No. 25-_____

IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM MICHAEL DENNIS,

Petitioner,

v.

CHANCE ANDES, Warden,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDICES TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI

JAMES S. THOMSON*
California SBN 79658
Attorney & Counselor at Law
732 Addison Street, Suite A
Berkeley, California 94710
Telephone: (510) 525-9123

Attorney for Petitioner
William Michael Dennis

*Attorney of Record

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Appendix A

NOT FOR PUBLICATION

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLIAM MICHAEL DENNIS, Petitioner-Appellant, v. RONALD BROOMFIELD, Warden of San Quentin State Prison, Respondent-Appellee.	No. 18-99008 D.C. No. 4:98-cv-21027-JST MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Jon S. Tigar, District Judge, Presiding

Argued and Submitted January 22, 2024
Pasadena, California

Before: McKEOWN, CLIFTON, and BENNETT, Circuit Judges.

In 1988, a California jury found William Michael Dennis guilty of first-degree murder of his former wife Doreen Erbert and second-degree murder of Doreen's eight-month fetus. The jury returned a verdict of death on the first-degree murder count, and the trial court sentenced Dennis to death. The California Supreme Court affirmed Dennis's conviction and sentence, *People v. Dennis*, 950 P.2d 1035 (Cal.

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

1998), and the United States Supreme Court denied certiorari, *Dennis v. California*, 525 U.S. 912 (1998).

In 2001, Dennis filed his federal 28 U.S.C. § 2254 habeas petition. Dennis filed the operative Second Amended Petition ("SAP") in 2003. In 2017, following a three-day evidentiary hearing, the district court denied Dennis's petition, but granted a Certificate of Appealability ("COA") as to three claims. In 2018, Dennis's case was reassigned, and the district court issued an amended order and judgment denying the SAP and expanding the COA to include one additional claim.

Dennis raises four certified issues with respect to the penalty phase: (1) ineffective assistance of counsel ("IAC") for failing to discover and present mental health evidence; (2) IAC for failing to present additional mitigating evidence; (3) IAC for failing to present execution-impact evidence; and (4) cumulative error. He also raises four uncertified issues: (1) IAC for failing to make a meaningful closing argument in the penalty phase; (2) IAC for failing to enter a plea of not guilty by reason of insanity ("NGI"); (3) IAC for failing to present additional mental health evidence in the guilt phase; and (4) conflict of interest.

We review de novo a district court's denial of habeas relief. *Avena v. Chappell*, 932 F.3d 1237, 1247 (9th Cir. 2019). The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214, governs Dennis's petition because he filed it after 1996. *Murray v. Schriro*, 745

F.3d 984, 996 (9th Cir. 2014). AEDPA "sharply limits" our review of claims adjudicated on the merits in state court. *Johnson v. Williams*, 568 U.S. 289, 298 (2013). Under AEDPA, habeas relief is barred unless the state court's denial of the claim "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1)–(2). "But for any claim not adjudicated on the merits by the state court, our review is de novo." *Sherman v. Gittere*, 92 F.4th 868, 875 (9th Cir. 2024).

The parties dispute the appropriate standard of review. Dennis concedes that we should review under AEDPA's deferential standard the California Supreme Court's decision that he did not state a prima facie case for IAC, but also argues that because he has satisfied 28 U.S.C. § 2254(d), we should review the remaining issues de novo. The State argues that AEDPA's deferential standard generally applies, but that even when the state court does not supply reasoning for its decision, we should engage in an "independent review of the record," which is "not a de novo review" but is a more complete review of the record under AEDPA's reasonability standard.[1]

[1] The State is correct that "[w]hen a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary," and "§ 2254(d) does not require a state court

Murray v. Schriro, 745 F.3d 984, 996–97 (9th Cir. 2014). We need not resolve this conflict. As discussed below, while we conclude the analysis from the California Supreme Court meets AEDPA's test for deferential review, we also hold that even if we reviewed the relevant issues de novo, we would reach the same conclusions. We affirm the district court's order denying the petition and deny a COA as to Dennis's uncertified claims.

CERTIFIED CLAIMS

I. Trial counsel did not render ineffective assistance when he failed to discover and present certain mental health evidence.

A. Dennis claims his trial counsel, Nazario Gonzales, failed to (1) present evidence that he had a delusional disorder; (2) conduct a proper investigation that would have allowed the testifying psychiatrist, Dr. Samuel Benson, "to differentiate between depression (his diagnosis) and deterioration into psychotic delusional thinking"; and (3) call another psychiatrist, Dr. Alan Garton, as a witness, because his opinion regarding Dennis's underlying paranoid trends was "considerably more helpful than that of Dr. Benson."

The California Supreme Court rejected this claim on the merits and dismissed it as untimely and successive. Because we assume without deciding that Dennis can overcome any procedural default, *see infra* n.2, we may grant habeas relief for this

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to give reasons before its decision can be deemed to have been 'adjudicated on the merits.'" *Harrington v. Richter*, 562 U.S. 86, 99–100 (2011).

claim only if the state court's denial "was contrary to, or involved an unreasonable application of, clearly established Federal law" or "was based on an unreasonable determination of the facts." 28 U.S.C. § 2254(d)(1)–(2). Because the state court's analysis was reasonable, we reject Dennis's claim.

In the district court, the State raised procedural default as an affirmative defense and argued that the California procedural bars provided adequate and independent grounds to reject Dennis's federal habeas claim. While the district court first agreed with the State, it later ruled that the procedural bars were inadequate.[2]

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[2] Although the district court granted a COA on the substantive IAC claim, the COA grant encompasses this procedural default issue. *See Jones v. Smith*, 231 F.3d 1227, 1231 (9th Cir. 2001) ("[W]here a district court grants a COA with respect to the merits of a constitutional claim but the COA is silent with respect to procedural claims that must be resolved if the panel is to reach the merits, we will assume that the COA also encompasses any procedural claims that must be addressed on appeal.").

Dennis makes no argument on appeal that the procedural bars invoked by the California Supreme Court are not adequate or independent. Accordingly, he has waived that issue. *See, e.g.*, *United States v. Cazares*, 788 F.3d 956, 983 (9th Cir. 2015) ("The failure to cite to valid legal authority waives a claim for appellate review."); *United States v. Graf*, 610 F.3d 1148, 1166 (9th Cir. 2010) ("Arguments made in passing and not supported by citations to the record or to case authority are generally deemed waived.").

The question now is whether Dennis may successfully excuse this default under *Martinez v. Ryan*, 566 U.S. 1 (2012). To answer that question, we must evaluate Dennis's underlying IAC claims. *See Clabourne v. Ryan*, 745 F.3d 362, 377–78 (9th Cir. 2014), *overruled on other grounds by McKinney v. Ryan*, 813 F.3d 798 (9th Cir. 2015) (en banc). We choose to assume without deciding that Dennis can overcome the procedural default of the underlying claim, and thus we address the merits. *See Franklin v. Johnson*, 290 F.3d 1223, 1232 (9th Cir. 2002) ("Procedural bar issues are not infrequently more complex than the merits issues

Following an evidentiary hearing, the district court determined that the California Supreme Court reasonably could have rejected Dennis's argument that Gonzales's representation was deficient because: (1) counsel adequately investigated Dennis's mental health issues; (2) counsel was entitled to rely on Dr. Benson's conclusions; (3) Dr. Benson's testimony was admitted as evidence in the penalty phase; (4) the trial court instructed the jury to consider all evidence, including evidence introduced during the guilt phase; and (5) counsel could have reasonably concluded that Dr. Garton's testimony would not have helped Dennis in the penalty phase.

Dennis argues that Gonzales's investigation into his mental state was deficient because Gonzales abandoned the investigation, limited Dr. Benson's evaluation, and instead focused on establishing whether Dennis was telling the truth about the facts of the crime. To prevail on his Sixth Amendment IAC claim before the state court, Dennis was required to show that Gonzales performed deficiently, and the representation fell "below an objective standard of reasonableness . . . under prevailing professional norms." *Strickland v. Washington*, 466 U.S. 668, 688 (1984). Dennis was also required to show that he was prejudiced, which occurs when "there is a reasonable probability that, but for counsel's unprofessional errors,

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presented by the appeal, so it may well make sense in some instances to proceed to the merits if the result will be the same.").

the result of the proceeding would have been different."[3] *Id.* at 694. Because the California Supreme Court denied this claim on the merits, to prevail on his habeas petition on this claim, Dennis must now "show that the state court's decision is so obviously wrong that its error lies 'beyond any possibility for fairminded disagreement.'" *Shinn v. Kayer*, 592 U.S. 111, 118 (2020) (per curiam) (quoting *Harrington*, 562 U.S. at 103). Because Dennis has failed to meet this burden, we affirm.

When Gonzales was appointed as Dennis's counsel in May 1987, Dennis had already been evaluated by a psychiatrist, Dr. Alfred P. French, who had performed psychological testing and determined that Dennis tested within normal limits. As soon as Gonzales was appointed, he started his investigation into Dennis's mental health as well as his preparation for a possible penalty phase. On May 19, Gonzales met with Dennis and set up a meeting with sentencing resource specialist Patricia Ivey, who subsequently prepared Dennis's social history report together with Jerolyn Roberts ("Ivey/Roberts Report"). Gonzales asked Dennis to prepare an autobiography addressing every stage of Dennis's life, including: painful or memorable experiences, names, and contact information for people who knew

[3] Neither the state court nor the district court expressly addressed whether Dennis was prejudiced, as both courts concluded Dennis had failed to show deficient performance. Even were we to separately review the prejudice prong de novo as it was not explicitly addressed by the state court, we would similarly conclude there was no resulting prejudice.

Dennis, his marriage with Doreen, the death of his son Paul, as well as Dennis's thoughts about life, religion, reality, his temper, and his character. Gonzales also met with Dennis's parents and asked them to fill out questionnaires.

Gonzales's mental health investigation continued through the trial and consisted of:

- counsel and defense investigators interviewing Dennis many times, including a follow-up interview just before Dr. Benson's testimony;
- defense investigators interviewing dozens of witnesses and counsel preparing outlines of those interviews;
- the Ivey/Roberts Report;
- counsel collecting various records (police reports, medical records, Kaiser mental health records, school records, work records from Lockheed, records from Dennis's civil suit against Doreen)[4] and preparing outlines of the autopsy and police reports, preliminary examination, and witness testimony at trial;
- counsel sharing all the above with the mental health experts;
- counsel securing the appointment of Dr. Garton by the Superior Court;[5]

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[4] Dennis and Doreen's son Paul tragically drowned in a pool at Doreen's house, and Dennis sued Doreen over Paul's death.

[5] The appointment requested by Gonzales and ordered by the Superior Court in February 1988 provided:

> The Court finds that psychiatric information regarding the defendant is needed by defendant's attorney in order to advise the defendant whether to enter or withdraw a plea based upon insanity or to present a defense based upon his mental or emotional condition.

Though Dr. Garton provided a report and information to Gonzales, he never opined that Dennis was insane.

- counsel consulting four mental health experts (Drs. Benson, Garton, Stephenson, and Missett);
- those mental health experts, in turn, consulting three additional mental health experts;
- Drs. Benson and Garton interviewing Dennis many times, including a drug-assisted interview, having some of those interviews video-recorded, and counsel sharing the recordings with the other mental health experts;
- Dr. Garton administering psychological tests to Dennis;
- counsel explaining to mental health experts the law in California regarding the different degrees of murder and manslaughter and defenses based on mental illness or insanity; and
- counsel asking mental health experts to let him know what other information they might need.

Thus, the record shows that Gonzales diligently and thoroughly investigated and analyzed Dennis's mental health.

B. Dennis argues that Gonzales performed deficiently in failing to order *neuropsychological* testing. Despite Dennis's argument to the contrary, the testing performed by Dr. Dale Watson did not show that Dennis had temporal lobe damage. One test showed an unusual discrepancy between auditory memory and visual memory indexes, which could be explained by a dysfunction in the left temporal lobe or by Dennis's hearing problems. Dr. Watson could have done more testing, such as a Magnetic Resonance Imaging or a Positron Emission Tomography scan, but did not. Other tests that likely would have shown potential brain damage had it

been present, such as the Benton Judgment of Line Orientation Test, the Rey Complex Figure Test, the Tactual Performance Test, and Trail Making A and B test, yielded normal results. Dennis informed Gonzales that he "never had any indication of brain damage." Given these test results and given that none of the experts who evaluated Dennis pre-trial suggested that neuropsychological testing should be administered, Gonzales was not deficient in failing to pursue such testing. *See Runningeagle v. Ryan*, 825 F.3d 970, 987 (9th Cir. 2016) (stating that a mental health declaration with "no affirmative diagnosis" is not materially mitigating).

Dennis's argument that Gonzales curtailed the investigation by focusing on whether Dennis was telling the truth rather than pursuing a mental health defense is unsupported by the record. Dennis relies on Dr. Benson's 2013 declaration and his 2014 testimony at the evidentiary hearing, in which Dr. Benson claimed that the purpose of the 1988 mental health evaluation was to determine whether Dennis was truthful "about some issues regarding the killing of Doreen" and that he "was not asked to determine whether . . . Dennis[] suffered from a mental illness that could negate a finding that he killed his ex-wife with malice." Dr. Benson also testified that Gonzales wanted to conduct the sodium amytal ("truth serum") examination, although he did not discourage Gonzales from going forward with it.

But this testimony 26 years after the trial is contradicted by evidence contemporaneous with the pretrial and trial period,[6] including (1) counsel specifically requesting that Dr. Benson evaluate Dennis's mental health;[7] (2) Dr. Benson's testimony at trial diagnosing Dennis with mental illness;[8] (3) counsel

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[6] We agree with the district court that "it appears that Dr. Benson's own inferences about trial counsel's motivations and goals differed from what trial counsel was communicating to Dr. Benson in various letters."

[7] For example, on May 3, 1988, Gonzales wrote Benson:

> How long will it take you to prepare a complete report, which includes documentation for your opinion that he suffered from a mental disease or disorder at the time of the homicide?

Dr. Benson never provided any such report.

On June 23, 1988, Gonzales wrote Dr. Benson:

> Right now it is critical that we focus on whether or not you can honestly and intellectually testify that Mike suffered from a mental disease or disorder at the time of the killing. So far, I have provided you with every piece of information in my file of which I am aware. If you need additional information, please tell me what you need and I will try to get it for you.
>
> * * *
>
> Simply stated, can you say that at the time of the killing Mike suffered from a mental disease or disorder?

Again, Dr. Benson never provided Gonzalez any diagnosis other than what Dr. Benson testified to at trial.

[8] At the evidentiary hearing, Dr. Benson explained that he opined on Dennis's mental state during his trial testimony, despite Gonzales's instructions, because "when evaluating someone, you have to evaluate their mental state" and Dennis's delusions were "too huge not to mention."

providing Dr. Benson with jury instructions on murder, degrees of murder, manslaughter, the definition of malice, the definition of deliberation, and case law on mental health defenses; and (4) counsel consulting other experts about Dennis's mental health rather than his veracity.[9]

We agree with the district court that "trial counsel's letters to Dr. Benson show that counsel repeatedly did seek to prepare Dr. Benson to testify to a legally cognizable defense prior to trial." We also agree with the district court that:

> [N]one of the reports or correspondence submitted to trial counsel by his experts, including Dr. French, Dr. Ste[ph]enson, Dr. Garton, and Dr. Benson, made a finding that Petitioner was insane at the time of the crimes despite trial counsel's correspondence suggesting a potential insanity defense based upon their opinions and reports.

In short, even if there were a missed diagnosis, Dennis cannot use that to support supposed ineffectiveness by counsel, when Dennis was subject to intensive evaluations by multiple competent and carefully selected mental health experts, who never made the diagnosis Dennis advanced decades later. *See Crittenden v. Ayers*, 624 F.3d 943, 966 (9th Cir. 2010) ("Attorneys are entitled to rely on the opinions of properly selected, adequately informed and well-qualified experts.").

II. Trial counsel did not render ineffective assistance when he failed to present additional mitigating evidence in the penalty phase.

[9] We also note that although the district court authorized Dennis's counsel to depose Gonzales, as counsel conceded at argument, they chose not to do so. *See* Oral Arg. at 22:18–22:40 (asking defense counsel, "You never put on any evidence as to why Mr. Gonzales did or did not choose to go forward with an NGI defense?" to which counsel replied, "That is correct. We did not have him testify, nor did the state.").

In Claim 18(b)(1), Dennis alleged that counsel was ineffective for failing to present "a mass of critical evidence" in the penalty phase. In the district court, as part of Claim 17, Dennis also alleged that trial counsel failed to present evidence of Dennis's good behavior in prison and ability to adjust to prison life. The SAP did not cite any declarations or any other evidence in support of this allegation. On appeal, Dennis argues both Claim 18(b)(1) and this part of Claim 17 with the second certified issue. We thus discuss them together.

In Claim 18(b)(1), Dennis argued Gonzales should have presented evidence of: (1) Dennis's struggle with hearing problems and stuttering; (2) his attendance in special education classes; (3) his social isolation; (4) his parents' divorce, leading to Dennis developing an eating disorder and undergoing liposuction; (5) Dennis's depression as a teenager and bowling as his source of pride; (6) Dennis's suicide attempt at age 19; (7) Dennis's close and loving relationship with his son, Paul; and (8) how upset Dennis was after Paul's death and how he lost touch with reality. Dennis first raised this claim in his initial state habeas petition. In contrast to the federal court proceedings, in state court Dennis claimed only that counsel should have presented evidence of Dennis's hearing problems and loving relationship with

Paul.[10] Dennis acknowledged that Gonzales did present lay testimony about his hearing problems but claimed it should have been supplemented with expert testimony about the effect such an impairment had on Dennis and his mental health. Gonzales did not submit any expert declarations in support. As for Dennis's relationship with Paul, Dennis argued that counsel should have presented copies of the divorce decree between Dennis and Doreen and the cancelled checks for child support payments in excess of the court-ordered amounts. In 1998, the California Supreme Court summarily denied on the merits the claim as it was raised in Dennis's first state habeas petition.

In Claim 17 in the district court, Dennis alleged that trial counsel failed to present evidence of Dennis's good behavior in prison and ability to adjust to prison life. Dennis first raised this claim in the second state petition. The California Supreme Court summarily denied the claim on the merits and also dismissed it as procedurally defaulted.

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[10] In the district court, Dennis maintained that this claim was exhausted and cited pages 5–7 of the first state petition. Although the State first disputed exhaustion because very few allegations in support of Claim 18(b)(1) appeared in the first state petition, it ultimately agreed that the claim was exhausted.

On appeal, the State does not argue that the new allegations altered and transformed this claim into a new unexhausted and now procedurally defaulted claim. Thus, we analyze it as if it were exhausted and not procedurally defaulted. *But see Williams v. Filson*, 908 F.3d 546, 572–73 (9th Cir. 2018) (explaining that new evidence can sometimes transform an exhausted claim into a new unexhausted claim).

Therefore, for the part of the second certified issue based on the allegations of Dennis's hearing problems and loving relationship with his son, as well as the allegations of Dennis's good behavior in prison and ability to adjust to prison life,[11] we may only grant habeas relief if the state court's denial "was contrary to, or involved an unreasonable application of, clearly established Federal law" or "was based on an unreasonable determination of the facts." 28 U.S.C. § 2254(d)(1)–(2). Because the state court's analysis was reasonable, we reject Dennis's claim. For the remainder of the second certified issue based on the other allegations not presented to the California Supreme Court, we assume without deciding that Dennis can overcome the procedural default. But even under a de novo standard of review, Dennis cannot show that counsel was ineffective or that Dennis was prejudiced.

In the district court, the State moved for summary judgment on the claim. In 2008, the district court granted summary judgment for the State. The district court reasoned that although "counsel's mitigation presentation was minimal," Gonzales did present "some evidence" on the issues identified by Dennis and additional evidence would have been "largely duplicative" and would not have affected the outcome.

[11] We assume without deciding that Dennis could overcome the state court's procedural default ruling as to these allegations.

Dennis cannot prevail on this claim because it is both unsupported and rebutted by the trial record. *Cullen v. Pinholster*, 563 U.S. 170, 185 n.7 (2011), bars consideration of the evidence Dennis relies on in this appeal, because Dennis did not present it in state court. The only evidence Dennis attached to his first state court petition—divorce records and cancelled child support checks—is a far cry from Dennis's allegation that "a mass of critical evidence" was not presented.

But even putting that aside, though Gonzales failed to call *all* possible witnesses regarding the mitigating information listed above, the new evidence is duplicative of the mitigation evidence Gonzales *did* present. *See Rogers v. Dzurenda*, 25 F.4th 1171, 1189 (9th Cir. 2022) (stating that opening statements help "contextualize the evidence the jury will hear and . . . help the jury understand each side's theory of the case"). During his guilt phase opening statement, Gonzales informed the jury:

> We are going to present psychiatric evidence, a psychiatrist. He's going to tell you that when . . . Dennis killed Doreen, that he was suffering from a mental illness . . . . He's going to tell you about what lead [sic] up to this mental illness: the fact that he was hard of hearing as a youth; how he was placed in mental retardation classes; they thought he was mentally retarded; how the self-esteem factor became so brittle and so endangered.

Gonzales then presented testimony from Dr. Benson, who informed the jury of Dennis's hearing problems and stuttering, special education classes, the resulting social isolation, the effect of Dennis's parents' divorce, his depression as a teenager

and how unusual it was for a male teenager to attempt to commit suicide because he could not find a girlfriend, Dennis's nonviolent nature, and how Paul's death devastated him. Dr. Benson's testimony was also admitted in the penalty phase.

Gonzales complemented expert testimony with lay witnesses in the guilt phase, including Dennis's mother and his friends, who testified on the same subjects Dennis now advances. Joseph Escobar, a close friend since high school, testified that Dennis's friends made fun of his stuttering: "[I]t was easy to make him the butt of jokes[.]" Dennis's mother testified about Dennis's hearing problems, the history of hearing and speech problems in the family, and Dennis attending special schools for the hearing impaired. Ronald Christian testified that Dennis talked about Paul "a lot" prior to Paul's death and Paul "meant a lot to him." In addition, most of the 16 lay witnesses who testified during the penalty phase corroborated the same information. Lila Vest, Dennis's insurance agent, testified that she "admired [Dennis] that he was so diligent about seeing his child regularly and paying child support." Arlene Arken, Dennis's former stepmother, who saw Dennis every Sunday from age 12 to 18 and was very close with Dennis, testified about the impact on Dennis of his hearing and speech problems and his parents' divorce. Robert Webb, who rented a room from and socialized with Dennis after Paul's death, testified that Dennis was hurting over the loss of his son, depressed, and lonely, and that Dennis blamed Doreen for Paul's death. The cassette tape that Dennis recorded

of his conversation with two-year-old Paul was played for the jury and admitted into evidence. Additional evidence would have been cumulative. *See United States v. Schaflander*, 743 F.2d 714, 718 (9th Cir. 1984) (per curiam) (holding that the testimony of 28 uncalled witnesses would have been cumulative of the 15 defense witnesses called at trial).[12]

Dennis faults Gonzales for failing to call an expert social historian in the penalty phase to "synthesize" this social history and connect it to Dennis's mental health. But Dennis has presented no declaration from such a historian, and Dr. Benson drew these connections for the jury. According to Dennis's legal expert Thomas Nolan, at the time of Dennis's trial, "it was standard practice for defense counsel in capital cases to obtain and present the client's social history by way of a social historian, psychologist, *or* psychiatrist." (emphasis added). That is what was done here. Dennis's social history was presented through Dr. Benson, a psychiatrist.

Dennis also alleged in the district court that Gonzales failed to present evidence of his good behavior in prison. The district court denied this claim,

[12] As the district court concluded:

> It may be that other evidence would have been stronger than the evidence actually presented; indeed, there can be little doubt that counsel's mitigation presentation was minimal; even so, any additional presentation would have been largely duplicative. There is no reasonable probability that the additional evidence contemplated in this subclaim would have affected the outcome of the penalty phase.

determining that Dennis's counsel "reasonably could have made a strategic decision not to open the door for the prosecution to introduce evidence to rebut any 'future dangerousness' evidence presented by the defense."

We agree with the district court that this could have been a reasonable strategic decision by Gonzales. We also conclude there was no showing of prejudice. "[E]vidence that the defendant would not pose a danger if spared (but incarcerated) must be considered *potentially* mitigating." *Skipper v. South Carolina*, 476 U.S. 1, 5 (1986) (emphasis added). Nolan declared that such evidence was typically presented "through experts who drew upon the defendant's social history, adjustment to structured and institutional settings, and the likely conditions under which the defendant would serve a[] [life without parole] sentence as well as opining upon the defendant's likely future adjustment." But Dennis has presented no such expert. And the only evidence that Dennis relies on is the probation report prepared *after* the jury reached the death verdict. Thus, Dennis fails to show either that Gonzales was ineffective, or that even if Gonzales were ineffective, that Dennis was prejudiced.

III. Trial counsel did not render ineffective assistance by failing to ask penalty phase witnesses if they wished the jury to spare Dennis's life.

Dennis alleged that Gonzales was ineffective for failing to ask any of the penalty phase witnesses if Dennis's life should be spared. Dennis contended that several would have pleaded for his life if they were given the opportunity.

According to Dennis, he was prejudiced because Gonzales's failure allowed the prosecutor to argue during the penalty phase closing argument: "Not one, not one [witness] asked that his life be spared. Not one had the nerve."[13] (alteration in original).

Following an evidentiary hearing on the mental-health claims,[14] the district court denied Dennis's IAC claim regarding Gonzales's failure to ask penalty phase witnesses to spare Dennis's life. The district court found that counsel was deficient in failing to present the evidence of six witnesses pleading for mercy, but concluded that Dennis had not shown prejudice. The district court determined that the additional mitigating value of such testimony was questionable, especially in the context of nature and quantity of the testimony about Dennis that counsel did present

[13] Dennis did not raise this claim in state court. In the district court, he asserted that he exhausted the claim by referring to the briefing on direct appeal and the first state habeas petition. But those filings only show that Dennis raised a prosecutorial misconduct claim based on the prosecutor's argument that no one "had the nerve" to plead for his life. This is insufficient to establish exhaustion. *See Arrendondo v. Neven*, 763 F.3d 1122, 1138 (9th Cir. 2014) ("To fairly present a federal claim, a state prisoner must present to the state courts both the operative facts and the federal legal theories that animate the claim."). But a state may expressly waive the exhaustion requirement, *see* 28 U.S.C. § 2254(b)(3), which the State has done so here by communicating to the district court that it did not intend to pursue the exhaustion argument and stipulated that Dennis had exhausted the claim.

[14] The district court "bifurcated the evidentiary hearing, ordering that the first phase of the hearing would address only [Dennis]'s mental-health claims, i.e., claims 3, 11, and 17." No evidentiary hearing was ever held on Claim 18.B.7.

at the penalty phase.[15] The district court noted that the disparity between the prosecution's "minimal presentation" in aggravation and Dennis's 16 witnesses in mitigation, as well as short jury deliberations, further supported the finding of no prejudice. The State argues on appeal that the district court was correct that there was no prejudice. We agree with the district court and the State that there was no prejudice. We also hold that the district court's deficiency determination was incorrect.

First, Dennis fails to rebut the strong presumption of counsel's competence mandated by *Strickland*. "[T]actical decisions at trial, such as refraining . . . from asking a particular line of questions, are given great deference and must . . . meet only objectively reasonable standards." *Dows v. Wood*, 211 F.3d 480, 487 (9th Cir. 2000). The district court erred when it held that the execution impact evidence was relevant and admissible at the time of Dennis's trial. The district court relied on *People v. Ochoa*, 966 P.2d 442, 506 (Cal. 1998), an opinion issued 10 years after Dennis's trial, in which the California Supreme Court held—for the first time—that "family members may offer testimony of the impact of an execution on them if by

[15] The district court concluded: "The proffered evidence, which would not have substantially changed the overall thrust of [Dennis]'s penalty phase presentation, would therefore have been cumulative to the testimony from most of [Dennis]'s friends and family. Accordingly, [Dennis] has not shown prejudice as a result of counsel's failure to elicit explicit requests for mercy from [Dennis]'s penalty phase witnesses."

so doing they illuminate some positive quality of the defendant's background or character." But until then, the law regarding execution impact evidence in California was unsettled. *People v. Camacho*, 520 P.3d 548, 595–96 (Cal. 2022); *see also People v. Cooper*, 809 P.2d 865, 908 n.14 (Cal. 1991) ("We need not now decide whether evidence of the impact on the defendant's family comes within this 'broad' range of constitutionally pertinent mitigation.").

In 1995, when presenting the related prosecutorial misconduct claim on direct appeal, Dennis argued that, had Gonzales tried to elicit the witnesses' opinions on the appropriate penalty, the prosecutor would have objected based on relevancy. Thus, even Dennis's appellate counsel believed that such testimony would (or might) not have been admitted, given the state of the law before *Ochoa*. That is likely why Dennis's appeal included a prosecutorial misconduct claim based on these facts, but not a related IAC claim.

Second, even if the district court were correct as to deficient performance, we conclude that there was no *Strickland* prejudice. Dennis must establish prejudice by showing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "The likelihood of a different result must be substantial, not just conceivable." *Harrington*, 562 U.S. at 112.

The very appearance of Dennis's relatives and friends on the witness stand, their testimony about his many good qualities, and the fact that they remained close with him after his incarceration, unambiguously conveyed their wish that Dennis not be executed. Gonzales also told the jury in his penalty phase closing that a life without parole sentence meant "the ability to be able to remember his friends, perhaps to have someone like Ted Grish come and visit him." Gonzales further argued that it said a lot about Dennis as a human being that Ted Grish testified for him, visited him in jail, and would love to go bowling with him. It was unnecessary for Gonzales to present the execution-impact testimony in any particular form. Given that the proffered evidence would not have substantially changed the overall thrust of Dennis's penalty phase presentation, we cannot conclude that Dennis has shown a "reasonable probability" that the result of his penalty trial would have been different. *Strickland*, 466 U.S. at 694. Accordingly, Dennis cannot show that he was prejudiced by Gonzales's failure to elicit direct statements evidencing the witnesses' desire for Dennis to live.

IV. As there was no error, there was no "cumulative" error.

Dennis separately argues that the cumulative effect of these alleged errors required a reversal of his conviction and sentence. But because there was no error, there is no prejudice to accumulate.

UNCERTIFED CLAIMS

Dennis presents four uncertified IAC claims. We decline to issue a COA for any. To obtain a COA on these claims, Dennis must make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "At the COA stage, the only question is whether the applicant has shown that 'jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.'" *Buck v. Davis*, 580 U.S. 100, 115 (2017) (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003)). "This threshold question should be decided without 'full consideration of the factual or legal bases adduced in support of the claims.'" *Id.* (quoting *Miller-El*, 537 U.S. at 336).

With respect to IAC claims, we have held that a COA should not be limited to separate or individual subclaims. *See Browning v. Baker*, 875 F.3d 444, 471 (9th Cir. 2017). Rather, because a COA issues for "the denial of a *constitutional right*," it must encompass "counsel's conduct *as a whole* to determine whether it was constitutionally adequate." *Id.* (expanding COA beyond a certified subclaim to "include whether [appellant] was denied effective assistance of counsel by his trial lawyer's wholesale failure to investigate and prepare for trial" (internal quotation marks omitted)). But when the certified and uncertified IAC claims involve different phases of proceedings, the *Browning* rule does not apply. *See McGill v. Shinn*, 16 F.4th 666, 679 (9th Cir. 2021) (granting a COA on penalty phase IAC claim under

Browning but denying a COA on guilt phase IAC claim because counsel's omission occurred during a "separate and discrete" phase), *cert. denied*, 143 S. Ct. 429 (2022).

AEDPA's deferential treatment of state court decisions is incorporated into consideration of a habeas petitioner's request for a COA. *Miller-El*, 537 U.S. at 341 (holding that when AEDPA applies, the question on a COA application is "whether the District Court's application of AEDPA deference, as stated in §§ 2254(d)(2) and (e)(1), to petitioner's . . . claim was debatable amongst jurists of reason").

I. Trial counsel was not ineffective by failing to make a "meaningful" closing argument.

Dennis alleges that Gonzales failed to deliver an effective penalty phase closing argument. Dennis relies on the beginning of Gonzales's argument: "Be honest with you, I kind of feel . . . helpless right now. I heard [the prosecutor] ask for death and gave all of her reasons why you should kill him . . . . [I] didn't have much time really to sit down and prepare a long articulate speech for you . . . ." Dennis contends that Gonzales then continued with "a rambling, disjointed and largely incoherent discourse." Dennis also faulted counsel for failing to mention the statutory mitigating factors.

The California Supreme Court denied this claim on the merits on direct appeal. It concluded that Dennis failed to show that counsel was deficient or that Dennis was prejudiced. The California Supreme Court reasoned that Dennis's "criticisms of his counsel's closing arguments amount[ed] merely to disagreements

about matters of style and technique" and that Gonzales reasonably employed "a humble and respectful tone that acknowledged the jury's ultimate responsibility for [Dennis]'s fate."

The district court granted summary judgment to the State. The district court characterized Gonzales's closing argument as weak, but not deficient, and concluded that Dennis did not establish prejudice. We agree and decline to expand the COA to include this claim because Dennis fails to show that, even considering Gonzales's conduct as a whole, the district court's resolution of the issue was debatable amongst jurists of reason.

Counsel was not ineffective by allegedly failing to make a "meaningful" closing argument. The purpose of a closing argument is to "sharpen and clarify the issues for resolution by the trier of fact, but which issues to sharpen and how best to clarify them are questions with many reasonable answers." *Yarborough v. Gentry*, 540 U.S. 1, 6 (2003) (per curiam) (cleaned up). The jury rejected the non-NGI mental health defense that Dennis presented during the guilt phase. Thus, Gonzales reasonably focused his penalty phase argument on other mitigating evidence that portrayed Dennis as a grieving father, and he made a plea for leniency based on the torment and pain Dennis experienced over the loss of Paul. Gonzales repeatedly reminded the jury about the tape of Dennis and Paul recorded a year before Paul's death and described it as evidence of Dennis's love for Paul. Gonzales spoke to the

jury about the bond he developed with his own son, the same bond that Dennis and Paul shared, and stated that he would trust his own child to Dennis's care. Gonzales pointed out that Dennis was 34 years old at the time of his arrest and throughout his life, he worked hard, helped provide a place for his mother, and took care of his brother. While Dennis now argues for a different closing argument, the actual argument was not constitutionally deficient. Because Dennis has not "made a substantial showing of the denial of a constitutional right" even considering Gonzales's conduct as a whole, and because Dennis has failed to show that jurists of reason could disagree with the district court's resolution, we decline to expand the COA to include this claim. *See* 28 U.S.C. § 2253(c)(2).

II. Trial counsel was not ineffective in failing to enter an NGI plea.

Dennis alleged that counsel was ineffective because he failed to sufficiently investigate and then present an insanity defense, despite evidence of Dennis's alleged delusionary belief system which supposedly made Dennis unable to understand that his acts were morally wrong. The California Supreme Court denied this claim on the merits and dismissed it as untimely and successive. The district court ordered an evidentiary hearing on this claim and then denied it but did not issue a COA.

The district court concluded that the state court record showed Gonzales was not deficient because he sought out mental health evaluations, provided the experts

with substantial materials to review, and was ultimately unable to obtain any opinion supporting an insanity defense from the experts. The supplemental record developed during the federal proceedings also showed that Gonzales actively considered the insanity defense, researched it, and consulted mental health professionals about it. The record also included evaluations by mental health specialists at the jail and in prison affirmatively finding Dennis sane before trial and shortly after. In addition, the district court determined the entire record belied Dennis's allegations that Gonzales failed to provide sufficient materials to the experts to enable them to opine that Dennis was insane. The district court also disagreed with Dennis that counsel had nothing to lose by entering an insanity plea. The district court determined that Gonzales did not render deficient performance and declined to evaluate prejudice.

On appeal, the State reasserts procedural default as an affirmative defense. Dennis argues only the merits of the claim, and requests a remand, if the panel "determines the default question should be addressed." Again, we assume without deciding that Dennis can overcome the procedural default.

We agree with the district court and decline to expand the COA to include this claim because Dennis does not show that reasonable jurists could disagree with the district court. In California, to assert an NGI defense, a defendant must show that due to his mental condition, he was unable either to understand the nature and quality of the criminal act or to distinguish right from wrong when committing the act. Cal.

Penal Code § 25(b);[16] *see also People v. Elmore*, 325 P.3d 951, 962–63 (Cal. 2014). A defendant bears the burden of proving by a preponderance of the evidence that he was legally insane when he committed the crime. Cal. Penal Code § 25(b).

Dennis contends that Gonzales should have entered an NGI plea in addition to a not guilty plea, because Dennis could not distinguish what was morally right from what was morally wrong at the time of the crimes. Dennis relies on Dr. Woods's opinion that Dennis "believed that what he was doing was the correct thing to do morally." Dennis contends that he had a delusion that Doreen intentionally murdered Paul, and that he tried to have the legal system declare Doreen responsible for it to no avail. Because the legal system broke down, he believed that he needed to do what the system refused to do.

The record shows that Gonzales was not deficient in not presenting an NGI defense. At the initial interview on May 20, 1987, Dennis told Gonzales that he had been examined by a psychiatrist and he was "not insane." Gonzales later contacted multiple mental health professionals to explore mental health defenses, including an NGI defense. None opined that Dennis was insane. Based on his investigation and consultation, Gonzales reasonably concluded that there was no foundation for an NGI defense.

[16] Cal. Penal Code § 25 has not been amended since it was enacted in 1982.

Moreover, as the habeas record amply reflects, entering an NGI plea would have opened the door to the prosecution presenting evidence that Dennis was not mentally ill, but instead had an antisocial (or sociopathic) personality disorder.[17]

But in addition, Dennis's conduct reflected overwhelming evidence that he understood that killing Doreen was morally wrong. For example, after the crimes, Dennis provided what the State's habeas expert psychiatrist Dr. Marc Cohen described as 23 versions of the relevant events, including many that were completely exculpatory and in which Dennis denied any involvement in the crimes or suggested the possible motive of others to have committed the crimes.[18] And Dennis chose to commit the crime on Halloween to disguise his identity and evade detection, stating, "[i]t was Halloween, and I was thinking that—that way I would not be recognized." After the crimes, Dennis discarded the incriminating evidence, including his bloody clothes and the machete he used to murder Doreen.

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[17] In a similar context, this court recently noted this possibility. *See Kimble v. Davis*, Nos. 17-99002, 17-99003, 2023 WL 4231717, at *2 (9th Cir. June 28, 2023) ("Had counsel introduced evidence of Kimble's difficult childhood and . . . various mental illnesses, the State would have introduced evidence of Kimble's antisocial personality disorder ('ASPD') . . . . Thus, when viewed alongside the State's penalty-phase rebuttal evidence, the penalty-phase evidence Kimble [wanted to introduce] . . . was 'by no means clearly mitigating, as the jury might have concluded that [Kimble] was simply beyond rehabilitation.'" (second alteration in original) (quoting *Cullen*, 563 U.S. at 201)).

[18] As one example, when officers advised Dennis that Doreen had been murdered, he responded: "'You're kidding' in 'a calm, expressionless demeanor.'" A second example is Dennis telling officers that "perhaps the killing was related to drugs . . . ."

Dennis also never told anyone the exact location where he disposed of that incriminating evidence. Prior to Dr. Benson's testimony, Gonzales's investigator asked Dennis the reason for the secrecy. Dennis responded that he wanted no one to know exactly what happened: "Well, I didn't want a bloody machete sitting in my house . . . . I was hoping not to get caught."

All this evidence, including evidence of a cover-up, was inconsistent with the defense that Dennis did not know the murders were morally wrong. *See Wong v. Belmontes*, 558 U.S. 15, 24–25 (2009) (finding no prejudice where evidence of "the cold, calculated nature of the . . . murder . . . would have served as a powerful counterpoint" to evidence of "an 'extended bout with rheumatic fever,' which led to 'emotional instability, impulsivity, and impairment of the neurophysiological mechanisms for planning and reasoning'" (citation omitted)). Moreover, "a defendant's unsuccessful attempt to raise an insanity defense positively correlates with a death penalty verdict." Michael L. Perlin, *The Sanist Lives of Jurors in Death Penalty Cases: The Puzzling Role of "Mitigating" Mental Disability Evidence*, 8 Notre Dame J.L. Ethics & Pub. Pol'y 239, 246 (1994); *see also Weekley v. Jones*, 76 F.3d 1459, 1463 (8th Cir. 1996) (en banc) ("[T]here is considerable empirical evidence that insanity pleas in and of themselves are not received favorably by jurors.").

Similarly, the record shows that Gonzales, who had known Dennis for more than a year prior to his trial and interviewed him multiple times, had reason to doubt that Dennis was unable to distinguish moral right from wrong or that he was motivated by bringing an alleged murderer (Doreen) to justice. In notes of his interviews with Dennis, Gonzales described Dennis's grievances:

> [Dennis] contends that there is no justice at all. The State wants to execute a man who is a MR. NICE GUY. He is sure he will be gassed to death because he lost his son to a woman who cheated on him while they were married, and started dating a married man the day they separated. She also lied to protect All State Insurance Company. "And for this I die?"

Gonzales also made these notes during his telephone call with Dr. Stephenson: "Reputation of being 'wimp.' Last 'wimp' act. No longer a wimp. Wants world to say 'What you did was understandable, and you are not a wimp.'" Based on the expert opinions and on Dennis's own descriptions of his motivation for the crimes, Gonzales drew his own conclusions about Dennis's sanity and his ability to understand that his actions were wrong. *See Dunn v. Reeves*, 594 U.S. 731, 741 (2021) (per curiam) ("It is not unreasonable for a lawyer to be concerned about overreaching."). Because Gonzales's performance was not deficient, Dennis was not prejudiced. *See Strickland*, 466 U.S. at 697. Therefore, we deny Dennis's request for a COA.

III. Trial counsel was not ineffective in failing to present additional mental health evidence in the guilt phase.

Dennis alleged that in addition to failing to enter an NGI plea, Gonzales failed to present other evidence in the guilt phase regarding Dennis's mental state at the time of the murders. This evidence included the diagnosis of Dennis's alleged delusional disorder, Dr. Garton's preliminary report, Dr. French's report, and Dr. Stephenson's opinion about Dennis's grief. Dennis claims that had this evidence been presented, he would only have been convicted of voluntary manslaughter for the killing of both Doreen and the fetus. The California Supreme Court denied this claim on the merits and dismissed it as untimely and successive.

In the district court, the State again raised procedural default as a defense to this claim. The district court rejected the State's defense and ordered an evidentiary hearing on this claim. Following the evidentiary hearing, the district court denied the claim. The district court concluded that Dennis failed to explain how any of the expert testimony Dennis presented would negate malice such that Dennis would have been entitled to a conviction of voluntary manslaughter. The district court observed that evidence of Dennis's delusions appeared to establish rather than negate deliberation and malice aforethought. The district court denied a COA on this claim.

We agree and decline to expand the COA to include this claim because Dennis does not show that reasonable jurists could disagree with the district court. On appeal, the State reasserts procedural default as an affirmative defense and again we

assume without deciding that Dennis can overcome the procedural default. Dennis concedes that the district court was "arguably correct" that his delusions did not negate the intent required for the murder of Doreen but claims the evidence would have helped negate malice as to the fetus and, accordingly, the jury would have acquitted Dennis of any charges as to the fetus. But Dennis's argument that the jury would have acquitted him of any charges as to the fetus was raised for the first time on appeal, and we may decline to consider it. *In re E.R. Fegert, Inc.*, 887 F.2d 955, 957 (9th Cir. 1989) ("The rule in this circuit is that appellate courts will not consider arguments that are not properly raised in the trial courts" (cleaned up) (quoting *Rothman v. Hosp. Serv. of S. Cal.*, 510 F.2d 956, 960 (9th Cir. 1975))).

And Dennis's original prejudice argument in the SAP—that he would have received voluntary manslaughter convictions for both Doreen and the fetus if Gonzales presented additional mental health evidence in the guilt phase—is foreclosed by the California Supreme Court's opinion on direct appeal. The California Supreme Court determined that there was no crime of voluntary manslaughter of a fetus in California. *See Dennis*, 950 P.2d at 1055. The California Supreme Court also held that the jury was improperly instructed on voluntary manslaughter with respect to Doreen because the killing could not have occurred in a sudden quarrel or heat of passion and the diminished capacity defense in California had been abolished before the crimes here. *Id*. at 1058. We are bound by the

California Supreme Court's determinations on matters of state law. *See Bradshaw v. Richey*, 546 U.S. 74, 76 (2005) (per curiam) ("[A] state court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus.").

But even considering Dennis's new prejudice argument raised for the first time on appeal—that the jury would have acquitted him of any charges as to the fetus—the claim fails. Dennis was convicted of a lesser offense with respect to the fetus, second-degree murder. Dennis cannot show that counsel was deficient in not presenting additional mental health evidence or that such presentation would have resulted in Dennis's acquittal on the fetus murder charge. Dennis used a machete to attack Doreen. It was so dangerous that Dennis seriously injured his own hand in the process of using it. Dennis had purchased plywood boxes appearing to be homemade coffins, and an anchor, to dispose at sea the murdered bodies of Doreen and her husband. The fetus autopsy report described many cuts to the fetus, including the amputation of its foot. Dennis told Dr. Benson that he continued cutting Doreen after the fetus was expelled. He did not call for help then, or ever. During deliberations, the jury asked to see a machete and requested a readback of Dr. Hauser's (the doctor who performed the autopsies on Doreen and the fetus) testimony about the fetus. The prosecutor argued in the guilt phase closing argument that the fetus "was not only a child, but . . . a symbol of Doreen, of Doreen's fertility,

of Doreen's ability to bear children, of the child that she bore [Dennis]." Even the most effective counsel could not have altered these facts. For these reasons, in addition to all the reasons identified above with respect to the issues related to mental health, this claim is not debatable among jurists of reason, and we deny a COA. *See Miller-El*, 537 U.S. at 336.

IV. Trial counsel did not have a conflict of interest in representing Dennis.

Finally, Dennis alleged that Gonzales had a conflict of interest because he was burned out and internally conflicted, which subsequently led him to become a prosecutor and seek a judicial appointment. Dennis claims these internal conflicts made Gonzales a less effective advocate. The California Supreme Court denied this claim on the merits and dismissed it as untimely and successive. In the district court, the State raised procedural default as a defense, but the district court rejected the defense. In 2008, the district court granted summary judgment on this claim in favor of the State, reasoning that the claim did not allege that Gonzales was deficient "in any particular respect." The district court denied a COA. Again, we agree and decline to expand the COA to include this claim because Dennis does not show that reasonable jurists could disagree with the district court. On appeal, the State reasserts procedural default as an affirmative defense, and we again assume without deciding that Dennis can overcome the procedural default.

The right to effective assistance of counsel includes a "correlative right to representation that is free from conflicts of interest." *Wood v. Georgia*, 450 U.S. 261, 271 (1981). To establish an actual conflict of interest, Dennis must show that his lawyer "actively represented conflicting interests," and the "actual conflict of interest adversely affected his lawyer's performance." *Cuyler v. Sullivan*, 446 U.S. 335, 350 (1980).

Dennis claims that Gonzales was "burned out, 'tired,' and planned to leave the defense community entirely at the time of [Dennis's] trial." Dennis also stresses that Gonzales described his case as an "emotional baptism."

As an initial matter, it is not a conflict of interest to be burned out or to plan to leave the public defense community. But even if it were, Gonzales's comments in requesting a continuance and opposing reassignment to a different public defender demonstrate his dedication to his client and his effective advocacy in obtaining a necessary continuance of the trial date:

> Oh, no, Your Honor. If I make a commitment to try the case, there have been a lot of things in my opinion that I have thought about. You know, I get tired, too. But I have made a commitment to myself and my client that I would not leave the homicide team until I finished all my present cases. And I feel that is something that I owe not only to my clients, but more importantly, to the office and to the court.
>
> So I will not—I will not get in—only way they'll keep me from trying the case, if I have some catostrophic [sic] illness or something. But I will be prepared to try it.

Furthermore, the correspondence between Gonzales and Dennis does not indicate any negative feelings between them. In any event, even if such feelings existed, they cannot serve as a basis for a conflict-of-interest claim. *See Plumlee v. Masto*, 512 F.3d 1204, 1210–11 (9th Cir. 2008) (holding that there is not a violation of the Sixth Amendment where "a defendant is represented by a lawyer free of actual conflicts of interest, but with whom the defendant refuses to cooperate because of dislike or distrust"); *Perez Goitia v. United States*, 409 F.2d 524, 527 (1st Cir. 1969) (stating that a "lack of rapport between attorney and client does not automatically mean that there has been inadequate representation"). Because nothing in the record suggests that Gonzales "actively represented conflicting interests," *Cuyler*, 446 U.S. at 350, or otherwise had a conflict of interest, we deny Dennis's request for a COA.

CONCLUSION

For these reasons, we affirm the district court's decision as to Dennis's certified claims, and we deny a COA as to his uncertified claims.

AFFIRMED.

Appendix B

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

WILLIAM MICHAEL DENNIS,

Petitioner,

v.

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

Respondent.

Case No. 98-cv-21027-JST

ORDER RESOLVING REMAINING CLAIMS, DENYING PETITIONER'S REQUEST FOR AN EVIDENTIARY HEARING, AND PARTIALLY GRANTING CERTIFICATE OF APPEALABILITY

DEATH PENALTY CASE

On December 19, 2017, following resolution of all other claims in the above-entitled action, the Court ordered the parties to brief the merits of Claims 18.B.7, 23, and 25. *See* ECF No. 423. Based upon the briefing, the underlying record, the evidence and exhibits adduced during the pendency of the action, and all other papers filed to date, the Court finds and orders as follows.

I. BACKGROUND

A. Facts

The facts of this case have been described at length in previous orders (*see, e.g.* ECF Nos. 117 & 423). As relevant here, Petitioner was found guilty by a Santa Clara Superior Court jury of the first-degree murder of his former wife, Doreen Erbert, and the second-degree murder of Ms. Erbert's unborn child. At the time of her death, Ms. Erbert was eight months pregnant.

Ms. Erbert and Petitioner previously had been married and had a son, Paul, together. The marriage ended in divorce, and Ms. Erbert married Charles Erbert in 1979. That same year, the

Erberts had a daughter, Deanna Erbert. In 1980, after Petitioner had returned Paul to the Erberts' home following a custodial visit, Paul drowned in the family's swimming pool. Ms. Erbert was home with Paul at the time, and Petitioner blamed Ms. Erbert for Paul's death.

On Halloween night in 1984, Ms. Erbert was stabbed and killed in her home. Ms. Erbert was visibly pregnant at the time; she was stabbed in the arm, neck, and stomach, and her unborn child was found lying, in parts, on the living room floor. When paramedics arrived, the fetus already was dead. Ms. Erbert died en route to the hospital. Petitioner eventually was arrested and tried for the murder of Ms. Erbert and the fetus. Although he initially denied that he had committed the crimes, Petitioner did not contest his identity as the killer at trial. Petitioner's trial counsel argued that Petitioner's actions resulted from mental illness and were not premeditated or deliberate. The jury found as a special circumstance that Petitioner had committed multiple murders. Following a separate penalty trial, the jury returned a verdict of death for the killing of Ms. Erbert.

B. Procedural Posture

In June 1995, following his conviction in the trial court, Petitioner filed an automatic appeal in the California Supreme Court. On February 19, 1998, the judgment of the trial court was affirmed. A petition for writ of certiorari to the United States Supreme Court was filed on April 15, 1998, and denied on October 5, 1998. On August 8, 1996, Petitioner filed a petition for writ of habeas corpus in the California Supreme Court. That petition was denied on November 4, 1998.

Petitioner's initial petition for writ of habeas corpus in this Court was filed on May 2, 2001. The Court found that the petition contained unexhausted claims and ordered Petitioner to file an amended petition alleging only exhausted claims or to dismiss this action. Petitioner filed an amended petition on August 3, 2001. He also filed an exhaustion petition in state court the same day; that petition was denied on November 27, 2002. A second amended petition was filed in this Court on February 11, 2003. *See* ECF No. 80 ("Fed. Pet."). Respondent filed an answer on June 18, 2003, and Petitioner filed his traverse on July 14, 2003. *See* ECF Nos. 162 & 165.

On July 27, 2009, following substantial motion practice that resulted in the determination of most of Petitioner's claims, this Court granted Petitioner's motion for an evidentiary hearing as to Claims 3, 11, 17, 18.B.7, and 25 (including the component of claim 25 described in subclaim 18.B.1), all of which assert ineffective assistance of counsel. *See* ECF No. 250 at 2. The Court later bifurcated the evidentiary hearing, ordering that the first phase of the hearing would address only Petitioner's mental-health claims, i.e., claims 3, 11, and 17. *See* ECF No. 254. A three-day hearing took place from April 21-23, 2014. *See* ECF Nos. 379-381. On May 15, 2017, the Court denied without prejudice Petitioner's request to set the second portion of the evidentiary hearing. *See* ECF Nos. 415 & 417. The Court subsequently denied Claims 3, 11, and 17 on the merits. Based on the evidence presented at the hearing and its assessment of that evidence, the Court directed the parties to brief the remaining claims on the basis of the existing record. *See* ECF No. 423.

C. Penalty Phase Trial

The Court's order with respect to Claims 3, 11 and 17 contains a detailed discussion of Petitioner's penalty phase proceedings. *See* ECF No. 423. The prosecution called one witness, Detective Caro, in aggravation. Detective Caro testified that in the course of his investigation he found two trapezoidal boxes, two anchors, two hand-sewn bags, a boat, and a navigational chart of Northern California at Petitioner's residence. The prosecutor connected the items to an alleged plan on Petitioner's part to drown the Erberts. The defense called sixteen witnesses in mitigation. *See id.* at 62-73. As the Court noted, the defense witnesses testified about various aspects of Petitioner's life, including his troubled childhood, his good character and good deeds, and his pain and anguish at losing his son.

During her closing argument, the prosecutor pointed out that Petitioner had not called several additional witnesses who might have offered evidence in mitigation and asserted that of the witnesses Petitioner did call, "not one, not one asked that [Petitioner's] life be spared. Not one had the nerve." *See* RT 4266.

D. Expert Testimony Proffered at the Evidentiary Hearing

On October 18, 2013, in preparation for the evidentiary hearing, Petitioner filed declarations from several medical and legal professionals in support of Claims 3, 11, 17, 18.B.7, and 25. *See* ECF No. 299. The testimony of these witnesses is summarized in the order denying Petitioner's mental-health claims and for the most part is not relevant to the remaining claims considered here. *See* ECF No. 423. However, Petitioner's *Strickland*[1] expert, Thomas Nolan, did testify that reasonably effective counsel would have asked mitigation witnesses to testify as to whether Petitioner's life should be spared. *See* ECF No. 375-3 at 26. Mr. Nolan also testified that Petitioner's trial counsel had no reasonable strategic basis for failing to do so.

Petitioner also submitted the declarations of five lay witnesses who stated that they would have asked the jury to spare Petitioner's life during the penalty phase had that question been put to them. *See* ECF Nos. 299-16 (Petitioner's brother, John Dennis); 299-48 (Petitioner's mother, Elizabeth Ross); 299-59 (Petitioner's friend, Eric Steinhauff); 299-60 (Petitioner's friend, Barbara Thorn); and 299-61 (Petitioner's friend, Robert Webb). Ms. Ross, Mr. Steinhauff, Ms. Thorn, and Mr. Webb, all of whom testified during the penalty phase, noted specifically in their declarations that trial counsel never asked them whether they believed Petitioner's life should be spared.

II. DISCUSSION

A. Standard of Review

Under the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2254, a district court may not grant a petition challenging a state conviction or sentence on the basis of a claim that was reviewed on the merits in state court unless the state court's adjudication of the claim: "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1)–(2). The first

[1] *Strickland v. Washington*, 466 U.S. 668 (1984).

prong applies both to questions of law and to mixed questions of law and fact, *see Williams v. Taylor*, 529 U.S. 362, 407-09 (2000), while the second prong applies to decisions based on factual determinations, *see Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003). Review under § 2254 is limited to the record that was before the state court that adjudicated the claim on the merits. *See Cullen v. Pinholster*, 563 U.S. 170, 180-81 (2011); *see also* 28 U.S.C. § 2254(d)(2).

The "contrary to" and "unreasonable application" clauses of § 2254(d)(1) have separate and distinct meanings. *See Williams*, 529 U.S. at 404. A state court decision is "contrary to" Supreme Court authority, and thus falls under the first clause of § 2254(d)(1), only if "the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." *See id.* at 412-13. A state-court decision is an "unreasonable application of" Supreme Court authority, falling under the second clause of § 2254(d)(1), if it correctly identifies the governing legal principle from the Supreme Court's decisions but "unreasonably applies that principle to the facts of the prisoner's case." *See id.* at 413. While circuit law may be "persuasive authority" for purposes of determining whether a state court decision is an unreasonable application of Supreme Court law, only the Supreme Court's holdings are binding on the state courts and only those holdings need be reasonably applied. *See Clark v. Murphy*, 331 F.3d 1062, 1070 (9th Cir. 2003), *overruled on other grounds by Lockyer v. Andrade*, 538 U.S. 63 (2003).

On habeas review, the court may not issue the writ "simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." *See Williams*, 529 U.S. at 411. Rather, the application must be "objectively unreasonable" to support granting the writ. *See id.* at 409; *see also Harrington v. Richter*, 562 U.S. 86, 101 (2001) ("'[A]n *unreasonable* application of federal law is different from an *incorrect* application of federal law'") (emphasis in original) (internal quotation and citation omitted). Accordingly, "[a] state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's

decision." *Richter*, 562 U.S. at 88 (citing *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). "While the 'objectively unreasonable' standard is not self-explanatory, at a minimum it denotes a great[] degree of deference to the state courts." *Clark*, 331 F.3d at 1068.

A state court's factual determinations are accorded similar deference. *See Pinholster*, 563 U.S. at 180-81. A state-court decision "based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding." *See Miller-El*, 537 U.S. at 340 (citing § 2254(d)(2)); *see also id.* (holding state court's factual determinations "are presumed correct absent clear and convincing evidence to the contrary") (citing § 2254(e)(1)).

When a federal court is presented with a state-court decision that is unaccompanied by a rationale for its conclusions, and there is no reasoned decision by a lower court, the court has no basis other than the record "for knowing whether the state court correctly identified the governing legal principle or was extending the principle into a new context." *See Delgado v. Lewis*, 223 F.3d 976, 982 (9th Cir. 2000), *overruled on other grounds by Lockyer*, 538 U.S. 63; *cf. Wilson v. Sellers*, ___ S.Ct. ___, 2018 WL 1800370, at *3 (Apr. 17, 2018) (holding federal habeas court should "look through" the unexplained state-court decision to the last state-court decision "that does provide a relevant rationale"). In such situations, federal courts must conduct an independent review of the record to determine whether the state court decision is objectively unreasonable, and "the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief." *Richter*, 562 U.S. at 98.

Even if a petitioner meets the requirements of § 2254(d), habeas relief is warranted only if the constitutional error at issue had a "substantial and injurious effect or influence in determining the jury's verdict." *See Brecht v. Abrahamson*, 507 U.S. 619, 637-38 (1993) (internal quotation and citation omitted). Under this standard, petitioners "may obtain plenary review of their constitutional claims, but they are not entitled to habeas relief based on trial error unless they can establish that it resulted in 'actual prejudice.'" *Id.* at 637 (citing *United States v. Lane*, 474 U.S. 438, 439 (1986)).

B. Ineffective Assistance of Counsel

Petitioner asserts in Claim 18.B.7 that trial counsel was ineffective at the penalty phase of his trial. Specifically, Petitioner argues that trial counsel was ineffective in failing to present available witnesses who would have asked the jury to spare Petitioner's life. *See* Fed. Pet. at 152. This claim was summarily denied by the California Supreme Court.

1. Standard of Review

The clearly established federal law applicable to this claim is set out in *Strickland*, 466 U.S. 668. In *Strickland*, the U.S. Supreme Court held that ineffective assistance of counsel is cognizable as a denial of the Sixth Amendment right to counsel, which guarantees not only assistance, but effective assistance, of counsel. *Id.*, 466 U.S. at 686. To prevail on an ineffective assistance of counsel claim, a petitioner must establish that: (1) his counsel's performance was deficient, i.e., that it fell below an "objective standard of reasonableness" under prevailing professional norms; and (2) he was prejudiced by counsel's deficient performance, i.e., that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 688-94. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

Ultimately, a petitioner must overcome the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" and "might be considered sound trial strategy" under the circumstances. *Id.* at 689 (internal quotation marks omitted). "In assessing adequacy of representation, '[the Court] is required not simply to give the attorneys the benefit of the doubt, but to affirmatively entertain the range of possible reasons [defense] counsel may have had for proceeding as he did.' " *Gallegos v. Ryan*, 820 F.3d 1013, 1030 (9th Cir. 2016) (citing *Pinholster*, 563 U.S. 170). A "doubly" deferential standard of review is appropriate in analyzing ineffective assistance of counsel claims under AEDPA because "[t]he standards created by *Strickland* and § 2254(d) are both highly deferential." *Richter*, 562 U.S. at 105 (internal quotation marks omitted). 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.*

At the outset, Petitioner argues the Court should consider his claims *de novo* because the California Supreme Court's denial of Claim 18.B.7 in a summary opinion was a finding that Petitioner did not make a prima facie case for relief and therefore was "objectively unreasonable" for purposes of § 2254(d). *See* Pet. Br. at 10-11. Respondent concedes that the California Supreme Court's summary denial of Petitioner's claim reflected a determination that Petitioner did not state a prima facie case entitling him to relief, but he argues the pivotal question nonetheless is " 'whether the state court's application of the *Strickland* standard was unreasonable,' " not whether Petitioner made a prima facie showing. *See* ECF No. 429 ("Resp. Br.") at 7 (quoting *Richter*, 562 U.S. at 98-99). For the reasons discussed below, the Court concludes that the California Supreme Court's summary denial of this claim was not objectively unreasonable. The Court would reach the same result on *de novo* review.

2. Reasonableness of Trial Counsel's Conduct

Petitioner claims that trial counsel's failure to present witnesses asking the jury to spare Petitioner's life was unreasonable, fell below the prevailing professional standard of competence, and cannot be justified by any tactical objective. *See* Fed. Pet. at 153. Respondent denies that trial counsel was ineffective and contends that even if he was, Petitioner has failed to show prejudice. *See* Resp. Br. at 9-13. Respondent does not dispute that the five witnesses who have submitted declarations relevant to Claim 18.B.7 would have asked the jury to spare Petitioner's life had trial counsel made an inquiry. *See* Resp. Br. at 13.[2]

Respondent first argues that the witnesses' proffered testimony is "execution impact" evidence and would not necessarily have been admissible at trial. According to Respondent, "execution impact" evidence is irrelevant except to the extent that it relates to a defendant's character. *See* Resp. Br. at 11. While Respondent is correct as to the general rule, the testimony at

[2] Based on this concession, as well as the California Supreme Court's practice of assuming the veracity of supported factual allegations when issuing a summary denial, the Court may rule on Claims 18.B.7 and 25 under the assumption that Petitioner's proffered witnesses would have testified consistently with the declarations they have submitted to the Court.

issue here was relevant and likely admissible because testimony from a close friend or loved one that a capital defendant deserves to live is admissible as "indirect evidence of the defendant's character." *People v. Ochoa*, 19 Cal. 4th 353, 456 (1998), as modified (Jan. 27, 1999). As Petitioner points out, similar testimony routinely has been admitted during California capital trials. *See People v. Sanders*, 11 Cal. 4th 475, 545 (1995) (noting that defendant's siblings were allowed to plead for defendant's life); *People v. Freeman*, 8 Cal. 4th 450, 522 (1994) (holding that "it is permissible for defense counsel to ask family members and friends about the appropriateness of a death sentence"); *People v. Bennett*, 45 Cal. 4th 577, 601 (2009) (noting that pleas for defendant's life were admitted to " 'illuminat[e] some positive quality of the defendant's background or character' "); *People v. Heishman*, 45 Cal.3d 147, 194 (1988), *abrogated on other grounds by People v. Diaz*, 60 Cal.4th 1176 (2015) (holding that trial counsel should have been allowed to ask defendant's wife whether she thought defendant should receive the death penalty). The Court concludes that Petitioner has made a sufficient showing that the proffered testimony would have been admissible.

Respondent next argues that the testimony was unnecessary and cumulative to the testimony given by Petitioner's other penalty phase witnesses. *See* Resp. Br. at 9-13. Specifically, Respondent contends that because penalty phase jurors must make a binary choice between life imprisonment and death, the jurors in this case would have understood that the sixteen penalty phase witnesses called to testify on Petitioner's behalf each were testifying "in service of persuading the jury to exercise the more merciful option [of the possible sentences]." *See* Resp. Br. at 10.

The Court agrees that the penalty phase jurors reasonably could have inferred that at least some of Petitioner's witnesses wanted Petitioner to live. Many of Petitioner's witnesses expressed love and affection toward Petitioner, permitting a reasonable inference that they wanted the jury to spare Petitioner's life. However, without the witnesses' clear testimony on the matter, the jurors were free to draw their own conclusions as to the purpose of each witness's testimony, especially with respect to those witnesses who, in addition to testifying about Petitioner's character, provided

background information or observations about Petitioner's behavior after Paul's death. Accordingly, Respondent's point is more salient with respect to the prejudice prong of *Strickland*, which is addressed below.

To perform effectively at the penalty phase, trial counsel should " 'present[ ] and explain[ ] the significance of all the available [mitigating] evidence.' " *Mayfield v. Woodford*, 270 F.3d 915, 927 (9th Cir. 2001). Here, trial counsel failed to " 'present[ ]' " the testimony of several penalty phase witnesses who were willing to ask the jury explicitly to spare Petitioner's life; with the exception of the testimony of Ted Grish, counsel also failed to " 'explain[ ] the significance' " of the testimony that the witnesses did provide. *Id.*; *see* RT 4279 (trial counsel noting, during closing argument, that "[f]or someone like Ted Grish, who would come in and say, yeah, I visited him in jail, and I'd love to go bowling with him, that's important, too"). Because the proffered testimony had at least some mitigating value, was available at the time of trial, and was not the type of evidence that would have opened the door to damaging evidence in rebuttal, the record reveals no apparent strategic basis for trial counsel's failure to introduce it. *Cf. Mickey v. Ayers*, 606 F.3d 1223, 1243-44 (9th Cir. 2010) (holding counsel was not ineffective in failing to introduce evidence of defendant's childhood abuse because it would have invited the prosecution to present rebuttal evidence of defendant's own sexual abuse of his step-daughter).

Respondent also argues that trial counsel could not have anticipated the prosecutor's comment that none of Petitioner's penalty phase witnesses had the "nerve" to ask the jury to spare Petitioner's life. *See* Resp. Br. at 11. This argument is misplaced; the reasonableness of trial counsel's conduct does not turn on anything the prosecutor said but rather counsel's failure to present clear testimony seeking mercy for Petitioner despite the availability of several witnesses being willing to testify toward that end. The prosecutor's closing argument simply called attention to trial counsel's failure to present the testimony.

Because the record as a whole supports a conclusion that trial counsel's conduct was not justified by strategic considerations, the Court concludes for present purposes that the first prong of *Strickland* has been satisfied.

3. Prejudice

However, to obtain habeas relief, Petitioner also must show prejudice. As noted, a petitioner must establish prejudice by showing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "The likelihood of a different result must be substantial, not just conceivable." *Richter*, 562 U.S. at 112.

Petitioner directs the Court's attention to *Austin v. Bell*, 126 F.3d 843 (6th Cir. 1997) and *Hall v. Washington*, 106 F.3d 742 (7th Cir. 1997). In *Austin*, the Sixth Circuit held defense counsel was ineffective when he failed to investigate and present mitigating evidence during the penalty phase of defendant Austin's trial. *See Austin*, 126 F.3d 848-49. Austin's friends, family, and several death penalty experts were ready and willing to testify on his behalf. *Id.* at 849. However, defense counsel did not think presenting mitigating evidence would "do any good" and opted not to present any witnesses or other evidence. *Id.* at 849. The panel held that the Sixth Amendment requires that a capital jury consider the circumstances of the crime and the defendant's background during the penalty phase, and defense counsel's reasoning did not "reflect a strategic decision, but rather an abdication of advocacy." *Id.* Accordingly, the Sixth Circuit remanded the case for retrial of the penalty phase.

In *Hall*, the Seventh Circuit concluded that defense counsel was ineffective during the penalty phase because counsel failed properly to advise Hall about the consequences of waiving a jury for the penalty phase, failed to explain the purpose of Hall's speaking to the probation officer compiling the sentencing report, and failed to contact Hall to discuss penalty phase strategy throughout the six weeks between the guilt and penalty phases. *Hall*, 106 F.3d at 747. The panel also observed that defense counsel failed to call several witnesses who wanted to testify about instances in which Hall had saved people's lives or had put himself in danger to help others. *Id.* Instead, defense counsel presented only the testimony of a minister who testified that Hall had attended church services for a year prior to the crimes. The Seventh Circuit held that Hall had made a sufficient showing of both ineffectiveness and prejudice, noting that "[w]ithout a

reasonable showing of mitigation by the defense," the factfinder had "no choice" but to find "a 'complete absence of mitigating factors.' " *Id.* at 752. The Court reversed and remanded the case for retrial of the penalty phase.

Austin and *Hall* both are readily distinguishable from this case. Unlike the attorneys in *Austin* or *Hall*, Petitioner's trial counsel thoroughly investigated Petitioner's background and called sixteen penalty phase witnesses who testified about Petitioner's good character, kindness, good deeds, love for his son, and deep sorrow upon his son's death. *See* ECF No. 423 at 62-78. Trial counsel's failure to present witnesses explicitly asking the jury to spare Petitioner's life, while not supported by any evident strategic considerations, does not come close to the virtual abandonment of counsel's duty to present mitigating evidence shown in *Austin* and *Hall*.

Petitioner nonetheless argues the "likely damage [to Petitioner's case] is best understood by taking the word of the prosecutor," *Kyles*, 514 U.S. at 444, and points to the prosecutor's closing argument that "not one, not one [witness] asked that [Petitioner's] life be spared. Not one had the nerve." *See* RT 4266. In response, Respondent observes that "[i]t is exceedingly unlikely that any juror could have come to believe that [Petitioner's] own friends and mother did not hope and believe that his life should be spared." *See* ECF No. 429 at 10. As noted previously, this Court agrees that the jury reasonably could have inferred that at least some of Petitioner's friends and family wanted Petitioner to live. Petitioner's friend, Ted Grish, testified that he would "love to go out there and [bowl] another six games with [Petitioner] at Moonlight Lanes." *See* RT 4136. Petitioner's mother, who lived with Petitioner at the time of the crimes, testified lovingly about Petitioner's life using a photo album she compiled. *See* RT 4206-4227. Another friend, Harry Strum, testified that Petitioner "enriched" his life. *See* RT 4143. Moreover, five other witnesses referred to Petitioner as their "friend" or "good friend" and spoke warmly about him, *see* RT 4113 (Eric Steinhauff), RT 4121 (Enoch Cole), RT 4161 (James Hall), RT 4173 (Robert Webb), RT 4199 (Barbara Thorn).

Notwithstanding the prosecutor's dismissive comment during closing argument, the California Supreme Court reasonably could conclude that the testimony at issue here would not

have been reasonably likely to change the result of the proceeding. *See Strickland*, 466 U.S. at 694. Viewed in context, Mr. Grish's testimony, which trial counsel referred to in his closing, was at odds with the prosecutor's characterization. While having additional witnesses ask the jury expressly to spare Petitioner's life obviously would not have harmed Petitioner's mitigation presentation, the additional mitigating value of the such testimony is questionable in the context of nature and quantity of the other favorable testimony about Petitioner that counsel did present at the penalty phase.

As noted earlier, the prosecution's penalty phase presentation consisted entirely of the testimony of Detective Caro—who testified that he found the various items related to Petitioner's alleged plan to drown the Erberts—and spanned only five pages of the transcript of the penalty phase. *See* RT 4092-97. While the prosecutor discussed Petitioner's mitigating evidence, she did not mention what she perceived as the failure to ask for mercy in any extended manner. The prosecutor went into significant detail regarding the facts and circumstances surrounding the crimes, including Deanna Erbert's presence in the home when Petitioner committed the crimes, the fact that Ms. Erbert's baby died "never having been held by a parent," RT 4247, the number of times Petitioner stabbed Ms. Erbert, RT 4254, what she imagined the "tape" of the crimes would sound like, RT 4264-65, and Petitioner's subsequent lies to law enforcement about his involvement in the killings, RT 4265. To the extent that the prosecutor discussed Petitioner's mitigating evidence, the prosecutor focused on what she perceived as unearned friendship and loyalty from Petitioner's sixteen penalty phase witnesses, whose testimony spanned 123 pages of the transcript and included information about various aspects of Petitioner's life, his good character and good deeds, his struggles after his son died, and statements from numerous witnesses whose testimony at least suggested a desire that Petitioner's life be spared. *See* RT 4098-40221.

Despite this disparity between the prosecution's extremely minimal presentation and Petitioner's comparably substantial effort to show mitigation, the jury returned a unanimous vote for the death penalty after only four hours of deliberation and having asked no questions. *See* RT

4297-4303. One may draw at least a reasonable inference from the record that the jury sentenced Petitioner to death almost exclusively because of the aggravated facts of this case, and that its decision was not a close one. *See, e.g.*, *Mickey v. Ayers*, 606 F.3d 1223, 1245-46 (9th Cir. 2010) ("The State's near exclusive reliance on the facts of the crime at the penalty phase strengthens our conclusion that there is not a 'reasonable probability' that the outcome would have been different had [the petitioner] presented a different mitigation case"). Moreover, although Petitioner's penalty phase presentation did not include witnesses' explicit pleas for mercy, the jury presumably understood that Petitioner's witnesses were testifying on Petitioner's behalf and, as noted, spoke warmly about Petitioner in a way suggesting that they wanted Petitioner to live. The evidence does not show a reasonable probability that the jury would have been swayed by the prosecutor's argument. The proffered evidence, which would not have substantially changed the overall thrust of Petitioner's penalty phase presentation, would therefore have been cumulative to the testimony from most of Petitioner's friends and family. Accordingly, Petitioner has not shown prejudice as a result of counsel's failure to elicit explicit requests for mercy from Petitioner's penalty phase witnesses. Because this Court cannot conclude that Petitioner has shown a "reasonable probability" that the result of his penalty trial would have been different or that the California Supreme Court applied the law unreasonably in rejecting this claim, Claim 18.B.7 will be DENIED. *See Strickland*, 466 U.S. at 694.

4. Evidentiary Hearing

Petitioner has requested an evidentiary hearing as to Claim 18.B.7. *See* Pet. Br. at 17. While it earlier granted that request, finding that there was a "triable issue of fact as to whether the deficiency in counsel's performance [alleged in Claim 18.B.7] prejudiced Petitioner," *see* ECF No. 240 at 14-15, the Court notified counsel following the evidentiary hearing on Petitioner's mental-health claims that it was inclined to reconsider that decision, and it invited briefing. *See* ECF No. 390 at 393-394; ECF No. 423 at 78. Respondent now has clarified he does not dispute that the proffered witnesses would have asked the jury to spare Petitioner's life, and accordingly there no longer is a dispute as to any material issue of fact. *See* Resp. Br. at 13 (waiving cross-

examination of witnesses for purposes of Claim 18.B.7). Petitioner has already introduced—and the Court has considered—the expert testimony of Mr. Nolan, who opined that the Petitioner's trial counsel was deficient in failing to present the proffered testimony. *See* ECF No. 299-5 at 26. As Petitioner has not identified any other material issues of fact requiring an evidentiary hearing, the Court concludes that such a hearing no longer is appropriate.

5. Conclusion

Claim 18.B.7 will be DENIED. Petitioner's request for an evidentiary hearing as to this claim also will be DENIED.

C. Lethal Injection

In Claim 23, Petitioner asserts that his death sentence is illegal and unconstitutional under the Eighth and Fourteenth Amendments to the United States Constitution because lethal injection, the method by which California proposes to execute him, violates the constitutional prohibition against cruel and unusual punishment. *See* Fed. Pet. at 197. Respondent points out correctly that no Supreme Court decision has held that execution by lethal injection is cruel and unusual. *See* ECF No. 162 ("Answer"), at 85. Despite the Court's earlier order directing the parties to do so, neither party has submitted further briefing on this claim. *See* ECF No. 423 at 78-79.

To the extent that Petitioner argues that execution by lethal injection is unconstitutional generally, *see* Fed. Pet. at 205-06, that argument has been foreclosed by the Supreme Court. which concluded in 2008 that absent specific issues in its implementation, execution by lethal injection is constitutional. *See Baze v. Rees*, 553 U.S. 35, 48-49 (2008). Moreover, to the extent that Petitioner challenges the lethal injection protocol in place in California at the time he filed his petition, his claim is moot given California's recent adoption of a new lethal injection protocol. Because Petitioner does not challenge the lethal injection protocol now in place, Claim 23 will be DENIED, without prejudice to Petitioner's right to challenge the new lethal injection protocol, if and when such a challenge is timely and appropriate. The Court expresses "no opinion as to whether this should be by way of habeas relief or through an action under 42 U.S.C. § 1983." *Payton v. Cullen*, 658 F.3d 890, 893 n.2 (9th Cir. 2011).

D. Cumulative Error

In Claim 25, Petitioner alleges that cumulative constitutional error requires a reversal of his convictions and death sentence. *See* Fed. Pet. at 210. Respondent argues there are no errors to accumulate. *See* Resp. Br. at 14.

In some cases, although no single trial error is sufficiently prejudicial to warrant reversal, the cumulative effect of several errors still may prejudice a defendant to a point that the defendant's conviction must be overturned. *See Alcala v. Woodford*, 334 F.3d 862, 893-95 (9th Cir. 2003). To warrant relief, a petitioner must show the cumulative error had a "substantial and injurious effect or influence" on the result. *Brecht*, 507 U.S. at 637. Cumulative error is more likely to be found prejudicial when the government's case is weak. *See United States v. Frederick*, 78 F.3d 1370, 1381 (9th Cir. 1996) (prejudice resulting from cumulative effect of improper vouching by prosecutor, improper comment by prosecutor about defense counsel, and improper admission of evidence previously ruled inadmissible required reversal even though each error evaluated alone might not have warranted reversal).

Despite vigorous litigation, the Court has identified only two errors in the course of these federal habeas proceedings.[3] In a previous order with respect to Claim 5.C.1, the Court concluded that trial counsel was ineffective when "counsel's carelessness and indifference to Petitioner's cause resulted in the activation of the sounds of falling bombs emanating from a 'Terminator' toy in counsel's pocket at the time the jury was being shown autopsy photos of Ms. Erbert and her fetus" during guilt phase closing arguments. *See* ECF No. 240 at 11. In the instant order with respect to Claim 18.B, the Court concluded that counsel was ineffective during the penalty phase when he failed to elicit explicit testimony from five witnesses who would have asked the jury

[3] Petitioner argues the Court should also should consider the cumulative prejudice from errors identified in Claim 18.B.1. *See* Pet. Br. at 21. The Court previously ruled that Petitioner failed to show ineffective assistance of counsel as to his allegation that counsel "failed to present a critical mass of evidence" in mitigation. *See* ECF No. 240 at 13. To the extent Petitioner relies on the mental-health evidence allegations in Claim 18.B.1, those allegations were subsumed by Claim 17, which has also been denied on the merits. *See* ECF No. 423. Accordingly, there is no error in Claim 18.B.1 to accumulate.

explicitly to spare Petitioner's life. *See supra* at p. 11. The Court also has concluded that neither of these instances of ineffective assistance taken by itself was prejudicial to Petitioner. *See* ECF No. 240 at 11; *supra* at pp. 11-15. While both errors were unfortunate, neither meets *Strickland*'s high bar of having been "so serious as to deprive [Petitioner] of a fair trial." *See Strickland*, 644 U.S. at 687

The Court also concludes that Petitioner has failed to show prejudice from cumulative error. Petitioner has not explained how the error identified in Claim 5.C.1 could have affected the penalty phase, or conversely, how the error identified in Claim 18.B.7 could have had any bearing on the guilt phase. This simply is not one of the exceedingly rare cases in which the cumulative effect of Petitioner's trial errors so infected the trial with unfairness as to make the resulting conviction a denial of due process. *Cf. Thomas v. Hubbard*, 273 F.3d 1164, 1179-81 (9th Cir. 2001) (reversing conviction based on multiple errors severely encroaching on petitioner's ability to dispute whether he committed the crime). Petitioner has therefore not shown that the cumulative effect of the errors had a "substantial and injurious effect or influence" on the jury's determinations, *Brecht*, 507 U.S. at 637, or that the California Supreme Court's denial of this claim was objectively unreasonable. This Court also would deny Claim 25 on the merits on *de novo* review.

Claim 25 will be DENIED. Because Petitioner has identified no remaining issues of material fact and makes only a conclusory assertion that an evidentiary hearing is necessary to determine prejudice, *see* Pet. Reply Br. at 26-27, the Court no longer sees a need for an evidentiary hearing as to this claim. An evidentiary hearing need not be granted when a petitioner's factual allegations are "insubstantial." *Schriro v. Landrigan*, 550 U.S. 465, 475 (2007). Accordingly, Petitioner's request for an evidentiary hearing on Claim 25 also will be DENIED.

III. CERTIFICATE OF APPEALABILITY

28 U.S.C. § 2253 provides for a "certificate of appealability" ("COA") for § 2254 cases under the following circumstances:

> (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—
>
> > (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
> >
> > (B) the final order in a proceeding under section 2255.
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
>
> (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

28 U.S.C. § 2253(c).

"Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy under § 2253 is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also Miller–El v. Cockrell*, 537 U.S. 322, 338 (2003) ("[A] claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that Petitioner will not prevail").

Given the "relatively low" threshold for granting a certificate of appealability, *Jennings v. Woodford*, 290 F.3d 1006, 1010 (9th Cir.2002), the Court concludes that in light of the relevant circuit authority, a COA is appropriate as to Claims 17 (ineffective assistance of counsel at the penalty phase for failure to discover and present certain mental health evidence), 18.B.1 (ineffective assistance of counsel at the penalty phase for general failure to present mitigating evidence), 18.B.7 (ineffective assistance of counsel at penalty phase for failure to elicit testimony explicitly seeking mercy for Petitioner), and 25 (cumulative error resulting in a violation of the constitutional right to due process and a fair trial).[4]

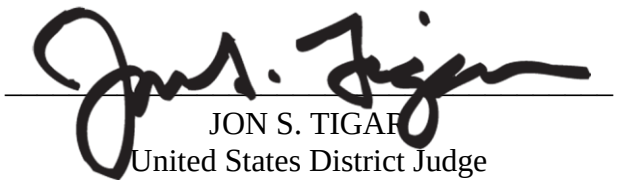
[4] The Court has considered carefully whether to grant a Certificate of Appeal as to Claim 3, which asserts that trial counsel was ineffective in failing to enter a plea of not guilty by reason of insanity. Based on the expert testimony at the 2014 evidentiary hearing and as discussed at length by the Court in Docket No. 423, the record suggests strongly that such a plea would have been futile and that counsel's decision not to enter such a plea was well within professional standards. *See* ECF No. 423 at 46-47.

IV. DISPOSITION

Good cause therefor appearing, Claims 18.B.7 and 25 are DENIED on the merits, Claim 23 is DENIED without prejudice to a future challenge to Petitioner's proposed execution by lethal injection, and Petitioner's request for an evidentiary hearing on the above-mentioned claims is DENIED. This Order disposes of all remaining claims; a judgment denying the Petition will be entered accordingly. A COA is GRANTED as to Claims 17, 18.B.1, 18.B.7, and 25. This order's effective date will remain August 17, 2018. *See* ECF No. 431.

IT IS SO ORDERED.

Dated: June 17, 2019



JON S. TIGAR
United States District Judge

Appendix C

FILED

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLIAM MICHAEL DENNIS, Petitioner-Appellant, v. RONALD BROOMFIELD, Warden of San Quentin State Prison, Respondent-Appellee.	No. 18-99008 D.C. No. 4:98-cv-21027-JST Northern District of California, San Francisco ORDER

Before: McKEOWN, CLIFTON, and BENNETT, Circuit Judges.

Petitioner-Appellant has filed petitions for panel rehearing and rehearing en banc. Dkt. No. 70. The panel has unanimously voted to deny the petition for panel rehearing. Judge Bennett has voted to deny the petition for rehearing en banc, and Judges McKeown and Clifton so recommend. The full court has been advised of the petition for rehearing en banc, and no judge of the court 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.

Appendix D

Appellate Courts Case Information

Supreme Court

Change court

Court data last updated: 10/12/2020 02:32 PM

Docket (Register of Actions)

DENNIS (WILLIAM MICHAEL) ON H.C.
Division SF
Case Number S055380

Date	Description	Notes
08/08/1996	Petition for writ of (AA-related) Habeas Corpus filed	By Attys Andrew Parnes and E. Evans Young (20 Pp. Excluding Exhibits)
08/19/1996	Filed:	Suppl Exhibit to Petn.
08/20/1996	Filed:	Errata to Habeas Petn.
11/04/1998	Petition for writ of Habeas Corpus denied (AA)	The Petn for Writ of H.C. filed on 8-8-96, Is denied. all claims Are denied on The merits. to The Extent Claim Ix Was Raised and Rejected on Appeal, it Is Barred by in Re Waltreus (1965) 62 Cal.2d 218, 225. to the Extent Claim Ix Was not Raised on Appeal, it Is Barred by in Re Dixon (1953) 41 Cal.2d 756, 759. claims X and Xiii Are Barred by in Re Waltreus, Supra 62 Cal.2d 218. Mosk, J. and Brown, J., would Deny the Petn Solely on the merits.

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Appendix E

S099587

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re WILLIAM MICHAEL DENNIS on Habeas Corpus

The petition for writ of habeas corpus, filed on August 2, 2001, is denied.

Claim I is denied on the merits. It is also procedurally barred, separately and independently, as untimely (see *In re Robbins* (1998) 18 Cal.4th 770, 780-781; *In re Clark* (1993) 5 Cal.4th 750, 763-799) and as successive (see *In re Robbins*, *supra*, 18 Cal.4th at pp. 778, fn. 1, 788, fn. 9; *In re Clark*, *supra*, 5 Cal.4th at pp. 767-768; *In re Horowitz* (1949) 33 Cal.2d 534, 546-547).

Claim II is denied on the merits. It is also procedurally barred, separately and independently, as untimely (see *In re Robbins*, *supra*, 18 Cal.4th at pp. 780-781; *In re Clark*, *supra*, 5 Cal.4th at pp. 763-799) and as successive (see *In re Robbins*, *supra*, 18 Cal.4th at pp. 778, fn. 1, 788, fn. 9; *In re Clark*, *supra*, 5 Cal.4th at pp. 767-768; *In re Horowitz*, *supra*, 33 Cal.2d at pp. 546-547).

Claim III, first subclaim, is denied on the merits. It is also procedurally barred, separately and independently, as untimely (see *In re Robbins*, *supra*, 18 Cal.4th at pp. 780-781; *In re Clark*, *supra*, 5 Cal.4th at pp. 763-799) and as successive (see *In re Robbins*, *supra*, 18 Cal.4th at pp. 778, fn. 1, 788, fn. 9; *In re Clark*, *supra*, 5 Cal.4th at pp. 767-768; *In re Horowitz*, *supra*, 33 Cal.2d at pp. 546-547).

Claim III, second subclaim, is denied on the merits. It is also procedurally barred, separately and independently, as untimely (see *In re Robbins*, *supra*, 18 Cal.4th at pp. 780-781; *In re Clark*, *supra*, 5 Cal.4th at pp. 763-799) and as

successive (see *In re Robbins*, *supra*, 18 Cal.4th at pp. 778, fn. 1, 788, fn. 9; *In re Clark*, *supra*, 5 Cal.4th at pp. 767-768; *In re Horowitz*, *supra*, 33 Cal.2d at pp. 546-547).

Claim IV is denied on the merits. It is also procedurally barred, separately and independently, as untimely (see *In re Robbins*, *supra*, 18 Cal.4th at pp. 780-781; *In re Clark*, *supra*, 5 Cal.4th at pp. 763-799), as pretermitted (see *In re Dixon* (1953) 41 Cal.2d 756, 759), and as successive (see *In re Robbins*, *supra*, 18 Cal.4th at pp. 778, fn. 1, 788, fn. 9; *In re Clark*, *supra*, 5 Cal.4th at pp. 767-768; *In re Horowitz*, *supra*, 33 Cal.2d at pp. 546-547).

Claim V, first subclaim, is denied on the merits. It is also procedurally barred, separately and independently, as untimely (see *In re Robbins*, *supra*, 18 Cal.4th at pp. 780-781; *In re Clark*, *supra*, 5 Cal.4th at pp. 763-799) and as successive (see *In re Robbins*, *supra*, 18 Cal.4th at pp. 778, fn. 1, 788, fn. 9; *In re Clark*, *supra*, 5 Cal.4th at pp. 767-768; *In re Horowitz*, *supra*, 33 Cal.2d at pp. 546-547).

Claim V, second subclaim, is denied on the merits. It is also procedurally barred, separately and independently, as untimely (see *In re Robbins*, *supra*, 18 Cal.4th at pp. 780-781; *In re Clark*, *supra*, 5 Cal.4th at pp. 763-799) and as successive (see *In re Robbins*, *supra*, 18 Cal.4th at pp. 778, fn. 1, 788, fn. 9; *In re Clark*, *supra*, 5 Cal.4th at pp. 767-768; *In re Horowitz*, *supra*, 33 Cal.2d at pp. 546-547).

Claim VI is denied on the merits. It is also procedurally barred, separately and independently, as successive. (See *In re Robbins*, *supra*, 18 Cal.4th at pp. 778, fn. 1, 788, fn. 9; *In re Clark*, *supra*, 5 Cal.4th at pp. 767-768; *In re Horowitz*, *supra*, 33 Cal.2d at pp. 546-547.) Further, to the extent that Claim VI was raised and rejected on appeal, it is also procedurally barred as repetitive. (See *In re Harris* (1993) 5 Cal.4th 813, 824-829; *In re Waltreus* (1965) 62 Cal.2d 218, 225.) To the extent that Claim VI could have been, but was not, raised on appeal, it is procedurally barred as pretermitted. (See *In re Dixon*, *supra*, 41 Cal.2d at p. 759.)

Claim VII is denied on the merits. It is also procedurally barred, separately and independently, as untimely (see *In re Robbins*, *supra*, 18 Cal.4th at pp. 780-781; *In re Clark*, *supra*, 5 Cal.4th at pp. 763-799) and as successive (see *In re Robbins*, *supra*, 18 Cal.4th at pp. 778, fn. 1, 788, fn. 9; *In re Clark*, *supra*, 5 Cal.4th at pp. 767-768; *In re Horowitz*, *supra*, 33 Cal.2d at pp. 546-547).

Claim VIII, first subclaim, is denied on the merits. It is also procedurally barred, separately and independently, as untimely (see *In re Robbins*, *supra*, 18 Cal.4th at pp. 780-781; *In re Clark*, *supra*, 5 Cal.4th at pp. 763-799) and as successive (see *In re Robbins*, *supra*, 18 Cal.4th at pp. 778, fn. 1, 788, fn. 9; *In re Clark*, *supra*, 5 Cal.4th at pp. 767-768; *In re Horowitz*, *supra*, 33 Cal.2d at pp. 546-547).

Claim VIII, second subclaim, is denied on the merits. It is also procedurally barred, separately and independently, as untimely (see *In re Robbins*, *supra*, 18 Cal.4th at pp. 780-781; *In re Clark*, *supra*, 5 Cal.4th at pp. 763-799) and as successive (see *In re Robbins*, *supra*, 18 Cal.4th at pp. 778, fn. 1, 788, fn. 9; *In re Clark*, *supra*, 5 Cal.4th at pp. 767-768; *In re Horowitz*, *supra*, 33 Cal.2d at pp. 546-547).

Claim VIII, third subclaim, is denied on the merits. It is also procedurally barred, separately and independently, as untimely (see *In re Robbins*, *supra*, 18 Cal.4th at pp. 780-781; *In re Clark*, *supra*, 5 Cal.4th at pp. 763-799) and as successive (see *In re Robbins*, *supra*, 18 Cal.4th at pp. 778, fn. 1, 788, fn. 9; *In re Clark*, *supra*, 5 Cal.4th at pp. 767-768; *In re Horowitz*, *supra*, 33 Cal.2d at pp. 546-547).

Claim VIII, fourth subclaim, is denied on the merits. It is also procedurally barred, separately and independently, as untimely (see *In re Robbins*, *supra*, 18 Cal.4th at pp. 780-781; *In re Clark*, *supra*, 5 Cal.4th at pp. 763-799) and as successive (see *In re Robbins*, *supra*, 18 Cal.4th at pp. 778, fn. 1, 788, fn. 9; *In re Clark*, *supra*, 5 Cal.4th at pp. 767-768; *In re Horowitz*, *supra*, 33 Cal.2d at pp. 546-547).

Claim VIII, fifth subclaim, is denied on the merits. It is also procedurally barred, separately and independently, as untimely (see *In re Robbins*, *supra*, 18 Cal.4th at pp. 780-781; *In re Clark*, *supra*, 5 Cal.4th at pp. 763-799) and as successive (see *In re Robbins*, *supra*, 18 Cal.4th at pp. 778, fn. 1, 788, fn. 9; *In re Clark*, *supra*, 5 Cal.4th at pp. 767-768; *In re Horowitz*, *supra*, 33 Cal.2d at pp. 546-547).

Claim VIII, sixth subclaim, is denied on the merits. It is also procedurally barred, separately and independently, as untimely (see *In re Robbins*, *supra*, 18 Cal.4th at pp. 780-781; *In re Clark*, *supra*, 5 Cal.4th at pp. 763-799) and as successive (see *In re Robbins*, *supra*, 18 Cal.4th at pp. 778, fn. 1, 788, fn. 9; *In re Clark*, *supra*, 5 Cal.4th at pp. 767-768; *In re Horowitz*, *supra*, 33 Cal.2d at pp. 546-547).

Claim IX, first subclaim, is denied on the merits. It is also procedurally barred, separately and independently, as untimely (see *In re Robbins*, *supra*, 18 Cal.4th at pp. 780-781; *In re Clark*, *supra*, 5 Cal.4th at pp. 763-799) and as successive (see *In re Robbins*, *supra*, 18 Cal.4th at pp. 778, fn. 1, 788, fn. 9; *In re Clark*, *supra*, 5 Cal.4th at pp. 767-768; *In re Horowitz*, *supra*, 33 Cal.2d at pp. 546-547).

Claim IX, second subclaim, is denied on the merits. It is also procedurally barred, separately and independently, as untimely (see *In re Robbins*, *supra*, 18 Cal.4th at pp. 780-781; *In re Clark*, *supra*, 5 Cal.4th at pp. 763-799) and as successive (see *In re Robbins*, *supra*, 18 Cal.4th at pp. 778, fn. 1, 788, fn. 9; *In re Clark*, *supra*, 5 Cal.4th at pp. 767-768; *In re Horowitz*, *supra*, 33 Cal.2d at pp. 546-547).

Claim IX, third subclaim, is denied on the merits. It is also procedurally barred, separately and independently, as untimely (see *In re Robbins*, *supra*, 18 Cal.4th at pp. 780-781; *In re Clark*, *supra*, 5 Cal.4th at pp. 763-799) and as successive (see *In re Robbins*, *supra*, 18 Cal.4th at pp. 778, fn. 1, 788, fn. 9; *In re*

Clark, *supra*, 5 Cal.4th at pp. 767-768; *In re Horowitz*, *supra*, 33 Cal.2d at pp. 546-547).

Claim X is denied on the merits. It is also procedurally barred, separately and independently, as untimely (see *In re Robbins*, *supra*, 18 Cal.4th at pp. 780-781; *In re Clark*, *supra*, 5 Cal.4th at pp. 763-799), as pretermitted (see *In re Dixon*, *supra*, 41 Cal.2d at p. 759), and as successive (see *In re Robbins*, *supra*, 18 Cal.4th at pp. 778, fn. 1, 788, fn. 9; *In re Clark*, *supra*, 5 Cal.4th at pp. 767-768; *In re Horowitz*, *supra*, 33 Cal.2d at pp. 546-547).

Claim XI, first subclaim, is denied on the merits.

Claim XI, second subclaim, is denied on the merits. It is also procedurally barred, separately and independently, as untimely. (See *In re Robbins*, *supra*, 18 Cal.4th at pp. 780-781; *In re Clark*, *supra*, 5 Cal.4th at pp. 763-799.)

Claim XI, third subclaim, is denied on the merits. It is also procedurally barred, separately and independently, as untimely. (See *In re Robbins*, *supra*, 18 Cal.4th at pp. 780-781; *In re Clark*, *supra*, 5 Cal.4th at pp. 763-799.)

Claim XII is denied on the merits.

Claim XIII is denied on the merits.

Petitioner's motions for calendar preference, filed on August 2, 2001, October 16, 2001, and January 25, 2002, are denied as moot.

Chief Justice

Appendix F

S201330

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re WILLIAM DENNIS on Habeas Corpus.

The petition for writ of habeas corpus, filed on April 3, 2012, is denied. All claims are denied on the merits.

CANTIL-SAKAUYE

Chief Justice