim, the prosecutor did not strongly suggest in his argument that Dr. Cutting's opinion should be given independent consideration. In the main, the prosecutor merely stressed that the worth of Dr. Nuernberger's views were diminished by his failure to consider the results of another professional evaluation undertaken closer to the time of the capital crime. Under these circumstances, the jury was unlikely to give improper substantive consideration to the hearsay evidence, and omission of a limiting instruction does not undermine confidence in the judgment.[19]

[19] Thus, the prosecutor argued vigorously and repeatedly that Dr. Nuernberger had "shrugged off" and "ignored" the views of Dr. Cutting, "this defendant's [own] expert," when they were brought to his attention. Noting Dr. Nuernberger's assertion that he would not be controlled by the opinions of another, the prosecutor cited Dr. Cutting's views as an illustration that "Dr. [Nuernberger] wouldn't be controlled by reality if it disagreed with any of his own theories." The prosecutor hammered home the point that Dr. Nuernberger's conclusions were contradicted by the more contemporaneous and "common sense" evaluations of Drs. Cutting and Siegel. Only twice did the prosecutor seem to stray from this proper limited argument. Extolling the care and specificity of Dr. Siegel's evaluation at one point, the prosecutor remarked that "[i]t also shows you to a little lesser extent that [Dr.] ... Cutting, the defense expert, the defense psychiatrist[,] had a basis for his opinion that the defendant was not ... impaired at the time of his horrible murder." Later, in one of his assertions that Dr. Nuernberger had "ignored" Dr. Cutting's views, the prosecutor suggested that "[w]e have got [lack of mental impairment] ... by the [defendant's] own witness*es*...." (Italics added.) Even if these brief remarks incorrectly invited the jury to give Dr. Cutting's views independent consideration, reversal is not warranted on that basis.

Defendant also argues that Dr. Nuernberger's credibility was damaged by counsel's incompetent failure to prepare him for his testimony. Defendant points to Dr. Nuernberger's concessions that he had not

refreshed his memory about his 1979 observations of defendant, had not more recently reviewed defendant's prison file, had not interviewed persons who observed defendant around the time of the murder, and no longer recalled in detail the facts of the crime.

***925** But the appellate record establishes neither incompetence nor prejudice. However counsel dealt with this expert, he faced the tactical risk that too much preparation might undermine, rather than fortify, the favorable nature of the opinions the witness was willing to give. Nor may we infer on appeal that Dr. Nuernberger's testimony would have been of greater benefit to defendant had he prepared more fully. Hence, we cannot conclude that any omission by counsel undermines confidence in the judgment.

5. *Financial-gain special circumstance.*

As previously noted, defendant's 1979 guilt jury found two special circumstances: that the murder (1) was intentional and carried out for financial gain (§ 190.2, subd. (a)(1)), and (2) occurred in the commission of a robbery (*id.,* subd. (a)(17)(i)). In *Montiel I, supra,* we struck the financial-gain special circumstance as inapplicable to this robbery case, where the homicide was not " 'an essential prerequisite to the financial gain sought by the defendant.' " (39 Cal.3d at p. 927, 218 Cal.Rptr. 572, 705 P.2d 1248, quoting *People v. Bigelow* (1984) 37 Cal.3d 731, 751, 209 Cal.Rptr. 328, 691 P.2d 994.)

Nonetheless, at the prosecutor's request and with defense counsel's agreement, the instant trial court took judicial notice in the jury's presence that *both* financial-gain and robbery-murder "special circumstances" had previously been found true. The jury was later formally instructed that "special circumstance *s* " had specifically been sustained. (Italic added.) The prosecutor made significant reference in his closing argument to the existence and separate significance of the two special circumstances.

Defendant submits the prosecutor committed "grievous" misconduct, and the trial court serious error, by bringing the inapplicable *****732 **1304** special circumstance before the jury in direct violation of *Montiel I.* He asserts violations of the principles of collateral estoppel, due process, fair trial, double jeopardy, and reliable capital sentencing.

It appears, as defendant suggests, that both court and counsel entirely ignored and disregarded our elimination of the financial-gain special circumstance in this case. The People concede the mistake. They offer no excuse, and we perceive none. The situation is serious and deeply troubling, and a reprimand to all concerned is in order.

However, defense counsel's acquiescence waives direct claims of error and misconduct. Accordingly, defendant presents the issue in the context of ineffective assistance of his counsel, but counsel's lapse does not undermine confidence in the judgment. Even on this record, the danger that the penalty ***926** jury would improperly "double count" any duplicative aspects of the robbery-murder and financial-gain special circumstances was minimal. The jury knew the case involved an uncomplicated robbery-murder and must have understood that the "financial gain" finding referred only to money taken in the robbery. (See, e.g., *People v. Adcox* (1988) 47 Cal.3d 207, 251–252, 253 Cal.Rptr. 55, 763 P.2d 906.)

The prosecutor conceded that the two special circumstances "overlap to a certain extent." Addressing the separate significance of the financial-gain finding, he said it not only indicated the "serious" crime of

robbery, but also showed that the related homicide was "intentional." Hence, he made no improper effort to exploit those aspects of dual-use overlap which we condemned in *Bigelow* and *Montiel I.*[20]

[20] As we explained in *Bigelow,* the impermissible "overlap" which occurs when robbery-murder and financial-gain special circumstances are both applied to a robbery case is that the obvious motive of robbery is financial gain. We concluded that the financial-gain special circumstance applies only to that distinct category of murders, such as insurance killings and murders for hire, which are carried out "for" financial gain, i.e., in which the victim's death is a prerequisite to the financial reward. (37 Cal.3d at pp. 750–751, 209 Cal.Rptr. 328, 691 P.2d 994.) However, the striking of a duplicative financial-gain special circumstance does not necessarily invalidate those aspects of the jury's findings which are unconnected to the "overlap" problem. Thus, in *Montiel I,* we found *Carlos* error (see *Carlos v. Superior Court* (1983) 35 Cal.3d 131, 197 Cal.Rptr. 79, 672 P.2d 862, later overruled in *People v. Anderson* (1987) 43 Cal.3d 1104, 240 Cal.Rptr. 585, 742 P.2d 1306) harmless because intent to kill was necessarily included in the jury's finding of an *intentional* murder for financial gain. We made clear that the striking of the financial-gain special circumstance for other reasons "does not nullify the validity of the finding that 'the murder was intentional.' " (*Montiel I, supra,* 39 Cal.3d at p. 928, 218 Cal.Rptr. 572, 705 P.2d 1248.) Nothing in *Montiel I* precluded this penalty jury from learning that its predecessor found an intentional killing. Contrary to defendant's claim, such comments did not preclude the penalty jury from considering, in mitigation of punishment, whether defendant killed while his moral and behavioral controls were impaired by intoxication. (§ 190.3, factor (h); see also discussion *ante,* at pp. 722–723 of 21 Cal.Rptr.2d, pp. 1294–1295 of 855 P.2d.) Nor did reference to the prior jury's valid finding of intent to kill violate the double jeopardy clause. (Compare *Bullington v. Missouri* (1981) 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270; see *People v. Melton, supra,* 44 Cal.3d 713, 756, fn. 17, 244 Cal.Rptr. 867, 750 P.2d 741.)

Defendant notes that the prosecutor briefly exhorted the jury to "count" special circumstances. However, in context, the remark seems intended only to highlight the "intentional" aspect of the financial-gain finding.

We therefore conclude that the financial-gain special circumstance was not exploited, and could not reasonably have been considered, in a manner which undermines confidence in the judgment. Hence, there is no basis for reversal.

6. *Impeachment of family drug testimony.*

Defendant's mother Hortencia, his father Richard, Sr., and his sister Irene all testified in support of his claim that drugs had impaired his capacity to ***927** appreciate the criminality of his conduct and to behave lawfully. (§ 190.3, factor (h).) Both parents recounted that defendant acted in bizarre ways and was often delusional in the weeks before Gregorio's murder. Irene testified that two or three days before the *****733 **1305** murder, defendant was brought home unconscious from a party. The next morning, she gave defendant two PCP "joints," which he smoked.

On cross-examination, without objection, the prosecutor obtained admissions from both Hortencia and Irene that though they were witnesses at the 1979 trials, they had not previously testified about defendant's heavy drug use and its effects during the weeks before Gregorio was murdered. Richard, Sr.,

was not asked about his similar prior testimonial silence, but without objection, the prosecutor attacked all three witnesses on this basis in his closing argument. The prosecutor suggested that whatever the defense tried in 1979 had not worked, so it was taking "a different [tack]" this time.

Defendant claims it was misconduct for the prosecutor to impeach these witnesses with their prior testimonial silence, because they had not been asked about his drug use and intoxicated behavior in their earlier court appearances. The prosecutor transgressed further, defendant insists, by insinuating that the defense had sought to fabricate new evidence. Defendant concedes that his counsel's failure to object waives direct attacks on the misconduct, but he asserts that counsel's inaction was ineffective assistance.

A witness "may not be impeached by showing that he omitted to state a fact or stated it less fully at a prior proceeding unless his attention was called to the matter at that time and he was then asked to testify concerning the very facts embraced in the questions propounded at the [current] trial." (*Brooks v. E.J. Willig Truck Transp. Co.* (1953) 40 Cal.2d 669, 675, 255 P.2d 802; *People v. Lewis* (1986) 180 Cal.App.3d 816, 824, 225 Cal.Rptr. 782.) Defense counsel should have known, and the record implies he did know,[21] that Hortencia, Richard, Sr., and Irene had not previously been examined about defendant's drug use. As defendant suggests, there seems no plausible tactical reason why counsel failed to raise appropriate objections.

[21] On redirect examination of Hortencia, counsel asked whether any court testimony she had given was limited to answering questions actually put to her by examining lawyers. She replied in the affirmative. Counsel then asked Hortencia whether he had represented defendant in the 1979 trials. She replied in the negative.

Nonetheless, we find no prejudice. There was no serious dispute about the gravamen of these witnesses' testimony, that defendant was a serious chronic drug abuser who was grossly intoxicated at the time of the murder. Moreover, the misleading "sting" of the prosecutor's tactic was diminished ***928** in several ways. Defense counsel's redirect examination of Hortencia (see fn. 21, *ante,* p. 733 of 21 Cal.Rptr.2d, p. 1305 of 855 P.2d), though ambiguous, was calculated to advise the jury that Hortencia had never before been examined about defendant's drug-related behavior. When the prosecutor inquired of Irene whether she had mentioned the two PCP cigarettes in earlier testimony, she responded, "Nobody ever asked me." Defense counsel elaborated on the point in his redirect examination of Irene.

These exchanges gave the jury ample opportunity to conclude that the family's prior silence on drug issues did not mean the current testimony was fabricated. Hence, the prosecutor's unchallenged efforts to impeach the witnesses on this ground do not undermine confidence in the judgment.[22]

[22] Defendant makes a brief related contention that the prosecutor also committed misconduct, which his counsel should clearly have challenged, by impeaching Irene's "PCP cigarette" testimony with inconsistent hearsay statements made by defendant in his interview with Dr. Siegel. However, defendant's statements to Dr. Siegel were not made inadmissible by the hearsay rule. (See discussion, *ante,* p. 728 of 21 Cal.Rptr.2d, p. 1300 of 855 P.2d.) In any event, we cannot assume that any mistake in the litigation of this highly collateral evidentiary matter was prejudicial.

7. *Family violence; sufficiency of evidence.*

Defendant claims that evidence of his alleged 1969 assault on his sister-in-law Yolanda Estrada, and of alleged violence toward his parents in or before 1968, ***734 **1306 was inadmissible. In defendant's view, this evidence was legally insufficient to establish that such crimes were committed, and was also barred by the statute of limitations. However, the points are waived as direct appellate issues, since trial counsel made no effort to exclude or strike the evidence and submitted no request that the jury be instructed to disregard it.[23]

[23] Even if defendant need do nothing at trial to preserve an appellate claim that evidence supporting his *conviction* is legally insufficient, a different rule is appropriate for evidence presented at the penalty phase of a capital trial. There the ultimate issue is the appropriate punishment for the capital crime, and evidence on that issue may *include* one or more other discrete criminal incidents. (§ 190.3, factors (b), (c).) If the accused thinks evidence on any such discrete crime is too insubstantial for jury consideration, he should be obliged in general terms to object, or to move to exclude or strike the evidence, on that ground. (Evid.Code, § 353, subd. (a); but cf. *People v. Belton* (1979) 23 Cal.3d 516, 521–523, 153 Cal.Rptr. 195, 591 P.2d 485 [motion for acquittal need not aid prosecution by identifying specific failure of proof].) And though the defendant is deemed to have objected to *instructions actually given* (§ 1259), generally he cannot claim that limiting instructions were wrongly *omitted* unless his proffer of such instructions was rejected. (See, e.g., *People v. Collie, supra,* 30 Cal.3d 43, 63–64, 177 Cal.Rptr. 458, 634 P.2d 534; *People v. Woods* (1991) 226 Cal.App.3d 1037, 1054–1055, 277 Cal.Rptr. 269.)

Nor can defendant prevail on his claims of ineffective assistance of counsel. We have previously rejected his assertion that evidence about an unadjudicated prior violent crime may not be presented in aggravation once *929 the statute of limitations on the underlying offense has run. (E.g., *People v. Pinholster* (1992) 1 Cal.4th 865, 973, 4 Cal.Rptr.2d 765, 824 P.2d 571.) His claim of legal insufficiency has more merit, but he fails to demonstrate he was prejudiced by admission of the evidence.

As defendant observes, the only clear evidence about his violence against Yolanda and his parents was the statements given by Richard, Sr., Hortencia, and Rachel Montiel when deputies responded to the 1968 and 1969 family disputes. Each such extrajudicial claim of violence had apparently been made by only a single person.[24] At the 1986 trial, all these witnesses repudiated their earlier statements. On the stand, Rachel denied she saw defendant assault Yolanda, and her exculpatory trial version of the 1969 incident was corroborated by Helen Pacheco. Both of defendant's parents testified that he was never violent toward them.

[24] Thus, Richard, Sr., alone told the deputies that defendant had beaten him in the past. Hortencia alone told the deputies that defendant tried to hit her with a telephone during the 1968 family argument; this was the only violence against her that came to light. Rachel alone told deputies in 1969 that defendant had struck Yolanda.

Generally, an extrajudicial statement repudiated at trial cannot form the sole basis for a conviction. (*In re Miguel L.* (1982) 32 Cal.3d 100, 106, 185 Cal.Rptr. 120, 649 P.2d 703; *People v. Gould* (1960) 54 Cal.2d 621, 631, 7 Cal.Rptr. 273, 354 P.2d 865.) The concern is that "where 'no evidence' incriminates the accused save a single witness's extrajudicial statement repudiated under oath, the extrajudicial statement lacks the 'traditional indicia of reliability' which attach to an accusation made under oath and subject to cross-examination in a formal judicial proceeding...." (*People v. Lucky, supra,* 45 Cal.3d 259, 289, 247 Cal.Rptr. 1, 753 P.2d 1052, quoting *Miguel L., supra,* 32 Cal.3d at pp. 106–107, 185 Cal.Rptr.

120, 649 P.2d 703.) We therefore assume, as defendant suggests, that an extrajudicial statement repudiated under oath is also legally insufficient, standing alone, to establish aggravating violent criminal conduct beyond a reasonable doubt (see *People v. Robertson* (1982) 33 Cal.3d 21, 53–55, 188 Cal.Rptr. 77, 655 P.2d 279) at the penalty phase of a capital trial.[25]

[25] We reiterate that *Gould* requires reversal only "when [the conviction] is based *solely* on an extrajudicial statement not confirmed by the witness at trial" (*In re Miguel L., supra,* 32 Cal.3d at p. 106, 185 Cal.Rptr. 120, 649 P.2d 703, italics added), and the modicum of evidence which will validly support an unconfirmed extrajudicial statement is slight. For example, we have concluded that an unconfirmed extrajudicial statement by *one* witness may corroborate the unconfirmed extrajudicial statement of another, so as to remove the case from the *Gould/Miguel L.* rule. (*Lucky, supra,* 45 Cal.3d at p. 289, 247 Cal.Rptr. 1, 753 P.2d 1052.)

*****735 **1307** The People argue that the *Gould/Miguel L.* rule applies only when identification of the perpetrator is the crucial issue. While the rule developed in that context, however, its reach seems broader. The reliability concerns that prompted the rule apply equally when the issue is whether any crime occurred at all.

***930** Even if counsel should have intervened, however, we find no reversible prejudice. These alleged incidents of family violence were by no means trivial, and the prosecutor did identify them as aggravating factors in his closing argument. However, they were both the least serious and the most weakly supported of the various aggravating matters presented for the jury's consideration. Given the brutal nature of the capital murder, and the several other incidents of violence and recidivism of which the jury was aware, counsel's failure to exclude evidence on these matters does not undermine confidence in the penalty judgment.[26]

[26] Defendant makes several related arguments which may be rejected on similar grounds. First, he contends that under the applicable pre-Proposition 8 law (see *People v. Smith* (1983) 34 Cal.3d 251, 257–263, 193 Cal.Rptr. 692, 667 P.2d 149 [Prop. 8 does not affect trials for earlier crimes]), Rachel Montiel was improperly impeached with a prior conviction for sale of heroin. (See *People v. Spearman* (1979) 25 Cal.3d 107, 116, & fn. 5, 157 Cal.Rptr. 883, 599 P.2d 74.) Second, he urges the trial court erred by failing to instruct sua sponte that a fetus cannot be the victim of an assault. (Compare § 187 [*murder* is unlawful, malicious killing "of a human being, *or a fetus*" (italics added)] with § 240 [assault is committed "on the person of another"].) The prosecutor exploited the omission, he asserts, by exhorting the jury to consider defendant's attack on the pregnant Yolanda Estrada as a "double assault." However, the court satisfied its instructional duty by accurately setting forth the definition, elements, and defenses relating to assault. Defendant's other claims were waived by trial counsel's silence or express acquiescence. In any event, the obvious weakness and relative insignificance of the evidence of the Yolanda Estrada incident renders any arguable error harmless. (Compare *Johnson v. Mississippi* (1988) 486 U.S. 578, 108 S.Ct. 1981, 100 L.Ed.2d 575 [where subsequently invalidated *felony conviction* was aggravating factor on which prosecution principally relied, death judgment could not stand].)

8. *Hearsay regarding 1968 family argument.*

Deputy Fowler was one of two deputies who responded to the 1968 incident, in which defendant's brother Antonio was apparently stabbed. Fowler said Richard, Sr., told him at that time, among other things, that defendant had been berating Hortencia shortly before Antonio was cut. Defendant now suggests his counsel rendered ineffective assistance by failing to challenge this "inflammatory" and "irrelevant" hearsay.

The contention lacks merit. In earlier testimony, Richard, Sr., purported to recall details of the 1968 incident in a manner favorable to defendant. However, he consistently, and unconvincingly, denied remembering any unfavorable statements to responding deputies. Given the witness's evasiveness, Fowler's hearsay description of their 1968 conversation was admissible for its truth as a prior inconsistent statement. (Evid.Code, § 1235; *People v. Green* (1971) 3 Cal.3d 981, 985–991, 92 Cal.Rptr. 494, 479 P.2d 998.)

***931** Moreover, the evidence was clearly relevant, and more probative than prejudicial, to the dispute whether Antonio's injury was accidental or intentionally inflicted. The information aided the prosecution's theory that Antonio's attempt to protect Hortencia from defendant led to a fight in which defendant stabbed his brother. Hence, no basis for reversal appears.[27]

[27] Defendant contends his counsel was ineffective for conceding in jury argument that Antonio "almost died" from his wound. The evidence, defendant asserts, did not suggest the injury was life-threatening. However, there was testimony that Antonio had suffered a three- to four-inch-long chest wound and that an ambulance responded to the scene. Counsel's observations that Antonio "still cares" for defendant despite the seriousness of his injury was well within counsel's tactical discretion. (See *People v. Pope* (1979) 23 Cal.3d 412, 425–426, 152 Cal.Rptr. 732, 590 P.2d 859.)

9. *Question regarding defendant's preliminary hearing demeanor.*

As a defense witness, Richard, Sr., testified that defendant's attitude in jail was subdued and sad. On cross-examination, *****736** the prosecutor asked whether the witness had observed the same demeanor while defendant was in court. When the witness said yes, ****1308** the prosecutor asked whether he had seen defendant "sneering and jeering" at the preliminary hearing. Defense counsel's prompt objection was sustained.

Defendant complains that counsel's failure to request an admonition compromised his due process, fair trial, and reliable-penalty rights. However, we find the omission harmless. The colloquy between court and counsel on the objection, which occurred in the jury's presence, made clear the court's view that "it's [not] a proper question." A reasonable jury would clearly understand that it should disregard the question and not speculate about the answer. No basis for reversal appears.

10. *Questions about sentencing credits.*

Salvatore Russo, a prison teacher, testified for the defense that while on death row, defendant volunteered for educational help and made progress in reading, writing, and mathematics. On cross-examination, and without objection, the prosecutor asked Russo whether inmates can sometimes get "work time" or "good time" credits leading to an "early out" by participating in vocational and

educational programs, and whether they may lose such benefits if they present disciplinary problems. Russo agreed.

Defendant urges that examination on these issues violated his California constitutional right of due process (Cal. Const., art. I, §§ 7, 15) because, like the so-called "Briggs Instruction" struck down in *People v. Ramos* (1984) 37 Cal.3d 136, 207 Cal.Rptr. 800, 689 P.2d 430, it invited the ***932** jury to speculate that a sentence of life without parole might someday be commuted, permitting his release. (See *id.,* pp. 155–159, 207 Cal.Rptr. 800, 689 P.2d 430.)[28]

[28] Defendant claims the problem was "compounded" by defense counsel's incompetent examination of two of his own witnesses. Counsel asked Norman Davis, a correctional officer, how defendant might be expected to do if sentenced to life without parole and placed in the general prison population. Davis responded that "if my character judgment is correct, he'd probably do twenty years in mainline." Defendant also complains that counsel did nothing when, as his final response on cross-examination, Dr. Nuernberger declared, "I'm not advocating parole. I'm simply trying to comprehend behavior." Contrary to defendant's suggestion, neither of these witnesses said anything remotely calculated to suggest defendant might be released from prison.

Defendant waived a direct appellate challenge to admission of this evidence by failing to object or move to strike in the trial court. Nor can defendant's claim of ineffective assistance succeed. The prosecutor's questions were probably improper under principles established in *Ramos.* But even if counsel should have intervened, the omission does not undermine confidence in the judgment.

As defendant concedes, the prosecutor's tactic was "subtle." On the other hand, the jury was expressly instructed that a death sentence would be carried out, and that if the jury sentenced defendant to life without parole, he "will not be released from prison." We have routinely held that such admonitions dispel *Ramos* prejudice. (E.g., *People v. Hamilton* (1988) 45 Cal.3d 351, 375, 247 Cal.Rptr. 31, 753 P.2d 1109; *People v. Poggi, supra,* 45 Cal.3d 306, 336, 246 Cal.Rptr. 886, 753 P.2d 1082.) Defendant's suggestion that the instruction was not sufficiently prompt because it came only at the end of the case is not persuasive.[29]

[29] Defendant urges prejudice because the jury received a written copy of the no-release instruction, on which the court had inked over the word "never" and substituted "not." In defendant's view, the jury would speculate why the less forceful word had been inserted. So far as the photocopy included in the clerk's transcript discloses, the word stricken from the instruction was completely blotted out, and there was no basis for jury speculation about what that word might have been.

11. *Cross-examination of defendant.*

Defendant asserts that the prosecutor committed several instances of misconduct related to defendant's own testimony. With one limited exception, defendant's counsel failed to object, thus waiving *****737 **1309** direct appellate challenges to that extent. Whether addressed directly or in the context of ineffective assistance, all of defendant's contentions must fail.

In his direct examination, defendant gave extensive testimony suggesting he had sought to rehabilitate himself on death row. On cross-examination, the prosecutor pursued a line of questioning designed to

show that defendant's redemptive efforts might be motivated by his expectation of a new ***933** penalty trial. Defendant's prompt objection was initially sustained, but the prosecutor argued that his questions went to defendant's "state of mind" and then proceeded without further hindrance.

Responding to the prosecutor's questions, defendant denied that appellate reversals were "one of the biggest topics of conversation" on death row, but he agreed with the prosecutor's suggestion that getting a new trial was "a big factor on your mind during this period of time." In his closing argument, the prosecutor argued without objection that new trials must be "topic number one" for condemned prisoners, and that defendant had "six years to prepare, ... to come back, to have another shot at it."

Defendant now claims this prosecutorial conduct improperly diminished the jury's sense of sentencing responsibility by calling attention to the fact that its penalty judgment was subject to reversal on appeal. (Citing *Caldwell v. Mississippi, supra,* 472 U.S. 320, 328–329, 105 S.Ct. 2633, 2639–2640; *People v. Linden* (1959) 52 Cal.2d 1, 26–27, 338 P.2d 397.) We find no impropriety. Once defendant introduced mitigating evidence of his rehabilitative efforts in prison, the People were entitled to attack his sincerity by exposing the obvious hope of gaining jury sympathy in a later sentencing trial.

Defendant suggests that evidence of a "new trial" motive is more prejudicial than probative as a matter of law. (Evid.Code, § 352.) He also asserts that injection of such issues will chill capital defendants' federal constitutional right to introduce mitigating character and background evidence. (Citing *Skipper v. South Carolina* (1986) 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1.) Neither contention is persuasive. Nothing in Evidence Code section 352, or in *Skipper, supra,* supports the notion that defendant may present evidence of his rehabilitation in a false light.

Defendant next contends the prosecutor overstepped by forcing defendant to admit that "[a]ll your needs," such as food, art supplies, books, and a television, "were provided ... in prison" so "[y]ou didn't have to work for money...." The prosecutor elaborated on this theme in closing argument by suggesting that in prison, defendant had no need to rob because his needs were met.

Defendant suggests the prosecutor thus penalized the exercise of his rights under *Skipper, supra,* by bringing "aggravating evidence" before the jury which was both statutorily and constitutionally irrelevant. However, counsel's failure to object waives any direct challenge, and defendant's claim of ineffective assistance also fails. The prosecutor was entitled to rebut defendant's mitigating evidence of good prison behavior by placing it in proper ***934** perspective. (See *People v. Rodriguez* (1986) 42 Cal.3d 730, 791, 230 Cal.Rptr. 667, 726 P.2d 113; *People v. Boyd, supra,* 38 Cal.3d 762, 775–776, 215 Cal.Rptr. 1, 700 P.2d 782.)

Finally, defendant testified on direct examination that he had accepted Christianity in prison, read the Bible, had come to feel remorse for the murder victim and his family, and would sacrifice his own life if that would bring the victim back. The prosecutor challenged these claims by obtaining, then stressing to the jury, defendant's concession that he did not literally agree with the Biblical maxim "an eye for an eye, a tooth for a tooth."

Defendant asserts that the prosecutor thus penalized his freedom of religious belief as guaranteed by the state and federal Constitutions (U.S. Const., Amend. I; Cal. Const., art. I, § 4). The claim, waived by failure to object, lacks merit in any event. No constitutional principle precludes examination of a witness

about the sincerity and depth of religious and remorseful feelings he himself has ***738 **1310 placed in issue. (Cf., *People v. Danielson* (1992) 3 Cal.4th 691, 715, 13 Cal.Rptr.2d 1, 838 P.2d 729.) Nor was reference to the Biblical maxim in this context calculated to diminish the jury's sense of sentencing responsibility.

12. *Victim impact.*

Under direct questioning by the prosecutor, the murder victim's grandson David testified that his grandfather, though 78 years old at the time of his death, was in excellent health, needed a walker to get around, but could hold a normal conversation, and was capable of "enjoy[ing] life to the fullest." In closing argument, the prosecutor asked the jury to remember the emotion in David's testimony and urged that the victim's wife, siblings, children, and grandchildren had been robbed of a beloved relative. He concluded this portion of his argument by "implor[ing]" the jury to return the death penalty, not only for the victim, his "children and his family," but also for the People of the State of California.

Counsel's failure to object and/or request an admonition waives any direct appellate challenge to this evidence and argument. The contention must also fail in the context of ineffective assistance of counsel.

Defendant concedes that earlier cases finding a federal constitutional proscription against "victim impact" evidence and argument (see *South Carolina v. Gathers* (1989) 490 U.S. 805, 109 S.Ct. 2207, 104 L.Ed.2d 876; *Booth v. Maryland* (1987) 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440) have been overruled. ***935** (*Payne v. Tennessee* (1991) 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720). Moreover, after *Payne* was decided, we concluded that the immediate injurious impact of a capital murder is a "circumstance of the crime" (§ 190.3, factor (a)) which may be introduced and argued in aggravation under state law. (*People v. Edwards* (1991) 54 Cal.3d 787, 833–836, 1 Cal.Rptr.2d 696, 819 P.2d 436.) By raising issues such as the victim's zest for life and the effect of his death on his immediate family, the prosecutor acted well within the boundaries of our *Edwards* decision. (*Id.,* at p. 826, 1 Cal.Rptr.2d 696, 819 P.2d 436.)

Defendant asserts the prosecutor improperly argued that the victim's family favored the death penalty. However, a reasonable jury would interpret the prosecutor's plea for death "for" the victim's "children and family" as merely a claim that the supreme penalty was the only appropriate means of redressing the injury. No basis for reversal appears.

13. *Custodial history.*

Defendant complains that his due process, confrontation, and reliable-penalty rights were violated by improper evidence and argument about his history of incarceration. First, he asserts that without evidentiary support, the prosecutor improperly suggested he had not been violent between 1973 (the Ramirez burglary) and 1979 (the Mankin robbery and Ante murder) because he was "continuously" incarcerated during that period. Second, he complains his own counsel was incompetent for eliciting from Hortencia the irrelevant fact that he was in jail one month before the murder.

Counsel did nothing in response to the prosecutor's argument, and defendant fails to persuade that an admonition would not have cured any harm. Hence, any direct appellate challenge to the prosecutor's remark is barred. In any event, we see no impropriety.

After discussing the 1973 Ramirez burglary, the prosecutor said, "We move on. January 13th, 1979. And ... obviously there's *some time* where the defendant is not available to victimize, to rob, to prey on people." (Italics added.) From defendant's 1973 burglary conviction, it was reasonable to infer he had spent "some time" in custody, and the prosecutor did not suggest his incarceration had been "continuous." Reasonably understood, his comment merely placed the aggravating evidence in perspective by inviting the jury to assume that for *some* period after the 1973 burglary conviction, defendant had no opportunity *****739 **1311** to commit criminal acts on the street. Such argument was not precluded.

Finally, we see no prejudice in Hortencia's brief statement about defendant's most recent prior incarceration. The valid evidence painted defendant ***936** as a chronic drug abuser who was periodically in trouble with the law. Any further improper aggravating inference the jury might draw from Hortencia's disclosure was marginal at worst. No basis for reversal appears.

14. *Misdemeanor burglary conviction.*

After eliciting eyewitness testimony from Anthony Ramirez, the victim of the 1973 burglary, the prosecution offered a court record showing defendant's plea of guilty to a misdemeanor in connection with the offense. The prosecutor offered the document only to corroborate defendant's identity as the perpetrator, and he noted that "[i]t is proper to have a limited instruction if the defense wants it." Defense counsel made no such request, and the record of defendant's conviction was received in evidence.

Defendant cites his counsel as ineffective for failing to seek the suggested instruction. He also claims the trial court erred by failing to give such an instruction sua sponte. No sua sponte duty existed, and counsel's failure to act does not warrant reversal.

Conviction of an offense is permissible aggravating evidence only if the conviction is for a felony. (§ 190.3, factor (c).) However, because the 1973 burglary involved actual or threatened violence, its circumstances were independently admissible in aggravation under factor (b) of section 190.3. The danger that the jury would assign significant additional aggravating weight to the fact of conviction was minimal. (*People v. Webster* (1991) 54 Cal.3d 411, 454, 285 Cal.Rptr. 31, 814 P.2d 1273; *People v. Morales* (1989) 48 Cal.3d 527, 557, 257 Cal.Rptr. 64, 770 P.2d 244.) Hence, counsel's omission does not undermine confidence in the judgment.

15. *Davenport error.*

As defendant correctly observes, the prosecutor committed misconduct by expressly arguing, subsequent to our decision in *People v. Davenport* (1985) 41 Cal.3d 247, 290, 221 Cal.Rptr. 794, 710 P.2d 861, that the capital murder was aggravated by the absence of statutory sentencing factors (see §

190.3) which can only be mitigating. The prosecutor made such claims as to factors (e) (victim consent or participation) and (g) (extreme duress or substantial domination by another).[30]

[30] Defendant claims similar misconduct with respect to factors (d) (extreme mental or emotional disturbance) and (f) (reasonable belief in moral justification), but in those cases, the prosecutor simply noted the absence of mitigating evidence; he did not label the absence of these factors as aggravating. The prosecutor did label aggravating the fact that defendant was not a mere accomplice with relatively minor participation (factor (j)), but we have not resolved whether evidence on this issue can only be mitigating. (*People v. Proctor* (1992) 4 Cal.4th 499, 553, 15 Cal.Rptr.2d 340, 842 P.2d 1100.)

***937** *Davenport,* decided in December 1985, clearly stated that prosecutorial argument of this kind "should not in the future be permitted." (41 Cal.3d at p. 290, 221 Cal.Rptr. 794, 710 P.2d 861.) We cannot condone the direct violation of *Davenport* committed by the prosecutor in this 1986 trial.

However, though counsel posed an unmeritorious and unsuccessful "relevancy" objection to argument about factors (e), (f), and (j),[31] he did not challenge the prosecutor's improper attempt to convert ****1312 ***740** "absence of mitigation" into "aggravation." Hence, a direct claim of *Davenport* error is barred.

[31] We have consistently held that a capital defendant is not entitled to delete all instructional or argumentative reference to statutory mitigating factors as to which no evidence was presented. (E.g., *People v. Danielson, supra,* 3 Cal.4th 691, 718, 13 Cal.Rptr.2d 1, 838 P.2d 729; *People v. Whitt* (1990) 51 Cal.3d 620, 653, 274 Cal.Rptr. 252, 798 P.2d 849; *People v. Miranda* (1987) 44 Cal.3d 57, 104–105, 241 Cal.Rptr. 594, 744 P.2d 1127.) "[A]s is apparent from the statutory language, it is for the jury to determine which of the listed factors are applicable or 'relevant' to the particular case. (§ 190.3, par. 6.)...." (*Miranda, supra,* at p. 105, 241 Cal.Rptr. 594, 744 P.2d 1127.) We therefore reject defendant's separate arguments that his objection should have been sustained, and that the trial court erred by failing, sua sponte, to delete the "inapplicable" mitigating factors from its instructions.

In any event, we have consistently deemed such misargument harmless under similar circumstances, and we do so here. The jury was instructed to consider only those sentencing factors it deemed "applicable." It heard that the sentencing process involved subjective weighing, not mechanical counting, of factors; that it was free to assign "whatever moral or sympathetic value you deem appropriate to each and all" of the factors; and that its task was "simply [to] determine under the relative evidence which penalty is justified and appropriate" by considering the totality of aggravation and mitigation. Finally, it was admonished that the death penalty could be assessed only if each juror was persuaded "that the aggravating evidence is so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole."

Despite the prosecutor's argument, a reasonable jury thus aware of the facts, and of its broad sentencing discretion, " 'would not assign substantial aggravating weight to the absence of unusual extenuating factors.' " (*People v. Clark, supra,* 3 Cal.4th 41, 169, 10 Cal.Rptr.2d 554, 833 P.2d 561, quoting ***938** *People v. Gonzalez, supra,* 51 Cal.3d 1179, 1234, 275 Cal.Rptr. 729, 800 P.2d 1159; see also *People v. Proctor, supra,* 4 Cal.4th 499, 544–545, 15 Cal.Rptr.2d 340, 842 P.2d 1100; *People v. Brown, supra,* 46 Cal.3d 432, 454–456, 250 Cal.Rptr. 604, 758 P.2d 1135.) There is no reasonable likelihood the jury was misled to defendant's prejudice. Thus, no basis for reversal appears.[32]

[32] Contrary to defendant's separate suggestion, the trial court had no sua sponte duty to instruct that the absence of a mitigating factor is not itself aggravating. (*People v. Livaditis* (1992) 2 Cal.4th 759, 784–785, 9 Cal.Rptr.2d 72, 831 P.2d 297.)

16. *Dual use of aggravating evidence.*

Among other things, section 190.3 requires the penalty jury to consider "[t]he circumstances of the crime for which the defendant was convicted in the present proceeding" (factor (a)), "[t]he presence or absence of [violent] criminal activity by the defendant" (factor (b)), and "[t]he presence or absence of any prior felony conviction" (factor (c)). Though the statute is not express on the point, we have observed that factor (a) obviously pertains to crimes of which defendant was convicted in the capital proceeding, while factors (b) and (c) pertain only to other crimes by the defendant. (E.g., *People v. Ashmus* (1991) 54 Cal.3d 932, 998, 2 Cal.Rptr.2d 112, 820 P.2d 214; *People v. Miranda, supra,* 44 Cal.3d 57, 106, 241 Cal.Rptr. 594, 744 P.2d 1127.)

The instant jury was instructed without elaboration in the statutory language. (CALJIC, No. 8.84.1.) Defendant claims the trial court erred prejudicially by failing to clarify, sua sponte, the proper separation among factors (a), (b), and (c), thus permitting duplicative multiple consideration of the same aggravating evidence under all these factors.

In *People v. Miranda, supra,* which was decided after this trial, we directed that clarifying instructions be given in future cases "to avoid any possible confusion." (44 Cal.3d at p. 106, fn. 28, 241 Cal.Rptr. 594, 744 P.2d 1127.) However, we have consistently found that the absence of a clarifying instruction on this issue is harmless.

As we have explained, factors (a), (b), and (c), taken together, allow the jury to consider all the offenses of which defendant was convicted in the current proceeding,[33] all his other criminal violence, *****741 **1313** and all his felony convictions entered before the capital crime was committed. Yet nothing in ***939** the statute or parallel instructions implies that any of these matters may be considered more than once. Hence, 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. (*Ashmus, supra,* 54 Cal.3d at p. 998, 2 Cal.Rptr.2d 112, 820 P.2d 214.)[34]

[33] Defendant makes the insupportable argument that neither factor (a) nor factor (b) permits aggravating consideration of crimes which, though unrelated to the capital murder, were charged and tried in the same proceeding. Hence, he urges, the jury was obliged to disregard the Mankin robbery in determining the penalty. However, we have assumed that factor (a), though it speaks in the singular of the "crime" of which defendant was currently convicted, covers the "circumstances" of *all* offenses, singular or plural, that were adjudicated in the capital proceeding. (E.g., *Ashmus, supra,* 54 Cal.3d at p. 998, 2 Cal.Rptr.2d 112, 820 P.2d 214; *People v. Caro* (1988) 46 Cal.3d 1035, 1063, 251 Cal.Rptr. 757, 761 P.2d 680.) No other construction is remotely reasonable. To exclude from consideration this entire highly relevant class of criminal conduct would be anomalous.

[34] Defendant concedes we have held that when the defendant suffered a "prior" felony conviction

for a violent crime, such as defendant's 1972 Foster Freeze robbery, the jury *may* separately consider the violence under factor (b) and the conviction under factor (c). (*People v. Melton, supra,* 44 Cal.3d at pp. 764–765, 244 Cal.Rptr. 867, 750 P.2d 741.) Defendant urges us to overrule this holding, but he presents no persuasive reason to do so.

Defendant also fears the jurors may have thought they could give independent consideration to defendant's *conviction* for the Mankin robbery, although factor (a) permits no separate consideration of *convictions in the current proceeding,* and factor (c) permits aggravating use of other felony convictions only if the convictions themselves preceded the capital crime. (*People v. Balderas* (1985) 41 Cal.3d 144, 203, 222 Cal.Rptr. 184, 711 P.2d 480.) However, the express language of factor (c) includes the word "prior," thus strongly implying its limitation to earlier convictions. In any event, having heard compelling evidence of the *facts* of the Mankin robbery, the jury was unlikely to give substantial independent aggravating weight to the subsequent conviction. (See *ante,* p. 738, of 21 Cal.Rptr.2d, p. 1310 of 855 P.2d.)

Defendant claims the prosecutor's argument encouraged dual use, but we see no such implication. The prosecutor thoroughly covered all relevant aspects of defendant's criminal record. He properly urged that the current crimes, including the Mankin robbery, were the culmination of a violent history. Though he displayed occasional uncertainty about which factor or factors applied to particular evidence, he never urged the jurors to consider the same aggravating aspect of defendant's behavior or history more than once.[35]

[35] Defendant worries in particular that the prosecutor encouraged improper separate consideration of his *conviction* for the January 13, 1979 robbery of *Eva Mankin* when, after discussing the 1972 Foster Freeze robbery and its resulting conviction, the prosecutor said, "We move on. *January 13, 1979. And again, we have got the felony conviction for the robbery,* and obviously there's some time when the defendant is not available to victimize, to rob, to prey on people." (Italics added.) The contention lacks merit. In context, the prosecutor was clearly referring to the *1972* conviction, followed by a period in which defendant was not "available," followed by the Mankin *incident.*

Defendant emphasizes that on several occasions, the prosecutor invited the jurors to count, rather than weigh, the aggravating factors.[36] This, he urges, exacerbated the danger of improper dual use of aggravating evidence.

[36] During his initial closing argument, the prosecutor, who was working from a chart showing his version of the aggravating and mitigating factors, exhorted the jury to "[l]ook at these circumstances, ladies and gentlemen. Look at each one. Count them up. Add them any way you look at it. All together they point toward the death penalty." At another point, the prosecutor said, "I've got ... 11 factors here, ladies and gentlemen. [¶] Now, as I indicated earlier, this is just not a numerical situation [, though] [o]f course, ... 10 of these 11 [point] to the death penalty, that's only numerically." Again in rebuttal, the prosecutor remarked that "[w]hen you look at all these factors ..., they show not only in weight, [but] by numbers, each and every one, they point to the death penalty."

***940** However, the court carefully instructed the jury that it must undertake subjective "weighing," rather than "mechanical counting," in order to reach the "appropriate" penalty. The bulk of both

counsels' arguments focused on this issue. We have routinely disapproved "counting" references, and we do so here. However, there is no reasonable likelihood this jury was misled.

17. *Definitions of aggravation and mitigation.*

On the second day of deliberations, the jury made a written request for definitions of aggravating and mitigating circumstances, "in writing if possible." Without apparent objection from defense counsel, the court delivered, then substantially repeated, *****742 **1314** the following response, proceeding slowly so the jurors could take notes: "Now, one is the opposite of the other.... [¶] Aggravation. The act, action or result of aggravation or of aggravating. An increasing in seriousness or severity, an act or a circumstance that intensifies or makes worse. [¶] Mitigation. The act of mitigating. To cause to become more gentle or less severe or less hostile, to soften, to alleviate."

Defendant claims this instruction encouraged the jury to ignore mitigating character and background evidence (see, e.g., *Skipper v. South Carolina, supra,* 476 U.S. 1, 4, 106 S.Ct. 1669, 1670, 90 L.Ed.2d 1; *Lockett v. Ohio* (1978) 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973) because it implied that mitigation relates only to the circumstances of the capital crime itself. We have previously dismissed similar challenges to essentially identical instructions. (*People v. Lang* (1989) 49 Cal.3d 991, 1035–1037, 264 Cal.Rptr. 386, 782 P.2d 627; see also *People v. Karis* (1988) 46 Cal.3d 612, 645, 250 Cal.Rptr. 659, 758 P.2d 1189.)

Here, as in *Lang, supra,* the jury was expressly instructed to consider not only extenuating aspects of the capital offense, but also "any sympathetic or other aspect of the defendant's character or record that the defendant offered as a basis for a sentence less than death, whether or not related to the offense for which he is on trial." Moreover, the jury was told it could assign whatever "sympathetic value" it deemed appropriate to each relevant factor. While prosecution and defense disagreed on the weight of defendant's mitigating character and background evidence, both counsel conceded its legal relevance in their arguments. As in *Lang,* we see no reasonable likelihood the jury was misled.[37]

[37] Defendant urges us to reconsider the rationale of *Lang.* There appears no persuasive reason to do so.

***941** 18. *Single-witness instruction.*

CALJIC No. 2.27 (1977 Rev.) reads as follows: "Testimony which you believe given by one witness is sufficient for the proof of any fact. However, before finding any fact required to be established by the prosecution to be proved solely by the testimony of such a single witness, you should carefully review all the testimony upon which the proof of such fact depends." The trial court gave this instruction as modified to delete the phrase "required to be established by the prosecution."

Defendant contends the modified instruction undermined the prosecution's duty to prove aggravating criminal violence (§ 190.3, factor (b)) beyond a reasonable doubt (see *People v. Robertson, supra,* 33 Cal.3d 21, 53–55, 188 Cal.Rptr. 77, 655 P.2d 279) by implying that if the *defense* called witnesses to rebut prosecution evidence on these issues, it too must shoulder a burden of "prov[ing] ... facts," and any such "proof" by a single defense witness was suspect. The contention lacks merit.

In *People v. Turner* (1990) 50 Cal.3d 668, 268 Cal.Rptr. 706, 789 P.2d 887, we rejected an identical challenge to the guilt judgment in a capital case. We acknowledged some ambiguity in the modified instruction's undifferentiated reference to "proof" of "facts," but we made clear that application of the single-witness instruction against the prosecution alone would accord the testimony of defense witnesses an unwarranted aura of veracity. (*Id.,* at pp. 695–697, 268 Cal.Rptr. 706, 789 P.2d 887.)

Nor is there a reasonable likelihood the jury was misled about the prosecution's burden of proof. Here, as in *Turner, supra,* the jury received extensive instructions which made clear that the prosecution had the burden of proving every element of any criminal offense beyond a reasonable doubt. Here, as there, "[w]e cannot imagine that the generalized reference to 'proof' of 'facts' in CALJIC No. 2.27 would be construed by a reasonable jury to undermine these much-stressed principles." (*Turner, supra,* 50 Cal.3d at p. 697, 268 Cal.Rptr. 706, 789 P.2d 887.)

*****743 **1315** 19. *Failure to instruct on intoxication.*
The trial court instructed on the elements of all crimes which the jury might consider in aggravation. However, it failed to advise, with respect to the Mankin robbery, that defendant's intoxication could be considered in deciding whether he formed the specific intent to commit that crime. Defendant asserts he was prejudiced by the court's failure to give such an instruction sua sponte.

***942** In a guilt trial, the court must instruct sua sponte on legally available defenses, such as intoxication which may negate specific intent, when such defenses are supported by substantial evidence. (E.g., *People v. Sedeno* (1974) 10 Cal.3d 703, 716, 112 Cal.Rptr. 1, 518 P.2d 913.) Though there is no sua sponte duty at the penalty phase to instruct on the elements of "other crimes" introduced in aggravation (e.g., *People v. Mitcham* (1992) 1 Cal.4th 1027, 1075, 5 Cal.Rptr.2d 230, 824 P.2d 1277), when such instructions are given, they should be accurate and complete. (See *People v. Malone* (1988) 47 Cal.3d 1, 49, 252 Cal.Rptr. 525, 762 P.2d 1249.) We therefore assume, without deciding, that penalty instructions on the elements of aggravating "other crimes" should include, on the court's own motion if necessary, any justified intoxication instructions.

Nonetheless, no reversible error occurred with respect to the Mankin robbery. Any right to correct instructions on crimes introduced in aggravation at the penalty phase stems from the right to have the penalty jury consider such crimes only if it finds them true beyond a reasonable doubt. (See *People v. Robertson, supra,* 33 Cal.3d 21, 53–55, 188 Cal.Rptr. 77, 655 P.2d 279.) However, decisions establishing the reasonable doubt standard for penalty phase criminal evidence make clear that they are referring to crimes *introduced for the first time at the penalty trial*—i.e., crimes "other" than, or "prior" to, those just established beyond reasonable doubt at the guilt phase of the same case. (See, e.g., *Robertson, supra,* 33 Cal.3d at pp. 53–55, 188 Cal.Rptr. 77, 655 P.2d 279; *People v. Stanworth* (1969) 71 Cal.2d 820, 840, 80 Cal.Rptr. 49, 457 P.2d 889; *People v. McClellan* (1969) 71 Cal.2d 793, 804–806, 80 Cal.Rptr. 31, 457 P.2d 871; *People v. Polk* (1965) 63 Cal.2d 443, 450–451, 47 Cal.Rptr. 1, 406 P.2d 641; *People v. Terry, supra,* 61 Cal.2d 137, 149, fn. 8, 37 Cal.Rptr. 605, 390 P.2d 381.)

Nothing in these authorities implies that crimes actually charged, proven, and finally adjudicated in the guilt trial—such as the robbery of Eva Mankin in this case—must be re-proven at the penalty phase before the jury can consider them in aggravation under factor (a). We decline to expand the *Robertson* rule in such a fashion.

The instant trial court, acting out of an abundance of caution, instructed that such "re-proof" was necessary as to the Mankin robbery; in so doing, however, it provided defendant with a benefit to which he was not entitled. It follows that any omission of instructions that intoxication might provide a ***943** defense to that crime did not prejudice the defendant's substantial rights. No basis for reversal appears.[38]

[38] We are not persuaded that omission of an intoxication instruction unduly interfered with defendant's right to have the penalty jury consider in mitigation any "lingering doubt" about his guilt of the Mankin robbery.

20. *1978 law sentencing scheme.*

Defendant argues that the sentencing scheme under California's 1978 death penalty law is constitutionally flawed in numerous ways. We have routinely rejected identical claims.

Thus, neither the 1978 law nor the instructions given in this case are defective for failing to make express distinctions between aggravating and mitigating circumstances. (See *People v. Cox* (1991) 53 Cal.3d 618, 674–675, 280 Cal.Rptr. 692, 809 P.2d 351.) There is no constitutional requirement of findings, let alone unanimous or written findings, that every aggravating factor weighed by the jury was true beyond a reasonable doubt, that specific aggravating *****744 **1316** factors were dispositive, that aggravation outweighed mitigation beyond a reasonable doubt, or that death is the appropriate penalty beyond a reasonable doubt. (*Id.,* at p. 692, 280 Cal.Rptr. 692, 809 P.2d 351, and cases there cited.) It is permissible to allow consideration of age-related circumstances as sentencing factors (*People v. Lucky, supra,* 45 Cal.3d 259, 301–302, 247 Cal.Rptr. 1, 753 P.2d 1052), introduce unadjudicated prior crimes at the penalty trial (*People v. Balderas, supra,* 41 Cal.3d 144, 204–205, 222 Cal.Rptr. 184, 711 P.2d 480), and present the circumstances of prior violent criminal incidents which resulted in guilty pleas (*People v. Melton, supra,* 44 Cal.3d 713, 755–756, 244 Cal.Rptr. 867, 750 P.2d 741). A jury told it may sympathetically consider all mitigating evidence need not also be expressly instructed that it may exercise "mercy." (*People v. Caro, supra,* 46 Cal.3d 1035, 1067, 251 Cal.Rptr. 757, 761 P.2d 680, cert. den. (1989) 490 U.S. 1040, 109 S.Ct. 1944, 104 L.Ed.2d 414.) The same underlying felony may be used to establish first degree murder, death eligibility, and aggravation warranting the death penalty. (*Lowenfield v. Phelps* (1988) 484 U.S. 231, 241–246, 108 S.Ct. 546, 552–555, 98 L.Ed.2d 568; *People v. Marshall* (1990) 50 Cal.3d 907, 945–946, 269 Cal.Rptr. 269, 790 P.2d 676.) The 1978 death penalty law does not deny equal protection insofar as it deprives capital defendants of the benefits of the Determinate Sentencing Act. (*People v. Williams* (1988) 45 Cal.3d 1268, 1330, 248 Cal.Rptr. 834, 756 P.2d 221; *People v. Allen* (1986) 42 Cal.3d 1222, 1286–1288, 232 Cal.Rptr. 849, 729 P.2d 115.)

21. *Cumulative prejudice.*

Defendant urges that in combination, the various errors and lapses of counsel caused "cumulative" prejudice warranting reversal of the death ***944** judgment. After a careful review of the record, we disagree. The trial errors acknowledged in this opinion were relatively few in number. Though they were not trivial, their significance to the actual fairness of defendant's trial was minimal. "Neither singly nor together could they have affected the process or the result to defendant's detriment." (*People v. Ashmus, supra,* 54 Cal.3d at p. 1006, 2 Cal.Rptr.2d 112, 820 P.2d 214; also cf., *United States v. Cronic* (1984) 466 U.S. 648, 656–657, 104 S.Ct. 2039, 2045–2046, 80 L.Ed.2d 657.)

22. *Stringer v. Black.*

In his reply brief, defendant argues that the sentencing factors contained in section 190.3 are impermissibly vague under *Stringer v. Black* (1992) 503 U.S. 222, 112 S.Ct. 1130, 117 L.Ed.2d 367. We have held that, assuming our statute is subject to the rationale of *Stringer,* 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, supra,* 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, supra,* 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, provable, and commonly understandable facts" about the capital offense and offender which the state properly deems pertinent to the penalty determination.[39]

[39] These factors direct the sentencer to consider whether the defendant committed the capital offense under extreme mental or emotional disturbance (factor (d)), with victim participation or consent (factor (e)), with reasonable belief in moral justification (factor (f)), under extreme duress or substantial domination by another (factor (g)), while impaired by mental disease or defect, or intoxication (factor (h)), or as an accomplice with relatively minor participation (factor (j)). They also instruct the sentencer to consider any extenuating circumstance of the capital crime, and any other mitigating character and background evidence the defendant offers as the basis for a sentence less than death (factor (k)).

*****745 **1317** Defendant urges that section 190.3 violates *Stringer* because it does not expressly identify which sentencing factors are aggravating and which are mitigating. We disagree. We have noted that certain of the factors can only be mitigating (e.g., factors (d), (e), (f), (g), (h), and (k)), and we have further concluded that the mitigating nature of these factors is clear even in the face of contrary argument. (See discussion, maj. op., *ante,* pp. 739–740 of 21 Cal.Rptr.2d, pp. 1311–1312 of 855 P.2d.) The aggravating nature of certain other factors (e.g., factors (b) ["other" violent criminal activity], (c) [prior felony convictions]) is equally apparent. Still other factors may ***945** allow either aggravating or mitigating consideration, depending on the particular circumstances. However, so long as they focus the sentencer's consideration on "specific, provable, and commonly understandable facts" that properly bear on the appropriate penalty, they cannot be deemed unconstitutionally vague "simply because they leave the sentencer free to evaluate the evidence in accordance with his or her own subjective values." (*People v. Tuilaepa, supra,* 4 Cal.4th 569, 595, 15 Cal.Rptr.2d 382, 842 P.2d 1142.) Defendant's challenge must be rejected.

23. *Section 190.4(e) motion.*

Defendant complains that the trial court committed several varieties of prejudicial error in ruling on his automatic motion for modification of the death verdict (§ 190.4(e)). His contentions lack merit.

Defendant first points to the court's observations that defendant brutally murdered a "helpless" and "defenseless" old man "for financial gain," and that the killing occurred "in the commission of a robbery" which was established by overwhelming, uncontroverted evidence. Thus, defendant asserts, the court perpetuated the erroneous consideration of the duplicative financial-gain finding we had stricken in *Montiel I.*

However, the record suggests the court was using "financial gain" not as a term of art, but as a synonym for robbery. There is no indication the court artificially inflated the seriousness of the capital crime by counting the financial-gain and robbery-murder findings separately.

Defendant next urges the trial court committed *Davenport* error by deeming the absence of certain mitigating factors to be aggravating. (See discussion, *ante,* p. 739 of 21 Cal.Rptr.2d, p. 1311 of 855 P.2d.) Nothing on the face of the court's remarks supports the claim. (See *People v. Lang, supra,* 49 Cal.3d 991, 1044, 264 Cal.Rptr. 386, 782 P.2d 627.) Defendant notes only that the court had just denied his new trial motion raising *Davenport* issues, but the inference defendant thus seeks to draw is unpersuasive.

Defendant contends the trial court improperly considered the legally insufficient evidence of the alleged 1969 assault on Yolanda Estrada. (See discussion, *ante,* pp. 734–735 of 21 Cal.Rptr.2d, pp. 1306–1307 of 855 P.2d.) However, though the prosecutor argued this incident in aggravation, the court's comments do not suggest it gave the assault on Yolanda any significant weight.[40]

[40] The court observed generally that "[t]he evidence established beyond reasonable doubt that the defendant had in the past used, or attempted to use, force and violence upon others and threatened force and violence upon other persons." This remark is supported by the valid evidence, which includes such more significant incidents as the 1972 Foster Freeze robbery, the 1973 Ramirez burglary, and the 1968 knife assault against defendant's brother.

***946** Defendant next argues the court did not give a sufficient statement of reasons for its ruling (see *People v. Rodriguez, supra,* 42 Cal.3d 730, 792–794, 230 Cal.Rptr. 667, 726 P.2d 113) because it did not separately discuss whether each of the statutory aggravating and mitigating factors was present or absent. The claim is not convincing.

The court indicated awareness that it must independently weigh the penalty evidence. It noted as aggravating factors the circumstances of the Mankin robbery, the *****746 **1318** Ante robbery-murder, and defendant's violent past. Discussing the capital murder in detail, the court noted the brutal method of killing and the vulnerability of the victim. The court cited defendant's prison behavior, and his allegedly impaired mental capacity during the homicide, as possible mitigating factors. However, it deemed defendant's mental defense to be outweighed by expert and circumstantial evidence suggesting that his intoxication did not render him unable to appreciate the criminality of his conduct. In particular, the court focussed on evidence of his immediate concern for incriminating items left at the scene of the murder. The court also found generally that the mitigating evidence was outweighed by the evidence in aggravation.

Deeming defendant a "brutal" killer who "is a serious menace to civilized society," the court made clear that, based on the evidence presented at the trial, "I would have reached the same conclusion as the

jury." This statement of reasons was adequate. (See *People v. Anderson* (1990) 52 Cal.3d 453, 484, 276 Cal.Rptr. 356, 801 P.2d 1107; *People v. Hernandez* (1988) 47 Cal.3d 315, 371–373, 253 Cal.Rptr. 199, 763 P.2d 1289.)

Finally, defendant claims we must assume the court weighed certain improper considerations urged by the prosecutor, i.e., that "35 of ... 36 [jurors had] ... found death the proper penalty,"[41] that the murder victim's family had "prayed" for a death sentence, and that defendant was "dangerous." Of course, evidence-based arguments about the defendant's potential for future violence are not prohibited. (E.g., *People v. Payton* (1992) 3 Cal.4th 1050, 1063–1064, 13 Cal.Rptr.2d 526, 839 P.2d 1035; *People v. Bell* (1989) 49 Cal.3d 502, 549, 262 Cal.Rptr. 1, 778 P.2d 129.) Even if the other two comments were improper, there is no indication the court weighed them in reaching its decision. (See *People v. Lang, supra,* 49 Cal.3d 991, 1044, 264 Cal.Rptr. 386, 782 P.2d 627.) We see no error affecting the motion for modification of verdict.

[41] The remark referred to the 1979 "hung" penalty jury, the subsequent 1979 death verdict overturned in *Montiel I,* and the current penalty verdict.

***947** DISPOSITION

The judgment of death is affirmed.

LUCAS, C.J., and PANELLI, KENNARD, ARABIAN and GEORGE, JJ., concur.

MOSK, Justice, dissenting.
I dissent.

On retrial of the issue of penalty after we reversed a judgment of death in *People v. Montiel* (1985) 39 Cal.3d 910, 218 Cal.Rptr. 572, 705 P.2d 1248 (hereafter *Montiel I*), the question whether defendant's life was to be taken or spared turned largely on the extent of his use of drugs and alcohol around the time of the offenses in question and on the degree of his resulting mental impairment. It was undisputed, as even the prosecutor's expert witness had to admit, that defendant was then "obviously grossly intoxicated."

In my view, defense counsel provided defendant with ineffective assistance in violation of his rights under the Sixth Amendment to the United States Constitution and article I, section 15 of the California Constitution.

To begin with, the trial was tainted by pervasive and serious deficiencies on the part of defense counsel related to pervasive and serious misconduct on the part of the prosecutor.

For example, the prosecutor improperly rested his case for death in part on the financial-gain special circumstance found by the jury at the original trial—which he urged weighed against any impairment on

defendant's part—in spite of the fact that he knew that in *Montiel I,* 39 Cal.3d, *supra,* at pp. 927–928, 218 Cal.Rptr. 572, 705 P.2d 1248 we had set that finding aside. The majority concede, as they must, that what they understate as the prosecutor's "mistake" is "serious and deeply troubling." (Maj. opn., *ante,* at p. 732 of 21 Cal.Rptr.2d, p. 1304 of 855 P.2d.) Defense counsel, however, failed to object.

*****747 **1319** The prosecutor proceeded to wrongfully press his case for death by suggesting that life imprisonment without possibility of parole did not mean life imprisonment *without possibility of parole,* in spite of the fact he knew that in *Montiel I,* 39 Cal.3d, *supra,* at p. 928, 218 Cal.Rptr. 572, 705 P.2d 1248 we had reversed as to penalty because the trial court had given the so-called "Briggs Instruction," which carried such a suggestion. Defense counsel, however, failed to object.

In addition, the prosecutor inexcusably used as substantive evidence Michael Palacio's inadmissible hearsay relating defendant's alleged confession, which he presented as weighing against impairment. The majority ***948** concede, as they must, that the "confession" is the "only direct evidence that defendant consciously formed a criminal intent before he killed...." (Maj. opn., *ante,* at p. 729 of 21 Cal.Rptr., p. 1301 of 855 P.2d.) Defense counsel, however, failed to object.

Similarly, the prosecutor inexcusably used as substantive evidence inadmissible hearsay by a defense expert witness at the original trial, which he presented as weighing against impairment. Defense counsel, however, failed to object.

Also, the prosecutor falsely insinuated that defendant's father, mother, and sister recently fabricated their testimony about defendant's extensive use of drugs and alcohol around the time of the offenses in question and his resulting substantial mental impairment. Defense counsel, however, failed to object.

Moreover, the prosecutor improperly impeached defendant's former wife with a felony sale-of-heroin conviction, even though he must have known that under *People v. Spearman* (1979) 25 Cal.3d 107, 116, footnote 5, 157 Cal.Rptr. 883, 599 P.2d 74, which declared the governing, pre-Proposition 8 law, a witness could not be impeached with such a conviction. Defense counsel, however, failed to object.

In addition, the prosecutor wrongfully argued that the absence of mitigation amounted to the presence of aggravation, even though he must have known that in *People v. Davenport* (1985) 41 Cal.3d 247, 288–290, 221 Cal.Rptr. 794, 710 P.2d 861, argument of this kind had been proscribed. Defense counsel, however, failed to object.

The trial was also tainted by pervasive and serious deficiencies by defense counsel unrelated to prosecutorial misconduct.

Most generally, defense counsel egregiously failed to prepare his case for life. This fact is revealed by even the most cursory review of the testimony of Louis G. Nuernberger, M.D., a psychiatrist. Dr. Nuernberger could have been a strong witness. But, because of counsel's default, on cross-examination his credibility was undermined.

More specifically—to cite but a few instances—in the course of jury selection defense counsel inexplicably failed to peremptorily challenge a woman who was subsequently sworn as a juror, in spite of the fact that she had expressed views on the use of drugs that were unfavorable to defendant's

position. Also, in cross-examining a prosecution witness, counsel unnecessarily suggested that defendant had used a handgun in the Foster ***949** Freeze robbery, even though the victim testified that he "thought it was a starter pistol." Further, during direct examination of a defense witness, counsel, for no reason, elicited the fact that defendant had been in custody one month before the offenses in question. And, in summation, counsel argued, to no purpose and with no evidence, that defendant had almost killed his brother in a knife fight. Contrary to the majority's assertion, counsel did not simply "fail[ ] to challenge" argument to this effect by the prosecutor. (Maj. opn., *ante,* at p. 735, fn. 27 of 21 Cal.Rptr.2d, p. 1307, fn. 27 of 855 P.2d.) If only he had.

Considered together, defense counsel's pervasive and serious deficiencies "resulted in a breakdown of the adversarial process at trial; that breakdown establishes a violation of defendant's federal and state constitutional right to the effective assistance of counsel; and that violation mandates reversal of the judgment even in the absence of a showing of specific prejudice." *****748 ***Cal.Rptr.2d748** (*People v. Visciotti* (1992) 2 Cal.4th 1, 84, 5 Cal.Rptr.2d 495, 825 P.2d 388 (dis. opn. of Mosk, J.).) " 'The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective' of punishment in accordance with deserts. [Citations.] In other words, 'The system assumes that adversarial testing will ultimately advance the public interest in truth and fairness.' [Citation.] It follows that the system requires 'meaningful adversarial testing.' [Citation.] When [as here] such testing is absent, the process breaks down and hence its result must be deemed unreliable as a matter of law." (*People v. Bloom* (1989) 48 Cal.3d 1194, 1236–1237, 259 Cal.Rptr. 669, 774 P.2d 698 (conc. & dis. opn. of Mosk, J.).)

For these reasons, I would reverse the judgment of death.

All Citations

5 Cal.4th 877, 855 P.2d 1277, 21 Cal.Rptr.2d 705

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S033108

IN THE SUPREME COURT OF CALIFORNIA

IN RE RICHARD GALVAN MONTIEL

ON

HABEAS CORPUS

The motion for judicial notice of the records in the underlying appeals is granted.
The petition for writ of habeas corpus is denied.
The delay in presentation of claims has been adequately explained.
All claims are denied on the merits. (See *Harris v. Reed* (1989) 489 U.S. 255, 264, fn. 10.)

Chief Justice