

No. 17 - _____

IN THE SUPREME COURT OF THE UNITED STATES

DAVID FIERRO

Petitioner,

v.

WILLIAM MUNIZ,
Acting Warden of Salinas Valley State Prison

Respondent.

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

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

JAMES S. THOMSON
Counsel of Record
732 Addison Street, Suite A
Berkeley, California 94710
Telephone: (510) 525-9123

Attorney for Petitioner
DAVID FIERRO

INDEX OF APPENDICES

Appendix A	Memorandum Opinion, <i>Fierro v. Muniz</i> , Ninth Circuit Case No. 14-56356 (September 18, 2017)	1
Appendix B	Order Denying Rehearing, <i>Fierro v. Muniz</i> , Ninth Circuit Case No. 14-56356 (October 26, 2017)	7
Appendix C	Report and Recommendation of United States Magistrate Judge, <i>Fierro v. Lewis</i> , California Central District Court Case No. 2:94-cv-03198-GHK-AJW (March 22, 2013) . .	9
Appendix D	Order Accepting Report and Recommendation of Magistrate Judge, <i>Fierro v. Lewis</i> , California Central District Court Case No. 2:94-cv-03198-GHK-AJW (June 17, 2014) . .	115
Appendix E	Judgment, <i>Fierro v. Lewis</i> , California Central District Court Case No. 2:94-cv-03198-GHK-AJW (June 17, 2014) . .	117
Appendix F	28 U.S.C. §2254 (1995)	119
Appendix G	Competency Evaluation Report by Dr. Sayed Hamed (May 9, 1986)	138
Appendix H	Findings and Decision, <i>In re Fierro</i> , Riverside Superior Court Case No. RIC 440182/CR 23644 (July 21, 2010)	144

Appendix A

FILED

SEP 18 2017

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DAVID FIERRO,

Petitioner-Appellant,

v.

CLARK E. DUCART, Warden,

Respondent-Appellee.

No. 14-56356

D.C. No.

2:94-cv-03198-GHK-AJW

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
George H. King, District Judge, Presiding

Argued and Submitted August 31, 2017
Pasadena, California

Before: W. FLETCHER and IKUTA, Circuit Judges, and BARKER,** District
Judge.

David Fierro appeals the district court's denial of his petition for a writ of
habeas corpus under 28 U.S.C. § 2254. We have jurisdiction under 28 U.S.C.
§ 1291 and review the district court's ruling de novo. *Deere v. Cullen*, 718 F.3d

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

** The Honorable Sarah Evans Barker, United States District Judge for
the Southern District of Indiana, sitting by designation.

1124, 1144 (9th Cir. 2013). Because Fierro filed his petition before the effective date of the Antiterrorism and Effective Death Penalty Act, “we grant habeas relief if [Fierro] proves by a preponderance of the evidence that he ‘is in custody in violation of the Constitution or laws or treaties of the United States.’” *Id.* (quoting 28 U.S.C. § 2254(a) (1996)).

The district court did not err by denying relief on Fierro’s first certified claim that he was incompetent to stand trial, because the evidence meriting the most weight indicated he met the competency standard. All contemporaneous medical evaluations opined that Fierro was able to understand the nature and purpose of the proceedings against him and could cooperate in a rational manner with counsel in presenting a defense. *See Dusky v. United States*, 362 U.S. 402, 402 (1960) (per curiam); *Deere*, 718 F.3d at 1145. There is no evidence in the record that any of Fierro’s three defense attorneys or the state trial judge who observed and interacted with Fierro questioned his competency to stand trial. *See Deere*, 718 F.3d at 1145–46; *Williams v. Woodford*, 384 F.3d 567, 608 (9th Cir. 2004). Moreover, transcripts of Fierro’s interactions with the state trial judge and his penalty phase testimony disclose that Fierro “actually understood what was going on” and “accurately answered open-ended questions.” *Deere*, 718 F.3d at 1146. The various concerns that Fierro expressed to the trial judge were “logical.”

Id. The district court did not err by giving less weight to expert opinions proffered after trial. *See id.* at 1446–47. There is no evidence that Fierro was rendered incompetent by the use of Xanax during the trial; rather, the evidence shows that his dosage of Xanax was “reduced” during guilt phase proceedings. Moreover, although there is some evidence that Fierro had access to heroin while in prison, the record does not indicate that Fierro was under the influence of illicit drugs during trial.

The district court also properly denied relief on Fierro’s certified claim that his trial counsel was ineffective for failing to investigate his competency to stand trial. Trial counsel was not deficient; he retained a medical expert to assess Fierro’s competency, and was entitled to rely on that properly selected expert’s opinion. *See Hendricks v. Calderon*, 70 F.3d 1032, 1038–39 (9th Cir. 1995); *Harris v. Vasquez*, 949 F.2d 1497, 1525 (9th Cir. 1990). We may not impute the expert’s deficiency, if any, to trial counsel. *Earp v. Cullen*, 623 F.3d 1065, 1077 (9th Cir. 2010). Moreover, Fierro cannot show that any error by trial counsel was prejudicial “[b]ecause the evidence indicates that [Fierro] was competent to stand trial.” *Boyde v. Brown*, 404 F.3d 1159, 1167 (9th Cir. 2005).

Nor did the district court err by denying relief on Fierro’s certified claim that trial counsel was ineffective for failure to investigate and present a mental state

defense. In reliance on then-existing state law, *People v. Frierson*, 39 Cal. 3d 803, 815–18 (1985), trial counsel presented Fierro’s preferred defense that Fierro had not been involved in the alleged criminal activity, and trial counsel performed reasonably by repeatedly challenging the credibility of the state’s eye witnesses. Upon selecting this defense strategy, “largely on the basis of [Fierro’s] own representations,” trial counsel’s “duty to investigate the directly conflicting [mental state] defense was at an end.” *Bean v. Calderon*, 163 F.3d 1073, 1082 (9th Cir. 1998). Given the state’s evidence, the contemporaneous hostility towards mental state defenses, *see Mickey v. Ayers*, 606 F.3d 1223, 1239 (9th Cir. 2010), and the jury’s special verdict finding that Fierro “shot and killed” the victim, there is no “reasonable probability that . . . the result of the proceeding would have been different” had trial counsel raised a mental state defense. *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

We have reviewed the uncertified claims that Fierro raised in his opening brief, which we construe as a motion to expand the certificate of appealability. Ninth Cir. R. 22-1(e). Because no reasonable jurist could disagree with the district court’s resolution of the constitutional claims, nor conclude that “the issues presented are adequate to deserve encouragement to proceed further,” we deny the

motion. *Buck v. Davis*, 137 S. Ct. 759, 773 (2017) (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003)).

AFFIRMED.

Appendix B

FILED

UNITED STATES COURT OF APPEALS

OCT 26 2017

FOR THE NINTH CIRCUIT

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

DAVID FIERRO,

Petitioner-Appellant,

v.

CLARK E. DUCART, Warden,

Respondent-Appellee.

No. 14-56356

D.C. No.

2:94-cv-03198-GHK-AJW

Central District of California,
Los Angeles

ORDER

Before: W. FLETCHER and IKUTA, Circuit Judges, and BARKER,* District Judge.

The panel has unanimously voted to deny appellant's petition for rehearing. Judge Fletcher and Judge Ikuta voted to deny the petition for rehearing en banc and Judge Barker so recommended. The petition for rehearing en banc was circulated to the judges of the court, and no judge requested a vote for en banc consideration.

The petition for rehearing and the petition for rehearing en banc are
DENIED.

* The Honorable Sarah Evans Barker, United States District Judge for the Southern District of Indiana, sitting by designation.

Appendix C

O

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

DAVID REY FIERRO,	)	Case No. CV 94-3198-GHK (MLG)
	)	
Petitioner,	)	REPORT AND RECOMMENDATION OF
	)	UNITED STATES MAGISTRATE JUDGE
v.	)	
	)	
MICHAEL MARTEL, Warden,	)	
	)	
Respondent.	)	
	)	

In 1986, a Riverside County Superior Court jury convicted Petitioner David Rey Fierro of first degree murder and two counts of robbery. The jury also found true a special circumstance allegation that the murder was committed during the commission of a robbery and that Petitioner used a firearm to commit the offenses. Petitioner was originally sentenced to death on the robbery-murder special circumstance charge, but that sentence was later reduced to life without the possibility of parole. Petitioner brings this petition for writ of habeas corpus to challenge his convictions and sentence.

//

1 **I. Background**

2 On January 6, 1985, around 6:00 p.m., Sam Allessie and his wife
3 Trudy Allessie had closed the market they owned, Trudy's Market, in
4 Glen Avon, California for the evening. (Reporter's Transcript ("RT")
5 at 2849). Trudy had approximately \$1,000 in cash and \$4,000 in checks
6 and money orders in her purse. (RT at 2853-56). The Allessies walked
7 to their truck, which was parked between Trudy's Market and the
8 adjacent business, Brenda's Café. (RT at 2856-60). Sam opened the
9 passenger door for his wife and she entered the truck. (RT at
10 2866-67, 3711, 3775). Sam walked toward the back of the truck. (RT
11 at 2869, 2872). Trudy then heard loud talking coming from the rear
12 of the truck. She did not recognize the speaker (RT at 2873) and
13 could not see Sam (RT at 2868, 2873). A "kid" suddenly appeared on
14 the driver's side and tried to unlock the driver's door with Sam's
15 keys. (RT at 2872-73, 2911-14). Sam warned Trudy to watch her purse.
16 Trudy started to exit the passenger door and was confronted by the
17 "kid," who demanded money. (RT at 2874). Trudy opened her purse,
18 handed over a bundle of cash, and placed her purse behind her in the
19 truck. (RT at 2874-75). The "kid" then reached inside the truck,
20 grabbed the purse, and ran to the rear of the truck. (RT at 2874-77,
21 2881, 2914-17, 3711-14, 3775).

22 Trudy Allessie testified that the robber was wearing a light
23 colored t-shirt, white or yellow, and dark pants. (RT at 2878-79).
24 She described him as clean cut, with dark hair and distinct,
25 penetrative eyes. She saw his face clearly. (RT at 2879-80). She
26 never saw this man with a gun, nor did she see any tattoos on his
27 arms. (RT at 2908, 2918, 2951-52). Trudy heard a gunshot after the

1 "kid" left her and ran around the back of the truck.¹ (RT at 2888,
2 2920). She did not see anyone else other than the "kid." (RT at
3 2906). Trudy identified Petitioner at trial as the man who took her
4 purse and money. (RT at 2877-78).

5 As Trudy ran to the back of the truck, she saw a low,
6 light-colored car leaving the scene heading toward the freeway. (RT
7 at 2884-86). At the same time, she noticed Robert Gonzalez using the
8 phone in a nearby telephone booth. (RT at 2887).

9 Gonzalez, a teenager, lived across the street from Trudy's
10 Market. (RT at 3153). Prior to the robbery, Gonzalez observed Trudy's
11 personal brown sedan parked in front of the market, as well as a
12 yellow Pacer in the parking lot in front of the neighboring Brenda's
13 Café. He saw the Allessies close and lock their market. (RT at
14 3156-57). Sam's pick-up truck was hidden from his view behind the
15 wall of the market. (RT at 3161, 3168). Shortly thereafter, he heard
16 a gunshot. He looked toward Brenda's Café, saw a man he identified
17 as Petitioner pointing a gun, and saw him fire a second shot. (RT at
18 3159-62). Petitioner then ran toward the Pacer, and Gonzalez ran for
19 cover behind the market. (RT at 3163). Gonzalez looked out and saw
20 a figure getting into the Pacer before it sped off toward the
21 freeway. (RT at 3164-65). Gonzalez did not know whether it was
22 Petitioner who had entered the Pacer. (RT at 3166).

23 Gonzalez went to the pickup truck and saw Sam Allessie lying in
24 front of Brenda's Café, alive but bleeding from a chest wound. Later
25

26 ¹ At trial, Trudy Allessie was equivocal about whether she
27 heard one shot or two when her husband was murdered and whether there
28 were one or two robbers. She denied telling investigating Officer
Watson that there must have been someone else who shot her husband, (RT
at 2931) but she did say that she told him that "there must have been
another one with [Petitioner]." (RT at 2932).

1 that night, Gonzalez remembered that he had seen the shooter before,
2 at a store in Fontana three months earlier. (RT at 3170-71). He did
3 not talk to any police officers that night or at any time until
4 several months later when contacted by the Riverside County Sheriff's
5 Department for an interview. (RT at 3171, 3176-77). Detective Jeffrey
6 Turley met him and showed him a photo line-up of suspects, and
7 Gonzalez told him "I'm not sure, but I think No. 2 is the man." (RT
8 at 3177-78). Gonzalez told Detective Turley that he had seen that man
9 both at a store in Fontana and at the shooting. (RT at 3181). Photo
10 No. 2 depicted Petitioner.

11 Carole DiCenso and her husband Antonio DiCenso were driving by
12 the market around 6:00 p.m. (RT at 3238). Antonio was driving and
13 Carole was riding in the rear passenger seat. As they drove by,
14 Carole saw three men standing by Brenda's Café. (RT at 3240, 3243).
15 One man was wearing a white t-shirt, the second was dressed in dark
16 clothing, and the third was in a black muscle shirt. (RT at 3245).
17 The man in the white t-shirt was standing much closer to the man in
18 dark clothing than the other, who was four or five feet away. (RT at
19 3273). The man in the white t-shirt fired a shot and the man in dark
20 clothing "slumped down" and fell over. (RT at 3247). The man in the
21 white t-shirt then stepped closer, bent down, and fired a second shot
22 into the man on the ground. (RT at 3248). The man in the white
23 t-shirt then reached under the body of the man on the ground. (RT at
24 3250, 3289). Carole did not see the men well enough to be able to
25 identify them and was not able to identify anyone in a photo line-up.
26 (RT at 3262, 3298, 3325).

27 Antonio DiCenso testified that he also heard two gunshots as he
28 drove past Trudy's Market. (RT at 3437-39). He did not see who fired

1 the shot and did not recall how many people were there. (RT at
2 3440-41, 3443-44). After the second shot, Antonio saw a man run
3 towards the building carrying a bag or something in his hand. (RT at
4 3442). As Antonio drove down the road, he lost sight of the man. (RT
5 at 3446). The man wore a light-colored t-shirt and did not have
6 light-colored hair. (RT at 3447). Antonio could not identify the man.
7 (RT at 3448).

8 Several other people in the neighborhood heard shots that night.
9 Some heard one shot and others heard two. Some saw one man running
10 away from the scene and others saw two men. None were able to
11 identify the fleeing individual(s).

12 After police were called and an initial investigation was
13 conducted, an alert was broadcast. On January 8, 1985, two days after
14 the murder, Fontana Police Officer Robert Mejia stopped Petitioner
15 in his Pacer and took him into custody. (RT at 3432-33). Trudy
16 Allesie identified Petitioner as the robber from a photographic
17 line-up presented by Detective Turley. (RT at 3476). Detective Turley
18 subsequently showed the same lineup to Gonzalez, who identified
19 Petitioner as the shooter and the person he had previously seen in
20 the Fontana store. (RT at 3479-80). After the arrest, Detective James
21 Bowen found and seized Petitioner's wallet from the purse of Laura
22 Fierro, Petitioner's wife. (RT at 3506). Detective Bowen found \$650
23 cash in large bills inside the wallet. (RT at 3506-08). He also
24 conducted a live lineup at which Trudy identified Petitioner as the
25 robber. (RT at 3512).

26 At trial, a number of investigators and experts testified.
27 Detective Patrick McManus was dispatched to the crime scene, arriving
28 about 6:05 p.m. (RT at 2972). Detective McManus found the victim

1 lying on his back and determined that he was dead. (RT at 2975). He
2 also interviewed Trudy Allessie. (RT at 2979). Detective McManus
3 first testified that Trudy stated that she had seen two subjects
4 running off. (RT at 2981). After reviewing his notes, however,
5 Detective McManus testified that Trudy had not reported seeing anyone
6 running from the scene. (RT at 2985).

7 Detective Turley arrived at the crime scene at about 7:25 p.m.
8 (RT at 2989). He saw that the victim had two wounds to his chest. (RT
9 at 3001-02). He noted that there was a spatter of blood under Sam's
10 arm, and an exit wound in his back. (RT at 3003, 3006-07). From the
11 information gathered in the investigation, Detective Turley put out
12 an alert for two males of Latin descent. One was a younger male, who
13 had been seen wearing a white or yellow t-shirt and dark pants. (RT
14 at 3012). The other male was of unknown age and had last been seen
15 wearing a dark colored tank top or muscle shirt. (RT at 3012-13). The
16 suspects were reported to be driving a light colored AMC Pacer. (RT
17 at 3012-13).

18 Michael Renney, a senior evidence technician with the Riverside
19 County Sheriff's Department, testified as an expert witness on
20 fingerprint identification and comparison. (RT at 3048-49). Renney
21 conducted the crime scene investigation and lifted six latent
22 fingerprints from Sam Alessie's truck. (RT at 3057, 3084). Five of
23 the prints were useable. (RT at 3058). Four of the latents, from the
24 back of the cab and the driver and passenger side door handle matched
25 Petitioner's fingerprints. (RT at 3064-65, 3080-81). The remaining
26 latent was a duplicate. (RT at 3084).

27 Fontana Police Detective Peter Moore had known Petitioner since
28 1972. (RT at 3424). Detective Moore confirmed that Petitioner

1 frequented the Fontana store identified by Gonzalez. (RT at 3424-25).

2 Dr. DeWitt Hunter, a contracting doctor with the Riverside
3 County Coroner's Office, performed the autopsy on Sam Alleessie. (RT
4 at 3346, 3348). Dr. Hunter observed two entry wounds in the left
5 chest area, and one exit wound and an "impact exit location" in the
6 victim's back. (RT at 3352, 3354-58). According to Dr. Hunter, the
7 latter wound represented a crush-type injury caused by the rebound
8 of the bullet into the body because the victim was lying against a
9 hard surface. (RT at 3358). What was designated wound No. 1
10 corresponded to the exit wound in the back; wound No. 2 corresponded
11 to the "impact exact location." (RT at 3363-64). Dr. Hunter found a
12 .38 caliber bullet that he stated was associated with wound No. 2.
13 (RT at 3368). Because of the size of the entrance wound, Dr. Hunter
14 found that wound No. 2 was caused by a gun being discharged "very,
15 very close to the subject's skin." (RT at 3371). He theorized that
16 wound No. 1 was caused by a gun being discharged between one and
17 twelve inches from the victim (RT at 3372), while wound No. 2 was a
18 "contact wound" (RT at 3373). Either wound would have been fatal. (RT
19 at 3379).

20 Dr. Hunter opined that wound No. 1 was inflicted first and wound
21 No. 2 shortly thereafter, as the impact injury was more likely to
22 have taken place following Sam Alleessie's fall to the ground. (RT at
23 3381-82). Dr. Hunter admitted that if the first shot was muffled and
24 the second shot louder, it would be reasonable to conclude, without
25 more, that wound No. 2 was inflicted first. (RT at 3408).

26 Criminalist Faye Springer searched the crime scene and collected
27 evidence, including blood samples. (RT at 3555-56). After
28 Petitioner's arrest, Springer found blood on the passenger door of

1 Petitioner's Pacer, the car that he was driving when arrested. (RT
2 at 3578). Springer then identified the ABO and electrophoresis typing
3 of the victim and Petitioner. (RT at 3581, 3591-93). Springer
4 concluded that the blood on the Pacer was consistent with that of the
5 victim and inconsistent with that of Petitioner. (RT at 3598-3600).
6 Based on statistical studies, Springer concluded that Sam Allessie
7 and one half of one percent of the population have blood with that
8 combination of genetic markers. (RT at 3603).

9 In 1986, following a jury trial, Petitioner was convicted of
10 first degree murder (Cal. Penal Code § 187(a)) and two counts of
11 robbery (Cal. Penal Code § 211). The jury also found true a special
12 circumstance allegation that the murder was committed during the
13 commission of a robbery (Cal. Penal Code § 190.2(a)(17)(i)), and that
14 Petitioner used a firearm to commit the offenses (Cal. Penal Code
15 § 12022.5). (Clerk's Transcript ("CT") at 203-06, 208-14, 216-19).
16 The jury also returned a special finding that Petitioner shot and
17 killed Sam Allessie. (CT at 206-07, 214-15). The jury fixed the
18 penalty at death. (CT at 341-42).

19 20 **II. Procedural History**

21 The judgment was automatically appealed to the California
22 Supreme Court (Case No. S004726). On December 26, 1991, the
23 California Supreme Court affirmed Petitioner's convictions and
24 sentence. *People v. Fierro*, 1 Cal. 4th 173 (1991). In 1992, the
25 United States Supreme Court denied certiorari. *Fierro v. California*,
26 506 U.S. 907 (1992).

27 While Petitioner's case was still pending on direct review, the
28 California Supreme Court denied a "preliminary" state habeas corpus

1 petition (Case No. S022650). In 1994, the California Supreme Court
2 denied a "finalized" state habeas petition (Case No. S031671). (See
3 Lodgment 32).

4 Petitioner filed the current federal habeas corpus petition in
5 October 1995, and a supplemental habeas petition in December 1996.
6 Respondent filed an answer and Petitioner filed a traverse.

7 In August 1997, Petitioner filed a motion for evidentiary
8 hearing on 16 of his claims for relief. In March 2000, District Judge
9 Lourdes G. Baird granted, in part, the motion for evidentiary
10 hearing. In May 2004, before an evidentiary hearing had been
11 conducted, the Court placed this case in abeyance to allow the state
12 courts the opportunity to examine whether Petitioner was mentally
13 retarded and ineligible for capital punishment, pursuant to *Atkins*
14 *v. Virginia*, 536 U.S. 304 (2002), which held that persons suffering
15 from mental retardation are ineligible for the death penalty.

16 In July 2010, the Riverside County Superior Court found
17 Petitioner had established he was mentally retarded within the
18 meaning of *Atkins*, 536 U.S. 304. (Notice of Motion and Motion to
19 Expand Record ("MERE"), Exh. 1 at 15; *In re David Rey Fierro*, Supreme
20 Court Case No. S116793, Superior Court Case No. RIC 440182/CR 23644).
21 The superior court vacated Petitioner's death sentence and imposed
22 a sentence of life without the possibility of parole. (MERE, Exh. 1
23 at 15). Thereafter, in November 2010, Petitioner returned to this
24 Court for consideration of his remaining guilt phase issues.

25 In November 2011, the matter was referred to this magistrate
26 judge for a Report and Recommendation. On January 26, 2012, after
27 several status conferences and additional briefing, it was determined
28 that an evidentiary hearing was not required to resolve the remaining

1 claims for relief, particularly in light of the state court order
2 setting aside the death penalty. (Docket Entry 199).

3 On May 15, 2012, Petitioner filed an Opening Memorandum of Law
4 ("Memo") raising the following claims for relief²:

5 B. Petitioner was not competent to stand trial. (Memo at 2-8).

6 D.1 Trial counsel was ineffective for failing to impeach the
7 state's pathologist and failing to present an alternative
8 theory of the crime. (Memo at 55-56, 63-70).

9 D.3 Trial counsel was ineffective for failing to present a
10 third party defense. (Memo at 70-71).

11 D.4 Trial counsel was ineffective for failing to present a
12 mental state defense. (Memo at 71-74).

13 D.6 Trial counsel was ineffective for failing to object to
14 prosecutorial misconduct and failing to request a curative
15 instruction. (Memo at 74-77).

16 E. The trial court erroneously denied a motion to suppress.
17 (Memo at 13-18).

18 F. Eyewitness identifications were tainted. (Memo at 8-13).

19 I. Trial counsel was ineffective for failing to object to the
20 exclusion of Hispanics from the jury. (Memo at 24-30).

21 L. The prosecutor misinformed the jury about the adversary
22 process at trial, the role of defense counsel, and
23 Petitioner's constitutional rights. (Memo at 58-60).

24 M. The prosecutor improperly commented on Petitioner's
25 decision not testify, misinformed the jurors about their
26

27 ² The identification of claims by letter and number is derived
28 from the original petition filed in 1994 and amended on August 20,
2007. The claims for relief not addressed were mooted when the death
sentence was set aside.

1 duties at trial, and asked the jurors to prejudge
2 Petitioner's case. (Memo at 19-23).

3 N. The admission of electrophoretic test results was error.
4 (Memo at 36-49).

5 O. Petitioner's right to confront witnesses was violated.
6 (Memo at 33-36).

7 P. The admission of gruesome photographs was prejudicial.
8 (Memo at 30-33).

9 Q. The prosecutor presented false evidence and failed to
10 disclose impeachment evidence; and trial counsel was
11 ineffective for failing to impeach the state's pathologist
12 with evidence of his bad reputation. (Memo at 49-56).

13 R. The prosecutor improperly compelled Petitioner's wife to
14 invoke her Fifth Amendment privilege. (Memo at 56-58).

15 S. The trial court violated Petitioner's right to present a
16 defense by refusing to qualify defense experts. (Memo at
17 77-79).

18 T. The prosecutor committed misconduct during closing
19 argument. (Memo at 79-82).

20 U. The trial court erred by failing to strike a firearm
21 enhancement allegation. (Memo at 89-91).

22 V. The jury was not properly instructed on the intent to kill
23 element of the special circumstance allegation. (Memo at
24 82-87).

25 W. The trial court denied Petitioner's right to a fair trial
26 by denying his motion to bifurcate the guilt and special
27 circumstance phases of trial. (Memo at 87-89).

28 X. The cumulative error at trial warrants reversal. (Memo at

106-07).

UU. Petitioner was denied a fair, non-arbitrary appellate review by the California Supreme Court on automatic appeal.

(Memo at 91-106).

Respondent filed a Response to Petitioner's Opening Memorandum of Law ("Response") on September 18, 2012. Petitioner filed a Reply to Respondent's Response ("Reply") on October 17, 2012 and a supplement on November 16, 2012. This matter is now ready for decision.

III. Standard of Review

Where a petitioner filed a federal petition for writ of habeas corpus before the effective date of the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) and "the district court retained jurisdiction over the case, AEDPA does not apply even if the petitioner files an amended petition after the effective date of AEDPA." *Thomas v. Chappell*, 678 F.3d 1086, 1100 (9th Cir. 2012); *Sivak v. Hardison*, 658 F.3d 898, 905 (9th Cir. 2011); see also *Lindh v. Murphy*, 521 U.S. 320, 327 (1997) (holding that the relevant portions of AEDPA "apply only to cases filed after the Act became effective").

Here, Petitioner filed his original federal habeas petition in October 1995, prior to the effective date of AEDPA. Therefore, AEDPA does not govern his claims, and this Court will conduct a de novo review of the record to determine whether habeas relief should be granted.

Under pre-AEDPA law, questions of law and mixed questions of law and fact are reviewed de novo. *Thomas*, 678 F.3d at 1101; *Sivak*, 658 F.3d at 905; *Williams v. Taylor*, 529 U.S. 362, 400 (2000) (O'Connor,

1 J., concurring) (explaining that under pre-AEDPA law, "a federal
2 habeas court owed no deference to a state court's resolution of such
3 questions of law or mixed questions"). State court factual findings
4 are entitled to a presumption of correctness, subject to eight
5 exceptions, as set forth in the previous version of section 2254(d).³
6 28 U.S.C. § 2254(d) (1994); *Thomas*, 678 F.3d at 1101; *Sivak*, 658 F.3d
7 at 905-06; see also *Jackson v. Brown*, 513 F.3d 1057, 1069 & n.6 (9th
8 Cir. 2008) (listing the eight exceptions to the presumption of
9 correctness rule). Petitioner asserts that three of these exceptions
10 apply here: "the factfinding procedure employed by the State court
11 was not adequate to afford a full and fair hearing;" Petitioner "did
12

13 ³ Former section 2254(d) sets forth the following eight
14 situations in which the state court factual findings are not entitled
to the presumption of correctness:

- 15 (1) that the merits of the factual dispute were not resolved
16 in the State court hearing;
- 17 (2) that the factfinding procedure employed by the State
18 court was not adequate to afford a full and fair
19 hearing;
- 20 (3) that the material facts were not adequately developed at
21 the State court hearing;
- 22 (4) that the State court lacked jurisdiction of the subject
23 matter or over the person of the applicant in the State
24 court proceeding;
- 25 (5) that the applicant was an indigent and the State court,
26 in deprivation of his constitutional right, failed to
27 appoint counsel to represent him in the State court
28 proceeding;
- (6) that the applicant did not receive a full, fair, and
adequate hearing in the State court proceeding; or
- (7) that the applicant was otherwise denied due process of
law in the State court proceeding;
- (8) or unless that part of the record of the State court
proceeding in which the determination of such factual
issue was made, pertinent to a determination of the
sufficiency of the evidence to support such factual
determination, is produced as provided for hereinafter,
and the Federal court on a consideration of such part of
the record as a whole concludes that such factual
determination is not fairly supported by the record.

28 U.S.C. § 2254(d) (1994).

1 not receive a full, fair, and adequate hearing in the State court
2 proceeding;" and Petitioner "was otherwise denied due process of law
3 in the State court proceeding." (Reply at 2 (quoting 28 U.S.C.
4 §§ 2254(d)(2), (d)(6), & (d)(7))).

5 6 **IV. Discussion**

7 **A. Petitioner's Competency to Stand Trial (Claim B)**

8 Petitioner contends that his right to due process was violated
9 because he was not competent to stand trial. (Memo at 2-5, 6-8; Reply
10 at 6-7, 12-13).

11 **1. Competency**

12 Trial of an incompetent defendant violates the Due Process
13 Clause of the Fourteenth Amendment. *Medina v. California*, 505 U.S.
14 437, 439 (1992); see also *Drope v. Missouri*, 420 U.S. 162, 171
15 (1975); *Pate v. Robinson*, 383 U.S. 375, 378 (1966). Competence to
16 stand trial requires that a defendant have (1) "a rational as well
17 as factual understanding of the proceedings against him," and (2)
18 "sufficient present ability to consult with his lawyer with a
19 reasonable degree of rational understanding." *Dusky v. United States*,
20 362 U.S. 402 (1960) (per curiam).

21 There are two types of competency claims: "procedural" due
22 process claims and "substantive" due process claims. A procedural due
23 process competency claim examines whether a state trial court erred
24 in not holding a competency hearing. See *Williams v. Woodford*, 384
25 F.3d 567, 603-10 (9th Cir. 2004). A substantive due process
26 competency claim focuses on whether the defendant was actually
27 competent during the relevant legal proceedings. Petitioner raises
28 both procedural and substantive due process competency claims.

1 **a) Procedural Due Process - Sua Sponte Competency Hearing**

2 A state trial court must sua sponte inquire into a defendant's
3 competency, where a reasonable judge would be expected to have a
4 "bona fide doubt" as to the defendant's competence to stand trial.
5 *Pate*, 383 U.S. at 385 (finding the statutory procedure using "bona
6 fide doubt" standard to be constitutionally adequate); *Maxwell v.*
7 *Roe*, 606 F.3d 561, 568 (9th Cir. 2010); *de Kaplany v. Enomoto*, 540
8 F.2d 975, 983 (9th Cir. 1976) (en banc) (explaining that whether a
9 bona fide doubt existed is based on an objective standard of whether
10 "a reasonable judge" in a similar situation, "should have experienced
11 doubt with respect to competency to stand trial"); *Drope*, 420 U.S.
12 at 171; *Pate*, 383 U.S. at 378. A bona fide doubt arises if there is
13 substantial evidence of incompetence. *Amaya-Ruiz v. Stewart*, 121 F.3d
14 486, 489 (9th Cir. 1997). "[E]vidence of a defendant's irrational
15 behavior, his demeanor at trial, and any prior medical opinion on
16 competence to stand trial are all relevant in determining whether
17 further inquiry is required," and "one of these factors standing
18 alone may, in some circumstances, be sufficient" to give rise to a
19 bona fide doubt regarding a defendant's competence. *Drope*, 420 U.S.
20 at 180; *Pate*, 383 U.S. at 385; see also *Torres v. Prunty*, 223 F.3d
21 1103, 1108-09 (9th Cir. 2000). In analyzing a procedural due process
22 competency claim, a federal habeas court consider only the evidence
23 that was before the state trial court. *Williams*, 384 F.3d at 603;
24 *Amaya-Ruiz*, 121 F.3d at 489.

25 Here, as the trial court did not inquire into Petitioner's
26 competency to stand trial, the Court examines whether there was
27 substantial evidence that Petitioner was mentally incompetent at the
28 time of the 1986 trial. *Williams*, 384 F.3d at 603; *Amaya-Ruiz*, 121

1 F.3d at 489. The record does not show that Petitioner exhibited any
2 bizarre behavior or unusual outbursts during trial that would have
3 caused a reasonable judge to have a bona fide doubt as to his
4 competence, and Petitioner does not identify any such behavior.
5 Rather, he asserts that his "passivity should have triggered the
6 Court's inquiry into his competency." (Reply at 16-17). This argument
7 is without merit. While Petitioner's passivity may have been
8 observable by the trial court, it is not substantial evidence of
9 incompetence. *See Dusky*, 362 U.S. at 402; *Amaya-Ruiz*, 121 F.3d at
10 489.

11 Next, Petitioner contends that declarations from his mother,
12 sister, and trial attorney provide evidence of his incompetency at
13 trial. (Reply at 17; Lodgment 29, California Supreme Court Habeas
14 Petition ("SHE"), Exh. 31, 44, 53, 54). These declarations describe
15 Petitioner as: moving "slowly" and "uncomfortable, like he was sick
16 or something" (SHE, Exh. 31 at 19); behaving as if he was "on drugs
17 because he was so 'spacey' and tired" (SHE, Exh. 53 at 7); and acting
18 "slow" and "paranoid and distrustful" (SHE, Exh. 44 at 3, 54 at 2).
19 However, these declarations are not properly considered in deciding
20 Petitioner's procedural due process claim, as they were prepared in
21 1993 and did not exist at the time of trial. *See Williams*, 384 F.3d
22 at 606; *Amaya-Ruiz*, 121 F.3d at 489.

23 Petitioner further contends that the trial court should have had
24 a bona fide doubt as to his competence, as he exhibited an
25 "irrational discomfort" with being represented by a public defender
26 and "paranoid distrust" for the public defender's office. (Reply at
27 16-18). The record shows that after the guilt phase of trial,
28 Petitioner sought new counsel. (Lodgment 34, Supplemental Reporter's

1 Transcript, July 14, 1986, Sealed ("SRT, 7/14/86") at 4367).
2 Petitioner's trial attorney, John Morris, reported that Petitioner
3 had "no criticisms" of his representation of the case, but Petitioner
4 had objected to Morris's representation because both the public
5 defender's office and the district attorney's office shared the same
6 employer, the County of Riverside. (SRT, 7/14/86 at 4367). When
7 questioned about his request for new counsel, Petitioner explained
8 that three public defenders had been assigned to his case, but he
9 would have preferred to have had a single attorney represent him from
10 arraignment through trial. (SRT, 7/14/86 at 4368-69). Petitioner also
11 asserted that a privately retained attorney may have presented a more
12 vigorous defense. (SRT, 7/14/86 at 4367). The record from this
13 hearing demonstrates Petitioner's ability to consult with Morris and
14 cogently state his request for substitution of counsel, skills which
15 were indicative of his competency.

16 In sum, the trial court was not confronted with "substantial
17 evidence" that Petitioner was incompetent to stand trial. *Amaya-Ruiz*,
18 121 F.3d at 489; *Moore*, 464 F.2d at 666. Nor does the record show
19 that the trial court "should have experienced doubt with respect to
20 competency to stand trial." *de Kaplany*, 540 F.2d at 983. Therefore,
21 Petitioner failed to establish that the trial court violated his
22 right to procedural due process by failing to conduct a competency
23 hearing.

24 **b) Substantive Due Process - Actual Incompetence**

25 Petitioner has also failed to establish that he was
26 unconstitutionally tried while incompetent. (Memo at 6-8). In
27 reviewing such a claim, facts and evidence that were not available
28 to the state trial court at the time of trial may be considered. See

1 *Williams*, 384 F.3d at 608; *Boag v. Raines*, 769 F.2d 1341, 1343 (9th
2 Cir. 1985). However, retrospective determinations of incompetence are
3 disfavored, and the lack of contemporaneous evidence of a defendant's
4 incompetence to stand trial is given significant weight. *Williams*,
5 384 F.3d at 608.

6 Here, there is considerable evidence of Petitioner's competence
7 to stand trial. (SRT, 7/14/86 at 4367). Especially relevant is a
8 competency evaluation prepared by psychiatrist Sayed K. Hamed, M.D.
9 (Reply, Exh. A at 1).

10 In April 1986, while the jury in Petitioner's case was still
11 being selected, Petitioner's trial attorney, John Morris, retained
12 Dr. Hamed to evaluate Petitioner's mental capacity. (Reply, Exh. A
13 at 1); see Cal. Penal Code § 1368. Dr. Hamed conducted a two-hour
14 examination of Petitioner, reviewed Petitioner's family, educational,
15 drug and alcohol, occupational, sexual, marital, and legal histories,
16 and administered a mental status examination. Dr. Hamed described
17 Petitioner as cooperative and alert, with good cognitive functions,
18 but also found that Petitioner was somewhat defensive, frequently
19 inappropriately demanding, and had a predominant mood that was
20 cautious and calculating. (Reply, Exh. A at 3-4). Petitioner
21 demonstrated a limited ability for abstract thinking and his general
22 fund of information was below average. (Reply, Exh. A at 4).
23 Petitioner's intelligence was estimated to be in the average range.
24 (Reply, Exh. A at 4). Dr. Hamed diagnosed Petitioner with alcohol
25 dependence, mixed substance abuse, and antisocial personality
26 disorder. (Reply, Exh. A at 4). Dr. Hamed concluded Petitioner was
27 competent to stand trial. Specifically, Dr. Hamed found that
28 Petitioner was "able to understand the nature and purpose of the

1 proceedings taken against him," was "able to cooperate in a rational
2 manner with counsel in presenting a defense," and was "able to
3 prepare and conduct his own defense in a rational manner without
4 counsel." (Reply, Exh. A at 1, 5). Dr. Hamed's contemporaneous
5 opinion that Petitioner was competent to stand trial is entitled to
6 significant weight in denying Petitioner's substantive due process
7 claim. *Williams*, 384 F.3d at 609.

8 Petitioner's active involvement in his defense provides further
9 evidence of his competence. In April 1986, before trial commenced,
10 Petitioner requested that Morris be replaced with a new public
11 defender. (Supplemental Reporter's Transcript, Sealed, 4/11/86 "SRT
12 J" at 116-17). Petitioner stated that he did not trust Morris and
13 that Morris had lied to him on more than one occasion.⁴ (SRT J at
14 116-17). Petitioner's motion suggests he understood the criminal
15 proceedings brought against him. Morris also discussed his
16 relationship with Petitioner. (SRT J at 119). Although Morris would
17 have had every incentive to argue that his client was incapable of
18 assisting with his defense, Morris never even hinted that Petitioner
19 was incompetent. See *Boyde v. Brown*, 404 F.3d 1159, 1167 (9th Cir.
20 2005). Rather, Morris stated that he had consulted sufficiently with
21 Petitioner and was adequately prepared for trial. (SRT J at 119-20).

22 Petitioner also took an active role in developing the defense
23

24 ⁴ When asked to specify how Morris had lied, Petitioner
25 responded that he could not remember what Morris had said or when the
26 misrepresentations occurred. (SRT J at 117). Petitioner simply insisted
that he wanted a new public defender that he could trust. (SRT J at
119). When pressed for a reason why he did not trust Morris, Petitioner
stated:

27 Petitioner: I am not too bright. You know, I don't know how
28 to explain stuff, but I am not stupid. I know I ain't
got a chance with the public defender I got. There ain't
no sense in having a trial.
(SRT J at 119).

1 strategy for his case. Initially, Morris had recommended that
2 Petitioner admit involvement in the crime and focus the defense on
3 the special circumstance murder charge. (SRT, 7/14/86 at 4367).
4 Petitioner rejected Morris's advice and instructed Morris to present
5 a defense that Petitioner was not present at the crime scene. (SRT,
6 7/14/86 at 4367). Morris deferred to Petitioner's wishes, despite
7 substantial evidence linking Petitioner to the scene and the crimes.
8 (SRT, 7/14/86 at 4367). After the guilt phase of trial, Morris
9 informed the trial court that Petitioner had cooperated throughout
10 trial and participated in formulating the defense strategy.⁵ (SRT,
11 7/14/86, at 4367-68). As Petitioner's trial attorney, Morris was "in
12 the best position to evaluate" Petitioner's comprehension of the
13 proceedings. *Hernandez v. Ylst*, 930 F.2d 714, 718 (9th Cir. 1991);
14

15
16 ⁵ Morris and the trial court engaged in the following
discussion regarding Petitioner's cooperation at trial and involvement
in developing the defense strategy:

17 The Court: You have had cooperation with Mr. Fierro, though?
He has consulted with you?

18 Mr. Morris: Yes, Your Honor, he certainly has. I feel
throughout this trial I have had his cooperation.

19 The Court: Mr. Fierro, did you want to make a statement to
the Court with regard to the matters raised by -- and
20 you can remain seated, if you wish.

21 Petitioner: Not no more than Mr. Morris has told, that it is
true I felt I might have felt more comfortable with the
22 state appointed, and I might -- they switching me from
Public Defender to Public Defender three times, I didn't
23 know which time they were going to switch. How can I
tell one [] story, and gets rid of me, and I grab
24 another one. I didn't know who to trust or which way to
go. I was --
* * * *

25 The Court: All right. I don't feel that the reasons stated either
26 by your attorney or by you this morning in any way would
require the Court to appoint another counsel --

27 Petitioner: No, no, no.

The Court: -- to represent --

28 Petitioner: I'm not asking for another no more. I just want
it on for the record.

(SRT, 7/14/86, at 4368-69).

1 see also *Williams*, 384 F.3d at 608 ("We find especially relevant
2 defense counsel's opinion that *Williams* was competent to stand
3 trial."); *United States v. Clark*, 617 F.2d 180, 186 n.11 (9th Cir.
4 1980); *Drope*, 420 U.S. at 176-77 ("[J]udges must depend to some
5 extent on counsel to bring issues into focus.").

6 Furthermore, Petitioner points to no clinical or psychiatric
7 evidence contemporaneous to the time of trial indicating that
8 Petitioner's mental impairment interfered with understanding the
9 proceedings or ability to assist counsel in presenting a defense. *Cf.*
10 *Drope*, 420 U.S. at 164 n.1 (noting that the trial court had a
11 psychiatric report stating that defendant "had difficulty in
12 participating well" and "was markedly circumstantial and irrelevant
13 in his speech"). Rather, the only contemporaneous psychiatric
14 evidence presented by Dr. Hamed indicates that Petitioner was
15 actually competent to stand trial. (Reply, Exh. A); see *Williams*, 384
16 F.3d at 608-09 (finding that mental health report provided to defense
17 counsel during trial may be properly considered in resolving claim
18 of actual incompetence). (Reply, Exh. A at 1).

19 To support his claim, Petitioner offers reports issued almost
20 seven years after Petitioner's trial from three mental health
21 experts, Dr. Jay Jackman, Dr. Karen Bronk-Froming, and Miguel
22 Ramirez. (SHE, Exh. 32, 39, 49). The following is a summary of these
23 reports:

24 Dr. Jay Jackman

25 Dr. Jackman, a forensic psychiatrist, evaluated Petitioner and
26 prepared a declaration in March 1993. (SHE, Exh. 39). The purpose of
27 the evaluation was to: determine Petitioner's mental status at the
28 time of the crimes; identify factors that were likely to have

1 influenced his actions during the period leading up to the crimes;
2 and determine his ability to assist his counsel prior to and during
3 trial and his ability to understand and participate in the legal
4 proceedings. (SHE, Exh. 39 at 2).

5 Dr. Jackman opined that Petitioner "suffers from organic brain
6 damage, borderline mental retardation, and several psychological
7 disorders, including post-traumatic stress disorder and generalized
8 anxiety disorder." (SHE, Exh. 39 at 3). Dr. Jackman concluded that
9 Petitioner, had a full scale IQ of 76, and possessed "a severely
10 limited ability to understand written material and verbal information
11 and a very limited fund of information." (SHE, Exh. 39 at 3-4).

12 Dr. Jackman reported that at the time of the crimes, Petitioner
13 was in an "altered state of consciousness" due to "acute heroin
14 withdrawal, which exacerbated his underlying mental deficits." (SHE,
15 Exh. 39 at 15). Dr. Jackman opined that in that altered state,
16 Petitioner lacked the capacity "to appreciate the criminality of his
17 conduct and to conform his conduct to the requirements of the law."
18 (SHE, Exh. 39 at 14).

19 Dr. Jackman further opined that Petitioner was "not competent
20 to assist his counsel with a reasonable degree of rational and
21 factual understanding of the proceedings against him." (SHE, Exh. 39
22 at 15). Dr. Jackman found that Petitioner's "brain damage and
23 borderline mental retardation vitiated his ability to participate in
24 a meaningful fashion in legal proceedings." (SHE, Exh. 39 at 15).
25 Further, Petitioner's impaired cognitive functioning was "impaired
26 by his ingestion of medication and street drugs while in custody
27 awaiting trial." (SHE, Exh. 39 at 16).

28 //

1 Dr. Karen Bronk-Froming

2 Dr. Froming is a neuropsychologist. (SHE, Exh. 32 at 1). In
3 1993, over a four-day period, Dr. Froming conducted an examination
4 of Petitioner which consisted of a battery of standard
5 neuropsychological tests as well as a mental status exam and
6 interview. (SHE, Exh. 32 at 1). Dr. Froming also reviewed
7 Petitioner's mental health evaluations and documents relating to
8 Petitioner's birth, education, medical, psychological, and
9 psychiatric histories. (SHE, Exh. 32 at 2).

10 Dr. Froming reported that intelligence testing indicated that
11 Petitioner has a full-scale IQ of 76 and is functioning in the
12 borderline mentally retarded range. (SHE, Exh. 32 at 7).
13 Neuropsychological testing revealed moderately severe impairments in
14 the ability to process, understand, and respond to verbal
15 information. (SHE, Exh. 32 at 4). Dr. Froming concluded that
16 Petitioner's "limited cognitive functioning, particularly his
17 deficits in processing verbal information, precluded him from
18 understanding and participating in the legal proceedings that results
19 in his death sentence." (SHE, Exh. 32 at 11).

20 Miguel Ramirez, MSW, LCSW

21 Mr. Ramirez, a licensed clinical social worker, was retained by
22 Petitioner's attorneys to investigate and evaluate Petitioner's
23 social history and background, with particular attention to his
24 family, educational, and medical histories. (SHE, Exh. 49 at 1-2).
25 Mr. Ramirez conducted a clinical interview of Petitioner and prepared
26 a declaration in March 1993, discussing his assessment of Petitioner.
27 (SHE, Exh. 49 at 2). Mr. Ramirez opined that Petitioner's mental
28 impairments affected his ability to think rationally, to exercise

1 judgment, and to understand the consequences of his decisions during
2 his legal proceedings. (SHE, Exh. 49 at 64). His mental impairments
3 also "undermined any trusting attorney-client relationship and
4 produced an irreconcilable conflict with Morris." (SHE, Exh. 49 at
5 64).

6 The Court gives little weight to these three retrospective
7 assessments of Petitioner's mental condition at the time of trial.
8 The declarations from Dr. Jackman, Dr. Fromer and Mr. Ramirez are not
9 based upon medical reports or psychological assessments
10 contemporaneous to the time of trial. Rather, these experts' opinions
11 are based upon neuropsychological test results and declarations from
12 Petitioner's family members prepared years after trial, or school
13 records that were issued years before the crimes, when Petitioner was
14 a child. The passage of time and the difficulties inherent in issuing
15 a retrospective competency opinion reduce the likelihood of an
16 accurate determination. *See Williams*, 384 F.3d at 610; *Pate*, 383 U.S.
17 at 387 (concluding that no meaningful retrospective competency
18 determination could be made six years after trial). The only
19 contemporaneous medical report, which was issued by Dr. Hamed, stands
20 in stark contrast to the opinions of Petitioner's three experts.
21 (SHE, Exh. 39 at 17). Because the accuracy of the retrospective
22 competency determinations of Petitioner's habeas corpus experts is
23 questionable, the determinations are not especially probative of
24 whether Petitioner actually was incompetent at the time of his trial.

25 Given the significant contemporaneous evidence of Petitioner's
26 competence from Dr. Hamed's report, along with Petitioner's
27 demonstrated coherence and competence during the proceedings, and the
28 absence of persuasive evidence to the contrary from Morris or

1 elsewhere, Petitioner has failed to establish a violation of his
2 right not to be tried and convicted while incompetent. Accordingly,
3 this claim should be denied.

4 **B. Petitioner Was Not Prejudiced by Shackling at the**
5 **Preliminary Hearing (Claim F)**

6 Petitioner contends that the trial court erred in allowing him
7 to appear at the preliminary hearing while shackled. (Memo at 8-13).
8 Petitioner contends that the shackling tainted the eyewitness
9 testimony of Trudy Allessie and Carole DiCenso, purportedly because
10 they "made their in-court descriptions and identifications of the
11 perpetrator only after they viewed [Petitioner] shackled and in jail
12 clothing." (Memo at 10).

13 The California Supreme Court found that no reasons for shackling
14 Petitioner appeared in the record. *Fierro*, 1 Cal. 4th at 220.
15 Therefore, the state supreme court concluded that the trial court
16 abused its discretion in allowing Petitioner to be shackled at the
17 preliminary hearing. *Id.* Despite this error, however, the state
18 supreme court concluded that Petitioner was not prejudiced. *Id.*

19 Because the issue of whether Petitioner was improperly shackled
20 was resolved in his favor, the Court limits its review here to
21 whether there was prejudice. A shackling claim brought on federal
22 habeas corpus is subject to harmless error analysis under *Brecht v.*
23 *Abrahamson*, 507 U.S. 619, 623 (1993). Thus, even if it was erroneous
24 to shackle a defendant, the Court must determine under *Brecht* whether
25 the shackling had a substantial and injurious effect on the verdict.
26 *Duckett v. Godinez*, 67 F.3d 734, 749 (9th Cir. 1995).

27 Here, Petitioner has not made such a showing. First, the
28 shackling occurred at the preliminary hearing, not at trial. It could

1 not have effected the verdict. To the extent that the shackling was
2 brought up at trial at all, it was elicited by defense counsel, who
3 sought to show that it affected Trudy Allessie's identification of
4 Petitioner. However, Trudy testified that she was not even aware that
5 Petitioner was restrained at the preliminary hearing. (RT at 2946-
6 47).

7 Because there is nothing in the record showing that Trudy was
8 even aware Petitioner was shackled, Petitioner cannot show it tainted
9 her identification of him. Furthermore, even if Trudy was aware of
10 the shackles, she identified Petitioner on two other occasions,
11 before the preliminary hearing. (RT at 2947-48). Petitioner makes no
12 claim that either the corporal lineup or the photo array were
13 improper in any way.

14 Petitioner's argument regarding DiCenso is similarly meritless.
15 DiCenso testified that the man she saw shoot Sam Allessie was wearing
16 a white T-shirt and dark pants. (RT at 3257-60). But, as Petitioner
17 admits, DiCenso did not identify Petitioner at the lineup, the
18 preliminary hearing, or at trial. (Memo at 12; Reply at 20;
19 Supplemental Reporter's Transcript I ("SRT I") at 67; RT at 3262-63).
20 And, as with Trudy, Petitioner points to nothing showing that DiCenso
21 was even aware that he was in shackles at the preliminary hearing.
22 Petitioner's shackling at the preliminary hearing could not have
23 possibly influenced the outcome of the case. *Brecht*, 507 U.S. at 623.
24 Petitioner's claim is wholly without merit.

25 **C. Petitioner is Precluded From Re-litigating His Fourth**
26 **Amendment Claim (Claim E)**

27 Petitioner asserts that his Fourth Amendment rights were
28 violated when the trial court admitted his wallet, and \$650 in cash

1 found in the wallet, as evidence of his guilt. (Memo at 13-18).

2 Counsel moved to suppress the evidence at trial. (CT at 11-25).

3 The court conducted a suppression hearing under California Penal Code
4 section 1538.5. (CT at 164). The evidence at the hearing revealed the
5 following: Two days after the shooting, Petitioner was stopped in
6 his car. (Lodgment 36, Pretrial Motions Reporter's Transcript
7 ("PMRT"), at 165-66). Petitioner's wife, Laura, was a passenger in
8 the car. (PMRT at 166). Petitioner was arrested and Laura agreed to
9 go to the police station to speak with detectives. (PMRT at 166-67,
10 173). At the conclusion of her conversation with officers, Laura
11 asked to use the women's restroom. (PMRT at 182). Officer Bowen
12 pointed where the restroom was located, and Laura picked up her purse
13 and started to leave. (PMRT at 182-83). Because it was large enough
14 to contain a handgun and the murder weapon had not been recovered,
15 Bowen became concerned that the purse might contain a weapon. (PMRT
16 at 182-83, 189, 191). Accordingly, he asked her if he could search
17 the purse. She responded, "Go -- yes, you may." (PMRT at 183, 185).
18 The first thing Bowen noticed inside the purse was a pair of brown
19 gloves. (PMRT at 184-85). Bowen asked who the gloves belonged to and
20 Laura responded, "Those are David's gloves. His wallet is in my purse
21 also." (PMRT at 184-85). Bowen asked if he could remove the gloves
22 and wallet and Laura assented. (PMRT at 185). Bowen continued to
23 search for a weapon but found none. (PMRT at 185). Then, aware that
24 Petitioner was on parole at the time and subject to parole search
25 terms, Bowen opened the wallet and found Petitioner's driver's
26 license and the \$650 in cash. (PMRT at 185-86, 188); *Fierro*, 1 Cal.
27 4th at 216.

28 Based on these facts, the trial court denied the motion to

1 suppress the evidence. (CT at 168). Petitioner challenged the ruling
2 in his automatic appeal to the California Supreme Court. The state
3 supreme court upheld the ruling, concluding that Laura consented to
4 the search, and the subsequent search of Petitioner's wallet after
5 it was removed from the purse was valid pursuant to his parole search
6 condition. *Fierro*, 1 Cal. 4th at 217.

7 Petitioner's claim is brought under the Fourth Amendment.
8 "[W]here the State has provided an opportunity for full and fair
9 litigation of a Fourth Amendment claim, a state prisoner may not be
10 granted federal habeas corpus relief on the ground that evidence
11 obtained in an unconstitutional search or seizure was introduced at
12 his trial." *Stone v. Powell*, 428 U.S. 465, 494 (1976). The relevant
13 inquiry is whether Petitioner had the opportunity to litigate his
14 claim, not whether the claim was correctly decided. *Ortiz-Sandoval*
15 *v. Gomez*, 81 F.3d 891, 899 (9th Cir. 1996).

16 Here, Petitioner was provided with an opportunity to litigate
17 his Fourth Amendment claim under California Penal Code section
18 1538.5. He not only had the opportunity to litigate his claim, but
19 he took full advantage of it by filing a motion to suppress the
20 evidence, participating in a suppression hearing, including cross-
21 examining the witnesses, presenting argument to the trial court, and
22 then challenging the ruling in the state supreme court. Therefore,
23 he is precluded from obtaining relief on this claim on federal habeas
24 review. *Stone*, 428 U.S. at 494.

25 Petitioner contends that he did not have a full and fair
26 opportunity to present his claim because he was represented by three
27 separate public defenders and was distrustful of his attorney at the
28 suppression hearing. (Memo at 18; Reply at 22-23). However, the only

1 question is merely whether the opportunity to litigate the claim was
2 available to Petitioner, see *Gordon v. Duran*, 895 F.2d 610, 613-14
3 (9th Cir. 1990), not the quality of his relationship with his
4 attorney at the time. Petitioner is not entitled to review of this
5 claim.

6 **D. The Trial Court Did Not Err in Declining to Strike the**
7 **Personal Use of a Firearm Allegation (Claim U)**

8 Petitioner contends that the trial court should have struck the
9 California Penal Code section 12022.5(a) allegation that he
10 personally used a firearm during the robbery of Trudy Allessie. (Memo
11 at 89-91). The allegation required the jury to find that Petitioner
12 "personally use[d] a firearm in the commission of a felony or an
13 attempted felony" Cal. Penal Code § 12022.5(a); (CT at 211,
14 250, 280-81). Petitioner contends there was insufficient evidence to
15 support the allegation because Trudy Allessie did not see Petitioner
16 possess a gun, and he did not threaten her with any firearm or make
17 any indication that he possessed one. (Memo at 90).

18 Petitioner raised this contention on direct review. The state
19 supreme court noted that "[i]t is undisputed that Ms. Allessie did
20 not see defendant display a gun when he robbed her." *Fierro*, 1 Cal.
21 4th at 225. Nonetheless, in construing the words of section 12022.5,
22 the court examined the legislative intent and concluded that, "[i]n
23 light of the legislative purpose to discourage the use of firearms,
24 it would appear to be immaterial whether the gun use occurred during
25 the actual taking or against the actual victim, so long as it
26 occurred 'in the commission' of the robbery." *Fierro*, 1 Cal. 4th at
27 226. The court also examined California case law, including the
28 principle that the crime of robbery is not complete until the robber

1 has won his way to a place of temporary safety. *Id.* Applying those
2 principles to Petitioner's case, the court concluded that the facts
3 were sufficient to support a finding that Petitioner personally used
4 the firearm in the commission of the robbery of Trudy Allessie
5 because "the jury could reasonably have inferred that [he] used the
6 gun against the murder victim to facilitate his escape or to prevent
7 his identification as the robber" *Id.* at 226-27.

8 To the extent Petitioner's claim rests on the California Supreme
9 Court's construction of section 12022.5, Petitioner has failed to
10 state a cognizable claim for relief. See *Swarthout v. Cooke*, --- U.S.
11 ---, 131 S. Ct. 859, 861 (2011) (noting that the Supreme Court has
12 "stated many times that 'federal habeas corpus relief does not lie
13 for errors of state law'" citing *Estelle v. McGuire*, 502 U.S. 62, 68
14 (1991)). State courts "are the ultimate expositors of state law."
15 *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975); *Mendez v. Small*, 298
16 F.3d 1154, 1158 (9th Cir. 2002) (it is undisputed that a "state court
17 has the last word on the interpretation of state law")

18 To the extent Petitioner's claim is one of sufficiency of the
19 evidence, it also fails. The Due Process Clause of the Fourteenth
20 Amendment requires that "no person shall be made to suffer the onus
21 of a criminal conviction except upon sufficient proof - defined as
22 evidence necessary to convince a trier of fact beyond a reasonable
23 doubt of the existence of every element of the offense." *Jackson v.*
24 *Virginia*, 443 U.S. 307, 316 (1979) (explaining *In re Winship*, 397
25 U.S. 358, 364 (1970)). To determine whether a criminal conviction
26 satisfies this constitutional requirement, a state court must decide
27 under *Jackson* "whether the evidence, viewed in the light most
28 favorable to the prosecution, would allow any rational trier of fact

1 to find the defendant guilty beyond a reasonable doubt." *Juan H. v.*
2 *Allen*, 408 F.3d 1262, 1274 (9th Cir. 2005) (citing *Jackson*, 443 U.S.
3 at 319). Federal courts and California courts apply the same *Jackson*
4 standard in evaluating insufficiency of the evidence claims. See
5 *People v. Johnson*, 26 Cal. 3d 557, 575-78 (1980); *People v. Cordell*,
6 195 Cal. App. 4th 1564, 1575 (2011).

7 As explained previously, the evidence showed that Petitioner
8 appeared at the passenger side of Sam's truck and demanded money from
9 Trudy. (RT at 2874-77, 2914-15, 3711-12, 3776). Trudy opened her
10 purse and handed Petitioner a bundle of currency. (RT at 2874-75,
11 2881, 2917). Petitioner then grabbed the purse and ran toward the
12 rear of the truck. (RT at 2876, 2881, 2917, 3712). Moments later,
13 Carole DiCenso passed by in a car and observed an individual dressed
14 like Petitioner point a gun at Sam. (RT at 3240, 3243, 3245). She
15 heard a shot and saw a gun blast. (RT at 3240, 3243). Sam slumped to
16 his knees and fell over. (RT at 3247). DiCenso observed the assailant
17 straddle Sam's body, aim and fire another shot into him. (RT at
18 3248). Under these circumstances, a rational trier of fact could have
19 concluded that Petitioner personally used a firearm "in the
20 commission" of the robbery of Trudy Allessie because the jury could
21 reasonably have inferred that Petitioner shot Sam to facilitate his
22 escape or to prevent his identification. See *Bovarie v. Giurbino*, 558
23 F. Supp. 2d 1030, 1042 (C.D. Cal. 2008) (even in cases where firearm
24 is not recovered, victim testimony describing use of gun during
25 robbery, by itself, is sufficient evidence to support personal use
26 of firearm allegation); *Coleman v. Johnson*, --- U.S. ---, 132 S. Ct.
27 2060, 2064 (2012) (per curiam) ("*Jackson* leaves juries broad
28 discretion in deciding what inferences to draw from the evidence

1 presented at trial"). Habeas relief is not warranted on this
2 claim.

3 **E. Evidentiary Issues**

4 **1. Admission of Prior Inconsistent Statements (Claim O)**

5 Petitioner contends that his right to confront witnesses was
6 violated because the trial court improperly admitted statements about
7 the number and timing of the shots Trudy Allessie heard fired on the
8 night of the crime. (Memo at 33-36). Specifically, Petitioner
9 challenges the impeachment or clarification of Trudy's trial
10 testimony with statements she made to officers shortly after the
11 crime, and also the officers' testimony about what she said to them.
12 (Memo at 33-36). Relatedly, Petitioner also contends that the
13 statements were not prior inconsistent statements under state law.
14 (Memo at 35-36).

15 At trial, Trudy initially testified that she believed she heard
16 two shots after the man had returned to the back of the truck.
17 However she was unable to say where she was when she heard the second
18 shot. (RT at 2882-84).

19 Shortly after this dialogue, Trudy admitted she was probably
20 confused about the shots. (RT at 2887-88). She testified that she did
21 not know they were shots at the time, but was unclear of the timing
22 sequence or where everyone was at the time of the second shot. (RT
23 at 2888). The prosecutor then asked Trudy about her prior statements
24 to officers that she heard two shots and that she heard the shots
25 after she got out of the truck. (RT at 2889-92). Counsel objected on
26 hearsay grounds, but the trial court allowed the testimony as prior
27 inconsistent statements. (RT at 2892-93). Trudy again oscillated
28 between testifying that there was one shot, or that there were two,

1 and also testified that she did not know "if they were right together
2 or when." (RT at 2894). Later, over counsel's continuing objection,
3 Detective McManus testified that Trudy told him she heard "a pop
4 followed by a louder pop," and that she heard the "pops or shots"
5 moments after the culprit ran toward the back of the truck, and that
6 she was outside the truck when the shots occurred. (RT 2980-81).
7 Detective Turley also provided similar testimony. (RT at 3015-16).

8 Preliminarily, the Court notes that although Petitioner cloaks
9 his claim as a violation of the Confrontation Clause, there is no
10 such constitutional violation at issue here. The Court agrees with
11 Respondent (Resp. at 49-50) and the California Supreme Court that
12 because "Mrs. Allessie testified at trial and was subject to full
13 cross-examination . . . there was no violation of the confrontation
14 clause," *Fierro*, 1 Cal. 4th at 222. *See California v. Green*, 399 U.S.
15 149, 162 (1970) ("[W]here the declarant is not absent, but is present
16 to testify and to submit to cross-examination, our cases, if
17 anything, support the conclusion that the admission of his
18 out-of-court statements does not create a confrontation problem.");
19 *United States v. Valdez-Soto*, 31 F.3d 1467, 1470 (9th Cir. 1994).

20 Rather, Petitioner presents a state evidentiary law claim.
21 Petitioner alleges that "the statements were not, under state law,
22 prior inconsistent statements" and that their admission violated
23 "state evidentiary law." (Memo at 35; *see also* Reply at 43). The
24 California Supreme Court, in examining California case law and a
25 specific provision of the California Evidence Code, determined that
26 the trial court properly admitted the statements. *Fierro*, 1 Cal. 4th
27 at 221-22. However, "it is not the province of a federal habeas court
28 to re-examine state-court determinations on state law questions."

1 *Estelle*, 502 U.S. at 68. Thus, to the extent the claim solely
2 involves alleged violations of state evidentiary law, it is not
3 cognizable on federal habeas corpus.

4 Petitioner contends that the claim is nonetheless subject to
5 review because admission of the statements resulted in a
6 "fundamentally unfair trial." (See Memo at 35, Reply at 43). However,
7 a writ of habeas corpus will be granted for an erroneous admission
8 of evidence "only where the 'testimony is almost entirely unreliable
9 and . . . the fact finder and the adversary system will not be
10 competent to uncover, recognize, and take due account of its
11 shortcomings.'" *Mancuso v. Olivarez*, 292 F.3d 939, 956 (9th Cir.
12 2002) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 899 (1983)
13 (superseded on other grounds by statute)); see also *Estelle*, 502 U.S.
14 at 67. In other words, the admission of evidence violates fundamental
15 unfairness and due process only if "there are no permissible
16 inferences the jury may draw from the evidence." *Boyde*, 404 F.3d at
17 1172 (quoting *Jammal v. Van de Kamp*, 926 F.2d 918, 920 (9th Cir.
18 1991)). Even then, evidence must "be of such quality as necessarily
19 prevents a fair trial." *Jammal*, 926 F.2d at 920-21 (quoting
20 *Kealohapauole v. Shimoda*, 800 F.2d 1463, 1465 (9th Cir. 1986)).

21 Here, there were permissible inferences to be drawn from the
22 challenged statements. Although Trudy Allessie's testimony at trial
23 switched from whether she heard one or two shots, her testimony that
24 she "heard a shot" or "a loud pop," both posed in the singular, and
25 that "I know I heard one as he went around the back of the truck.
26 [t]hat's all I know," plainly conflicted with statements to officers
27 that she heard two shots. (Compare RT at 2882 & 2888 with RT at 2980-
28 81 and RT at 3015-16). Also, her testimony that she heard the first

1 shot while she was still sitting in the truck clearly conflicted with
2 her statements to officers that the shots were fired after she got
3 out of the truck. (*Compare* RT at 2882 with RT at 2980 and RT at
4 3016). As the state supreme court found, "[h]er contemporaneous
5 statements suggested a longer period of time between defendant's
6 departure and the first shot, which rebutted defendant's claim that
7 although he might have been at the scene, he could not have shot the
8 victim because he was still at the truck." *Fierro*, 1 Cal. 4th at 222.

9 It was permissible for the jury to weigh Trudy Allesie's
10 conflicting statements to evaluate her credibility, and also assess
11 the truth of the matters asserted. See Cal. Evid. Code § 780(h)
12 (permitting the use of prior inconsistent statements for impeachment
13 purposes); *id.* § 1235 (permitting a witness's prior inconsistent
14 statement to be used as substantive evidence if the witness has an
15 opportunity to explain or deny the prior statement); see also *People*
16 *v. Green*, 3 Cal. 3d 981, 998-99 (1971) (explaining that a prior
17 statement can be inconsistent with a witness's professed lack of
18 memory), *overruled on another ground by People v. Chavez*, 26 Cal. 3d
19 334, 357 (1980). Accordingly, Petitioner is not entitled to habeas
20 corpus relief on this claim because there were permissible inferences
21 for the jury to draw from the statements.

22 2. Admission of Photographs of the Victim (Claim P)

23 Petitioner contends that the trial court erred in allowing the
24 prosecutor to show gruesome photographs of the victim during opening
25 statement and later admitting them at trial. (Memo at 30-33).
26 Petitioner contends the jury should not have been shown the
27 photographs because there was no dispute about the number of shots
28 fired, the nature or location of the wounds, or the tearing effect

1 of one of the wounds on the victim's clothing, and thus, they had no
2 probative value but were highly prejudicial. (Memo at 32).

3 At trial, Morris objected to the photographs. Morris described
4 one photograph as depicting "the unwashed body showing the victim's
5 face covered with blood, the blood is all over the body" (RT
6 at 2795). Morris further explained that it showed "blood coming out
7 of his mouth." (RT at 2872). The prosecutor agreed that the
8 photograph was "certainly not pleasant" and "is what defense counsel
9 may characterize as a gruesome photograph." (RT at 2795). The court
10 ruled that "[i]t's not -- certainly not the most gruesome photograph
11 that I have seen by far introduced in murder trials" and concluded
12 that it could be used during the prosecutor's opening statement. (RT
13 at 2797-98). At trial, other photographs were admitted that Detective
14 Turley described as showing blood spatter around the victim, and one
15 photograph which depicted a "dark mushy substance" that was centered
16 around one of the bullet holes. (RT at 3001-08).

17 The California Supreme Court concluded that the photographs were
18 relevant to the prosecution's theory at trial that the killing was
19 either perpetrated during the course of a robbery or was wilful,
20 deliberate and premeditated: "The photographs depicting the placement
21 and nature of the wounds and powder burns clearly supported the
22 prosecution's claim that defendant first shot the victim while the
23 two were facing each other, and fired a second shot from close range
24 into the victim's chest while the latter was lying helpless and
25 prostrate on the ground." *Fierro*, 1 Cal. 4th at 222. The state
26 supreme court also independently reviewed the photographs and
27 concluded that they were not unduly gruesome or inflammatory. *Id.* at
28 223.

1 Although Petitioner cites exhibit numbers corresponding to the
2 photographs, it does not appear that the actual photographs have been
3 lodged with the Court.⁶ Moreover, the California Supreme Court did
4 not describe the photographs in its decision. However, even taking
5 Morris's and Detective Turley's description of the photographs as
6 true, Petitioner is not entitled to relief.

7 As with the previous evidentiary issues, to the extent that
8 Petitioner claims the trial court violated California state law in
9 admitting the photographs, this claim fails to state a cognizable
10 federal habeas claim. See *Estelle*, 502 U.S. at 67; *Gerlaugh v.*
11 *Stewart*, 129 F.3d 1027, 1032 (9th Cir. 1997) (alleged improper
12 admission of gruesome photographs not cognizable on federal habeas
13 corpus). In addition, the Supreme Court has not clearly held that
14 "admission of irrelevant or overtly prejudicial evidence constitutes
15 a due process violation sufficient to warrant issuance of the writ."
16 *Holley v. Yarborough*, 568 F.3d 1091, 1101 (9th Cir. 2009).

17 Furthermore, there were permissible inferences for the jury to
18 draw from the photographs. See *Boyde*, 404 F.3d at 1172; *Jammal*, 926
19 F.2d at 920. In particular, as the California Supreme Court noted,
20 the jury could properly infer from the placement and nature of the
21 wounds and powder burns that after shooting the victim the first
22 time, the culprit fired the second shot at close range into the
23 victim's chest while on the ground. This supported the conclusion
24 that the shooting was "wilful, deliberate and premeditated," a
25 permissible inference for the jury to make. See *People v. Rich*, 45
26 Cal. 3d 1036, 1107 (1988) ("photographs disclosing and corroborating
27

28 ⁶ During trial, it appears that the photographs at issue here, and
others, were shown to the jury via a projector. (RT at 3006, 3578-79).

1 the manner in which the crime was committed, [are] clearly relevant
2 to the issue of malice" (internal quotations and citation omitted));
3 (CT at 257-61).

4 Petitioner also has not shown that the photographs were so
5 inflammatory as to make the resulting conviction a denial of due
6 process. *Jammal*, 926 F.2d at 920. "[V]ictim photographs . . . in
7 murder cases always are disturbing." *People v. Scheid*, 16 Cal. 4th
8 1, 19 (1997). However, "[t]he fact that evidence admitted as relevant
9 by a court is shocking to the sensibilities of those in the courtroom
10 cannot, for that reason alone, render its reception a violation of
11 due process." *Lisenba v. California*, 314 U.S. 219, 228-29 (1941);
12 *Gerlaugh*, 129 F.3d at 1032 (explaining that the introduction of
13 gruesome photographs does not by itself raise "the spectre of
14 fundamental unfairness such as to violate federal due process of
15 law"); *Batchelor v. Cupp*, 693 F.2d 859, 865 (9th Cir. 1982)
16 (photographs of deceased victim's naked body, including showing
17 genital area and lower body where there were no wounds, did not
18 render trial fundamentally unfair even where defendant did not
19 dispute certain facts of the crime and rape was not charged).
20 Petitioner is not entitled to relief.

21 **3. Admission of Blood Stain Evidence (Claim N)**

22 Petitioner challenges the trial court's admission of testimony
23 regarding electrophoretic testing of dried blood stains found on his
24 car. Petitioner contends that the testing failed to meet the
25 standards of scientific reliability under the *Kelly/Frye*⁷ test; that
26 "the prosecution failed to overcome the problems with the technique
27

28 ⁷ *People v. Kelly*, 17 Cal. 3d 24 (1976); *Frye v. United States*,
293 Fed. 1013 (D.C. Cir. 1923).

1 raised in *People v. Brown*, 40 Cal. 3d 512 (1985)"; and the
2 prosecution did not meet the burden of providing reliability and
3 acceptance in the scientific community "as demonstrated by problems
4 with the technique, lack of standards and licensing and certification
5 of practitioners, extremely high error rates, contamination problems
6 and misleading and prejudicial statistical presentations to the
7 jury." (Memo at 36-49).

8 After Petitioner was pulled over in his car and arrested, a
9 search of the car revealed dried blood stains on the molding and
10 plastic trim around the passenger door. (RT at 3578-80, 3626-27). The
11 prosecution's expert, Faye Springer, tested the blood stains through
12 "ABO" typing and the general procedure called "electrophoresis."⁸ (RT
13 at 3584-86). From this testing, Springer concluded that the blood was
14 "definitely not from David Fierro" and that it "certainly could be
15 from Sam." (RT at 3596-3600). She further testified that Sam Allesie
16 and one half of one percent of California's general population had
17 the blood type found in the samples. (RT at 3600-03). In comparing
18 it with the Latin segment of the California population, the
19 calculation ranged between one half of one percent to one percent.
20 (RT at 3602-03).

21 In a pretrial admissibility hearing, Morris stipulated that
22 Springer used the correct and appropriate scientific procedures in
23 the analysis of the blood stain evidence. He further stipulated that
24 _____

25 ⁸ Springer described in detail the electrophoresis process by
26 which the blood sample is placed in gel and an electric current is
27 passed through it, which separates enzymes into patterns of bands or
28 "types." (RT at 3586-91). Springer explained that, similar to ABO
testing which reveals blood types as A, B, O, or AB, the
electrophoresis testing reveals types that are numbered, such as 1, 2,
or 2-1. (RT at 3587). Electrophoresis testing is described in detail in
California case law. See, e.g., *People v. Reilly*, 196 Cal. App. 3d
1127, 1137-38 (1987).

1 Edward Blake, an expert in the field, had reviewed Springer's notes
2 of the blood analysis and that Blake agreed that the appropriate
3 scientific procedures had been used. (RT at 2746-47). The trial court
4 found that the evidence was admissible. (RT at 3452-53).

5 Petitioner challenged the ruling on direct review. In its
6 analysis of the issue, the California Supreme Court applied the
7 three-prong *Kelly/Frye* test, which examines the: (1) general
8 acceptance in the relevant scientific community; (2) testimony by
9 properly qualified experts; and (3) application of correct scientific
10 procedures in the case under review. *Fierro*, 1 Cal. 4th at 214
11 (citing *Kelly*, 17 Cal. 3d at 30, *Frye*, 293 Fed. at 1014). Regarding
12 the first prong, the supreme court noted that it had recently held
13 in two previous cases that electrophoretic testing of dried
14 bloodstains was sufficiently accepted in the scientific community to
15 be admissible. *Fierro*, 1 Cal. 4th at 214. Regarding the second prong,
16 the state supreme court found that Morris had raised no challenge,
17 either at the evidentiary hearing or at trial, to the qualifications
18 of Springer, and asserted no specific challenge to her qualifications
19 on appeal. *Id.* at 215. Regarding the third prong, the court held that
20 Morris's express stipulations at the evidentiary hearing that
21 Springer had used correct and appropriate scientific procedures in
22 the analysis of the blood samples waived the issue on appeal. *Id.*
23 Alternatively, the state supreme court held that Petitioner had not
24 "demonstrated any deficiency in the testing procedures, or any act
25 or omission which might have affected the reliability of the results
26 in this case." *Id.*

27 Similarly, the court concluded that Petitioner's challenge to
28 the statistical testimony was waived because Morris failed to object

1 to the admissibility of it at trial. *Id.* The state supreme court also
2 rejected the claim on the merits, stating that "both California and
3 the majority of other jurisdictions have traditionally admitted
4 statistical blood-group evidence of this kind in criminal cases, even
5 where it simply includes the accused within the class of possible
6 donors." *Id.* (internal quotations and citations omitted).

7 a) Procedural Bar

8 Respondent contends that the claim was procedurally defaulted
9 because Petitioner failed in state court to interpose a timely and
10 specific objection on the grounds he now alleges. (Resp. at 51-53 &
11 n.18). The Court agrees that Petitioner has procedurally defaulted
12 the claim for failing to object and because of Morris's stipulations.

13 "Under the doctrine of procedural default, a petitioner who has
14 defaulted on his claims in state court is barred from raising them
15 in federal court so long as the default is 'pursuant to an
16 independent and adequate state procedural rule.'" *Jackson v. Roe*, 425
17 F.3d 654, 656 n.2 (9th Cir. 2005) (quoting *Coleman v. Thompson*, 501
18 U.S. 722 (1991)). The Ninth Circuit has determined that California's
19 contemporaneous objection rule is an independent and adequate
20 procedural bar. See *Davis v. Woodford*, 384 F.3d 628, 654 (9th Cir.
21 2004); *Vansickel v. White*, 166 F.3d 953, 957-59 (9th Cir. 1999);
22 *Grizzle v. Horel*, 487 F. App'x 359, 360 (9th Cir. 2012). Thus, the
23 failure to comply with the state's contemporaneous objection rule
24 results in a procedural default that bars federal consideration of
25 the claim, unless a petitioner can demonstrate both "cause" for his
26 failure to raise the objection at trial and actual "prejudice"
27 accruing from the error. See *Coleman*, 501 U.S. at 750; *Cook v.*
28 *Schriro*, 538 F.3d 1000, 1025-26 (9th Cir. 2008) (petitioner barred

1 from raising claim on federal habeas review where he failed to meet
2 state's contemporaneous objection rule absent a showing of cause and
3 prejudice).

4 Here, even if Petitioner could establish cause, he would be
5 unable to show prejudice, because, as discussed below, any error was
6 harmless. To the extent Petitioner contends that Morris's ineffective
7 assistance constitutes cause for the procedural default (Reply at
8 45), the lack of prejudice also undermines this argument, since
9 prejudice is a necessary element of a finding of constitutionally
10 ineffective assistance of counsel. *See Strickland v. Washington*, 466
11 U.S. 668, 694 (1984); *Grizzle*, 487 F. App'x at 360 (counsel's
12 ineffectiveness was not cause to excuse procedural default because
13 petitioner failed to establish prejudice from counsel's inaction).
14 Accordingly, Petitioner's claim is procedurally defaulted.

15 b) Electrophoresis Testing Claim Fails on the
16 Merits

17 Even if Petitioner's claim was not procedurally barred, it would
18 face the same problem that Petitioner's other state law claims
19 regarding admissibility of evidence face: it is not cognizable on
20 federal review. *Estelle*, 502 U.S. at 67-68; *Kumar v. Yates*, No. CIV
21 S-09-2455 JAM CHS P, 2011 WL 2295030, at *11-12 (E.D. Cal. June 8,
22 2011) (challenge to state court evidentiary ruling on electrophoresis
23 typing of DNA is not subject to federal habeas corpus relief unless
24 the ruling violates due process or other constitutional guarantees).
25 However, even overlooking the procedural bar, and the non-cognizable
26 nature of the claim, the claim still fails on the merits. As
27 mentioned, after finding that aspects of Petitioner's claim had been
28 forfeited, the California Supreme Court went on to reject the claim

1 on the merits. The Court therefore addresses the merits of
2 Petitioner's claims in the alternative.

3 Petitioner fails to show there were no permissible inferences
4 to be drawn from testimony about the blood stain evidence. See *Boyde*,
5 404 F.3d at 1172; *Jammal*, 926 F.2d at 920. Evidence that blood was
6 found on Petitioner's car, that was not his, but could have been from
7 Sam Allessie, was probative of Petitioner's involvement in the crime.
8 Also, the jury could permissibly infer from the statistical evidence
9 the probability that the blood came from Sam Allessie, and not
10 someone else. Petitioner's criticism about electrophoresis testing
11 evidence, as the state supreme court noted, "goes to the weight of
12 the evidence, not to its admissibility." *Fierro*, 1 Cal. 4th at 214.
13 Rather than stipulate, Petitioner was free to challenge the evidence
14 including the testing methodology used and the conclusions drawn from
15 it. Nothing prevented him from introducing expert testimony in an
16 attempt to show, for example, that use of another testing methodology
17 resulted in different results, and Morris thoroughly cross-examined
18 Springer at trial. See generally *Daubert v. Merrell Dow*
19 *Pharmaceuticals, Inc.*, 509 U.S. 579, 596 (1993) ("Vigorous
20 cross-examination, presentation of contrary evidence, and careful
21 instruction on the burden of proof are the traditional and
22 appropriate means of attacking shaky but admissible evidence.") In
23 sum, the admission of blood stain evidence did not render
24 Petitioner's trial fundamentally unfair. See *Estelle*, 502 U.S. at 70.

25 Moreover, even if admission of the evidence were found to be a
26 constitutional violation, the error would have been harmless. As
27 previously explained, there was other incriminating evidence
28 connecting Petitioner to the crime: Petitioner's fingerprints were

1 found on Sam's truck; Petitioner was found in possession of money in
2 an amount consistent with what was taken during the robbery; Trudy
3 Allessie identified Petitioner; and DiCenso saw an individual dressed
4 like Petitioner point a gun at Sam Allessie and shoot him. Under
5 these circumstances, any error was harmless. *Brecht*, 507 U.S. at 639.

6 **4. Cumulative Evidentiary Error**

7 In the Reply, Petitioner alleges that the three evidentiary
8 issues discussed above "collectively rendered [P]etitioner's trial
9 unfair." (Reply at 41). Petitioner presents a similar contention in
10 Claim X, regarding the cumulative effect of all the alleged errors.
11 As explained in greater detail in that claim, Petitioner has not
12 shown the existence of any constitutional error regarding the
13 evidentiary issues presented here. Thus, Petitioner is not entitled
14 to relief on his "collective" evidentiary error claim. *Mancuso*, 292
15 F.3d at 957 ("Because there is no single constitutional error in this
16 case, there is nothing to accumulate to a level of a constitutional
17 violation.").

18 **F. Trial Court's Refusal to Qualify Defense Witnesses as**
19 **Experts (Claim S)**

20 Petitioner contends he was denied his right to present a defense
21 because the trial court refused to qualify two of his witnesses as
22 experts. (Memo at 77-79). Specifically, Petitioner challenges the
23 trial court's decision not to qualify David Duncan as an expert in
24 ballistics, firearms, examination of physical evidence, and crime
25 reconstruction, and Jules Slaick in ballistics and crime scene
26 reconstruction. (Memo at 77-79). Petitioner contends this hampered
27 his ability to introduce an alternative theory of the crime that
28 showed the prosecution's theory, supported by the testimony of Dr.

1 Hunter, was incorrect. (Memo at 77-79; Reply at 71).

2 Petitioner acknowledges that in claim D.1, an alternative
3 ground for relief addressed below, he contended that Morris was
4 ineffective for failing to consult with and present testimony of an
5 expert criminologist and pathologist, including one who could testify
6 about wound characteristics. (Memo at 64, 77). Part of that claim was
7 the allegation that the experts Morris did retain for this purpose,
8 Duncan and Slaick, were unqualified. (Memo at 64-65, 77). Petitioner
9 states in Claim S that he "reaffirms his belief . . . that counsel
10 was ineffective for failing to consult with a qualified criminologist
11 or pathologist," but nonetheless presents Claim S as an alternative
12 claim for relief. (Memo at 65, 77; Reply at 70).

13 As mentioned earlier, the prosecution's case was based in part
14 on Carole DiCenso's eyewitness testimony that she saw the culprit
15 fire two shots, the first while the victim was standing, and the
16 second when the victim was lying on the ground. (RT at 3248-49). This
17 testimony was bolstered by Dr. Hunter, the pathologist who performed
18 the autopsy on the victim. Dr. Hunter testified that the second
19 bullet did not exit the victim's back, but rather hit a hard, flat
20 surface such as pavement. (RT at 3358, 3382). He further testified
21 that the second bullet lodged in the victim's back, causing an
22 "epithelial crush injury," which indicated that the victim's back was
23 pressed against a hard surface. (RT at 3358, 3360, 3378, 3382). Dr.
24 Hunter also testified that the second bullet was lodged at a slight
25 downward path, consistent with having been fired while the victim was
26 lying on the pavement. (RT at 3377-79, 3387-88); *see also Fierro*, 1
27 Cal. 4th at 223.

28 At trial, Morris sought to qualify Duncan and Slaick as experts,

1 proffering their testimony to refute the prosecution's theory. The
2 trial court conducted a hearing pursuant to California Evidence Code
3 section 402⁹ to determine whether either witness were qualified as an
4 expert. (RT at 3869-3936). Duncan, a retired deputy sheriff, proposed
5 to testify that, based on his review of the autopsy, the type of
6 wounds, and the condition of the bullets, that the victim could not
7 have been lying on the ground when he was shot the second time. (RT
8 at 3920-23, 3930-31). On cross-examination, Duncan acknowledged that
9 he had no training or background in pathology, and had never
10 previously testified as an expert in that field. (RT at 3929-30.) He
11 testified he never examined a bullet wound microscopically, conducted
12 tests to determine the effects of a bullet on the human body, or
13 removed a bullet from a human body. (RT at 3929-30). He did not know
14 the meaning of the term "epithelial crush injury." (RT at 3930-31).

15 Slaick, a licensed private investigator, offered to testify
16 that, based on his review of autopsy photographs, transcripts of
17 witnesses' testimony, and observations of the physical evidence, that
18 the victim was not lying down when the second shot was fired into his
19 chest. (RT 3885-90, 3899-3901). Slaick acknowledged that he had no
20 training in pathology and had never attended an autopsy. (RT at
21 3902). He read part of one pathology book, but did not finish it. (RT
22 at 3903). Slaick's experience in accident reconstruction was based
23 on his military service 20 years earlier, when he took photographs
24 of plane and car crashes. (RT at 3903-08). He had never photographed
25 a crime scene involving a gunshot death. (RT at 3880-81, 3904). His
26

27 ⁹ California courts conduct a 402 hearing to decide preliminary
28 questions of fact upon which the admissibility of evidence depends.
People v. Superior Court (Blakely), 60 Cal. App. 4th 202, 209 n.6
(1997).

1 opinion regarding the effect of the bullets on the victim's body was
2 based on watching documentary films of men in combat that he viewed
3 for "personal interest," not for any particular training. (RT at
4 3902, 3906-08). He had no experience regarding gunshot injuries to
5 flesh, except through hunting animals. (RT at 3905-06). His purported
6 ballistics expertise was based on his own reading and experience with
7 guns. (RT at 3905). He had no formal training in ballistics and was
8 not familiar with the term "epithelial crush injury." (RT at 3905-
9 06). Slaick did not feel that like he was an expert based on any
10 education he received, and only purported to be an expert in
11 photography. (RT at 3881, 3911).

12 The trial court concluded that Duncan could testify that he
13 examined the bullet and that he could describe the deformations or
14 characteristics of the bullet. (RT at 3935-36). The court, however,
15 concluded that was he not qualified to give any physical or medical
16 testimony, such as whether the injury or wound was uncharacteristic
17 of wounds of that sort, or whether there was hemorrhaging in the
18 area. (RT at 3935-36). The trial court concluded that Slaick could
19 testify about his observations at the crime scene, including any
20 measurements that he made. (RT at 3889-90, 3920). However, the court
21 concluded that Slaick was "not in any different position than any
22 layman" to testify about "how the shooting went down" or his opinion
23 regarding ballistics because "he's not a ballistics expert." (RT at
24 3919-20). At trial, Slaick testified about measurements he took at
25 the crime scene and features of a "very rough sketch" his assistant
26 drew of the scene. (RT at 3962-73).

27 Petitioner presented his claim for relief to the California
28 Supreme Court. The court concluded that, although one need not

1 necessarily be a licensed physician to give a medical opinion, it was
2 "evident that Duncan was totally deficient in the requisite
3 background, training or experience to state an opinion on the nature
4 or cause of the victim's wounds." *Fierro*, 1 Cal. 4th at 224. Citing
5 state law, the state supreme court concluded "the trial court plainly
6 did not abuse its discretion in limiting Duncan's testimony to
7 ballistic evidence." *Id.* Similarly, the court concluded the trial
8 court was "plainly correct" in its ruling regarding Slaick because
9 he had not demonstrated an expertise in either crime reconstruction
10 or ballistics, and, by his own admission, Slaick had no background,
11 experience or training in pathology or ballistics. *Id.* at 224-25.

12 To the extent the California Supreme Court's decision was
13 predicated on its interpretation of California law, Petitioner has
14 failed to state a cognizable claim for relief. *See Swarthout*, 131 S.
15 Ct. at 861. Moreover, this Court is bound by a state court's
16 determinations under state law. *Bradshaw v. Richey*, 546 U.S. 74, 76
17 (2005) ("a state court's interpretation of state law, including one
18 announced on direct appeal of the challenged conviction, binds a
19 federal court sitting in habeas corpus"). The California Supreme
20 Court concluded that the witnesses were not qualified to testify as
21 experts under California law, and this Court may not review a state
22 court's interpretation of its own law unless that interpretation "is
23 clearly untenable and amounts to a subterfuge to avoid federal review
24 of a deprivation by the state of the rights guaranteed by the
25 Constitution." *Knapp v. Cardwell*, 667 F.2d 1253, 1260 (9th Cir.
26 1982). No such showing has been made here.

27 Petitioner's claim that the trial court's evidentiary ruling
28 violated his right to present a defense under the Due Process Clause

1 is also without merit. (Memo at 78; Reply at 70). "[T]he Constitution
2 guarantees criminal defendants a 'meaningful opportunity to present
3 a complete defense.'" *Crane v. Kentucky*, 476 U.S. 683, 690 (1986)
4 (internal citations omitted). However, criminal defendants do not
5 have an absolute constitutional right to introduce all evidence that
6 may be relevant to the defense. *Montana v. Egelhoff*, 518 U.S. 37, 42
7 (1996) (plurality); *Taylor v. Illinois*, 484 U.S. 400, 410 (1988)
8 ("The accused does not have an unfettered right to offer [evidence]
9 that is incompetent, privileged, or otherwise inadmissible under
10 standard rules of evidence."). When evidence is excluded on the basis
11 of a valid application of a state evidentiary rule, such exclusion
12 may violate due process only if the evidence is sufficiently reliable
13 and crucial to the defense. *Chambers v. Mississippi*, 410 U.S. 284,
14 302 (1973). In general, however, there must be "unusually compelling
15 circumstances . . . to outweigh the strong state interest in
16 administration of its trials." *Perry v. Rushen*, 713 F.2d 1447, 1452
17 (9th Cir. 1983).

18 Here, the trial court's evidentiary ruling did not undermine the
19 fundamental fairness of Petitioner's trial. As definitively found by
20 the California courts, the witnesses were not qualified to testify
21 as experts except as to the specific areas allowed by the trial
22 court. As mentioned, Duncan acknowledged that he had no training or
23 background in pathology, and had never previously testified as an
24 expert in that field. (RT at 3929-30.) Slaick did not feel that he
25 was an expert based on any education or training he received, and
26 only purported to be an expert in photography. (RT at 3881, 3911).
27 The witnesses, quite simply, were not experts in the areas Morris
28 sought to qualify them. Under these circumstances, there is no

1 constitutional violation.

2 **G. Prosecutorial Misconduct (Claims L, M, Q, R, and T)**

3 Petitioner contends that the prosecutor committed prejudicial
4 misconduct at several points during voir dire and in closing
5 argument, as follows: commenting on Petitioner's decision not to testify
6 at trial (Claim M.A); asking the jurors to prejudge the case (Claim
7 M.B); instructing the jurors on their duties (Claim M.C); offering
8 false evidence and withholding evidence (Claim Q); compelling
9 Petitioner's wife to invoke her 5th Amendment right against self-
10 incrimination (Claim R); misinforming the jury on the adversarial
11 process at trial, the role of defense counsel, and Petitioner's
12 constitutional right to remain silent (Claim L); and vouching for
13 prosecution witnesses, maligning defense counsel and commenting on
14 Petitioner's decision not to testify at trial (Claim T). For the
15 reasons discussed below, the Court finds that these claims lack
16 merit.¹⁰

17 Prosecutorial misconduct does not rise to the level of a
18 constitutional violation unless it "so infected the trial with
19 unfairness as to make the resulting conviction a denial of due
20 process." *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (quoting
21 *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)). "[T]he
22 touchstone of due process analysis in cases of alleged prosecutorial
23 misconduct is the fairness of the trial, not the culpability of the
24 prosecutor." *Smith v. Phillips*, 455 U.S. 209, 219 (1982).
25 Accordingly, "[o]n federal habeas review, the narrow issue before
26

27 ¹⁰ The Court further finds that Claims M.A, M.B, M.C, L, and T
28 are procedurally barred, as Petitioner did not raise contemporaneous
objections on the same grounds at trial. See *Fierro*, 1 Cal. 4th at 207-
13; see also *Coleman*, 501 U.S. at 729.

1 [the Court] is whether the prosecutor's comments violated the
2 defendant's due process right to a fair trial." *Sechrest v. Ignacio*,
3 549 F.3d 789, 807 (9th Cir. 2008); *Darden*, 477 U.S. at 181.

4 Even where prosecutorial misconduct rises to the level of a due
5 process violation, it will not provide a basis for "granting a habeas
6 petition unless it is deemed prejudicial under the 'harmless error'
7 test...." *Shaw v. Terhune*, 380 F.3d 473, 478 (9th Cir. 2004); see
8 *Brecht*, 507 U.S. at 637-38.

9 **1. Comments About Petitioner's Right to Remain Silent**
10 **(Claims M.A and T)**

11 Petitioner contends the prosecutor made improper comments during
12 voir dire and at closing regarding Petitioner's decision not to
13 testify at trial. (Memo at 19-20, 81-82); *Griffin v. United States*,
14 380 U.S. 609, 615 (1965).

15 *Griffin* error occurs, and a defendant's privilege against
16 self-incrimination is violated, when a prosecutor on his own
17 initiative asks the jury to draw an adverse inference from a
18 defendant's silence, or asks the jury to treat the defendant's
19 silence as substantive evidence of guilt. *Griffin*, 380 U.S. at 615.
20 While it is proper for the prosecution to address the defense
21 arguments, a comment is impermissible if it is manifestly intended
22 to call attention to the defendant's failure to testify, or is of
23 such a character that the jury would naturally and necessarily take
24 it to be a comment on the failure to testify. See *Lincoln v. Sunn*,
25 807 F.2d 805, 809 (9th Cir. 1987) (citing *United States v. Bagley*,
26 772 F.2d 482, 494 (9th Cir. 1985)).

27 //

28 //

1 a) Comment During Jury Selection (Claim M.A)

2 During jury selection, defense counsel Morris told the panel
3 that Petitioner might not testify at trial. (RT at 1972). Morris then
4 instructed the panel that if Petitioner did not testify, they could
5 not use that fact against Petitioner or even discuss it during
6 deliberations. (RT at 1972-73). Morris explained that there may be
7 plausible reasons why Petitioner, even if innocent, would choose not
8 to testify. (RT at 1972-73).

9 A short time later, the prosecutor reaffirmed Morris's
10 admonition that the jury should not consider a defendant's decision
11 not to testify at trial. (RT at 2082 (explaining that if the
12 defendant elects not to take the stand, "you can't hold that against
13 the defendant. You can't consider that")). While the prosecutor
14 observed that "there might be reasons why a guilty man doesn't want
15 to take the stand also and testify," he immediately followed that
16 comment with the admonishment that the jury could not "even think
17 about this," and that "it would be totally inappropriate for [the
18 jury] to think about all of this and try to guess about why somebody
19 does [not testify]." (RT at 2083).

20 Outside the presence of the jury, Morris asserted that the
21 prosecutor's remark concerning Petitioner's silence could be
22 considered as evidence of guilt. (RT at 2103). Therefore, Morris
23 requested an instruction on Petitioner's right to remain silent. (RT
24 at 2103). The prosecutor responded that a curative instruction was
25 unnecessary, as he and Morris had both instructed the jury that
26 Petitioner did not have to take the stand. (RT at 2103-04). The trial
27 court agreed that the subject had been adequately covered. (RT at
28 2103-04). The trial court also noted that it had admonished each

1 juror individually on the prosecution's burden of proof and
2 Petitioner's right to remain silent. (RT at 2103-04). Therefore, the
3 trial court declined to give the requested curative instruction. (RT
4 at 2104).

5 On direct review, the California Supreme Court found that there
6 was "no possibility" that the prosecutor's remark subjected
7 Petitioner to prejudice. *Fierro*, 1 Cal. 4th at 208-09. It explained
8 that while the prosecutor's challenged comment about a guilty person
9 having reasons for not testifying may have been "ill-considered," the
10 comment could not "reasonably have been construed as urging the jury
11 to consider [Petitioner's] silence as evidence of guilt." *Id.*
12 Further, the prosecutor admonished the jury panel not to consider the
13 matter. *Id.* at 209. The state court's reasoning and decision is
14 persuasive.

15 Petitioner has failed to establish a constitutional violation.
16 The prosecutor's statement that a guilty person might have reasons
17 for not taking the stand did not suggest that the jury should infer
18 Petitioner's guilt based on his failure to testify. *Fierro*, 1 Cal.
19 4th at 209. Placed in context, it is apparent the prosecutor's
20 comment was in response to Morris's rhetoric that an innocent
21 defendant may have good reasons for not testifying at trial. (RT at
22 1973-74, 2103). Even assuming error, the prosecutor's comment was not
23 extensive and the prosecutor, along with Morris, safeguarded against
24 any potential prejudice by admonishing the jury not to consider that
25 matter. (RT at 1972-73, 2082-83, 2103-04). *See Hovey v. Ayers*, 458
26 F.3d 892, 912 (9th Cir. 2006) (a *Griffin* error is harmless unless the
27 offending comments are "extensive, [] an inference of guilt from
28 silence is stressed to the jury as a basis for the conviction, and

1 [] there is evidence that could have supported acquittal.")
2 (internal quotations and citations omitted). Further, the trial court
3 instructed the jury that the attorneys' comments were not evidence
4 (CALJIC 1.02), and that the jury should be mindful that a criminal
5 defendant has an absolute constitutional right not to be compelled
6 to testify and that the jury must not draw any inference from that
7 fact or consider it in deliberations in any way (CALJIC 2.60). (CT
8 at 226, 240). As such, any error arising from the prosecutor's
9 argument was harmless. *See Brecht*, 507 U.S. at 637.

10 **b) Comment During Rebuttal Argument (Claim T)**

11 Petitioner asserts that the prosecutor committed misconduct
12 during rebuttal argument by referencing Petitioner's failure to
13 testify at trial. (Memo at 81-82). During closing, Morris argued that
14 the jury should not find the special circumstance murder allegation
15 true, because there was no evidence that Petitioner shot Sam Allessie
16 or intended to kill him. (RT at 4259). In rebuttal, the prosecutor
17 criticized Morris's lack of evidence argument. The prosecutor stated:

18 Mr. Morris'[s] argument is you cannot, there just is
19 no evidence in this case for you to base a finding that
20 that special circumstance is true.

21 And I, again, urge you don't accept that effort at a
22 compromise. The evidence in this case proves beyond a
23 reasonable doubt . . . that that allegation is true, that
24 this murder occurred during the course of a robbery, and
25 that the defendant had the intent to kill Sam Allessie.

26 * * *

27 Again, the defense is asking you to do something; and
28 that is, find that particular charge not true. *But they're*

1 giving you no evidence on which to do that.

2 (RT at 4300 (emphasis added)).

3 Petitioner asserts that the prosecutor's comments implied that
4 Petitioner "was attempting to hide something by not testifying."
5 (Memo at 81).

6 On direct appeal, the California Supreme Court rejected
7 Petitioner's claim. It held that the *Griffin* rule did not extend to
8 the prosecutor's remarks "which merely comment[ed] 'on the state of
9 the evidence or on the failure of the defense to introduce material
10 evidence or to call logical witnesses.'" *Fierro*, 1 Cal. 4th at 213.
11 The Court agrees with the state court's decision and rationale.

12 The prosecutor's challenged statement merely responded to
13 Morris's argument that there was insufficient evidence to support the
14 special circumstance murder charge. The prosecutor did not refer or
15 even allude to Petitioner's decision not to testify. Rather, it appears
16 that the prosecutor was referring to the lack of evidence which the
17 defense might have presented, such as physical evidence or possibly
18 testimony from other witnesses. But even if the challenged statement
19 is construed as an improper comment on Petitioner's decision not to
20 testify, the error was harmless. The prosecutor's remark was brief
21 and mild, and could be construed as no more than an indirect comment
22 upon Petitioner's failure to testify, without suggesting that an
23 inference of guilt should be drawn therefrom. *See Hovey*, 458 F.3d at
24 912. Habeas relief should be denied on this claim.

25 **2. Hypothetical Scenario During Voir Dire (Claim M.B)**

26 Petitioner contends the prosecutor improperly presented a
27 hypothetical scenario to the jury panel during voir dire, which
28 forced the jurors to prejudge Petitioner's guilt. (Memo at 20-21).

1 During jury selection, the prosecutor asked the jurors to
2 "pretend" that both sides had presented their cases, the court had
3 instructed them on the law, and after deliberations, they had come
4 to the conclusion that the charges had been proven beyond a
5 reasonable doubt. (RT at 2097). The prosecutor then asked the jurors
6 what their verdict would be under such circumstances. (RT at
7 2097). The prosecutor acknowledged, however, that the jurors could
8 not possibly state how they would vote in Petitioner's case, as they
9 had not heard any evidence. (RT at 2097). Morris objected on the
10 ground that he did not understand the question. (RT at 2099). The
11 trial court overruled the objection, finding that the question was
12 clear. (RT at 2099). Later during voir dire, the prosecutor explained
13 that he had not been trying to bias the jurors or get them to believe
14 Petitioner was already guilty, but had asked the hypothetical
15 question, as some people have difficulty voting guilty, regardless
16 of the evidence. (RT at 2293-94).

17 On direct review, the California Supreme Court held that the
18 prosecutor did not impermissibly attempt "to influence prospective
19 jurors to vote guilty" with the hypothetical scenario nor was there
20 "any possibility that such influence occurred." *Fierro*, 1 Cal. 4th
21 at 209.

22 The Sixth Amendment secures to criminal defendants the right to
23 trial by an impartial jury. *Irvin v. Dowd*, 366 U.S. 717, 722 (1961).
24 "No hard-and-fast formula dictates the necessary depth or breadth of
25 voir dire." *Skilling v. United States*, --- U.S. ---, 130 S. Ct. 2896,
26 2917 (2010); see *United States v. Wood*, 299 U.S. 123, 145-46 (1936).
27 Jury selection is "'particularly within the province of the trial
28 judge.'" *Skilling*, 130 S. Ct. at 2917 (quoting *Ristaino v. Ross*, 424

1 U.S. 589, 594-95 (1976)).

2 Here, the prosecutor's hypothetical question did not seek a
3 positive commitment that the jurors would convict without hearing any
4 evidence. Rather, the prosecutor simply asked the prospective jurors
5 what their verdict would be, if after deliberations, they had come
6 to the conclusion that the charges had been proven beyond a
7 reasonable doubt. (RT at 2097). This question sought information on
8 the venire's prejudices, not a commitment to reach a specified
9 outcome. Thus, Petitioner has failed to demonstrate that the
10 prosecutor's hypothetical scenario so infected the trial process with
11 unfairness so as to violate his right to an impartial jury or due
12 process. See *Darden*, 477 U.S. at 181. Accordingly, this claim should
13 be denied.

14 **3. Comments About Hold-out Jurors (Claim M.C)**

15 Petitioner challenges several comments made by the prosecutor
16 during voir dire regarding the duties and functions of jurors and the
17 concept of teamwork.¹¹ (Memo at 22 (citing RT at 75, 111, 929, 1132,

18
19 ¹¹ Petitioner challenges the following comments as improper:

20 [W]e're not looking for 12 quote leaders or 12 strong, rugged
21 individualists that will intentionally fight with the other
22 11 to try to show how individual they are What we're
23 looking for is 12 people, individuals who will work together
24 to try to discover the truth There's nothing wrong in
25 a juror [] being a quote follower if the reason you are
26 following is because you're seeing that that is the truth and
27 you concur with the truth and you're going along with the
28 truth 12 individuals not intentionally tugging at
each other, but rather working together, if possible, to get
at what the truth is and use that truth in arriving at a
verdict.

(Memo at 22, n.9 (citing RT at 2052-54)). Petitioner also contends the
prosecutor made improper remarks about the jurors "following" the
majority to reach a unanimous verdict, as follows:

[T]here's nothing in the world wrong with 12 people going up

1 2037, 2051-57)). Petitioner contends that the prosecutor's comments
2 impermissibly pressured the jury into reaching a unanimous verdict
3 of guilt, thereby foreclosing the possibility of a "no verdict"
4 outcome. (Memo at 23).

5 The California Supreme Court rejected this claim, finding that
6 there was no reasonable possibility that the prosecutor's statements
7 misled the prospective jurors regarding the use of independent
8 judgment. *Fierro*, 1 Cal. 4th at 210.

9 As determined by the state court, Petitioner has not shown that
10 the prosecutor's comments were improper. Nothing the prosecutor said
11 indicated to the prospective jurors that they were required to reach
12 a verdict, nor did he indicate possible reprisals for failure to
13 reach an agreement.¹²

14 Even assuming the prosecutor's comments constituted misconduct,
15 any alleged error was harmless. See *Donnelly*, 416 U.S. at 643. The
16 trial court instructed the jury that the prosecutor had the burden
17 of proving Petitioner guilty by proof beyond a reasonable doubt and
18 that the jury had a duty to decide the case based upon facts and law,
19 rather than on any arguments made by the attorneys. (CT at 226, 267-

20
21 into a jury room and all saying this is how I see the
22 evidence, everybody agreeing and then saying, "Well, then
it's obvious, this is the crime that was committed."

23 (RT at 2055).

24 ¹² In support of his claim, Petitioner relies on two Supreme
25 Court decisions: *Jenkins v. United States*, 380 U.S. 445 (1965) and
26 *United States v. United States Gypsum Co.*, 438 U.S. 422, 459 (1978).
(Memo at 23). Neither case is of assistance to him. Both *Jenkins* and
27 *Gypsum Co.* were based on instructions given to deadlocked juries in
federal prosecutions and neither opinion purported to interpret any
28 provision of the Constitution. *Early v. Packer*, 537 U.S. 3, 10 (2003)
(per curiam); see also *Lowenfield v. Phelps*, 484 U.S. 231, 239 n.2
(1988) (noting that *Jenkins* was based on the "supervisory power over
the federal courts . . . and not on constitutional grounds").

68; RT at 4327-28). The jury is presumed to have followed the trial court's instructions. *See Weeks v. Angelone*, 528 U.S. 225, 226 (2000) (court's instructions sufficient to cure any prejudice resulting from prosecution's assuredly improper closing argument and shifting of burden of proof to petitioner). And, as discussed previously, there was significant eyewitness testimony as well as physical evidence establishing Petitioner's guilt. The alleged error arising from the prosecutor's comment could not have had a substantial and injurious effect on the verdict. *Brecht*, 507 U.S. at 623.

**4. Prosecutor's Comments About the Adversarial Process
(Claim L)**

Petitioner contends the prosecutor committed misconduct by making comments during voir dire that grossly distorted the adversarial process and the roles of counsel. (Memo at 58-60).

During voir dire, both attorneys commented on the nature of the adversarial process. Morris analogized the trial to a "game," and stated that each side was trying to "win" for their team. *See Fierro*, 1 Cal. 4th at 207. The prosecutor responded that he represented the people of the State of California and that he had an obligation to ensure that defendants receive fair trials. (RT at 2028-29). The prosecutor explained that while Morris's sole obligation was to obtain an acquittal for Petitioner, the state was required to comply with certain rules and regulations that were designed to protect Petitioner's rights. (RT at 2029, 2031). The prosecutor emphasized that the state had the burden of providing the defense with full discovery, including police reports and information on all prosecution witnesses, whereas the defense had no obligation to reciprocate. (RT at 2029, 2031, 2424). The prosecutor stated that

1 Morris's sole obligation to Petitioner was "to obtain an acquittal."
2 (RT at 2031). Petitioner now claims that the prosecutor's statements
3 lightened the state's burden of proof and impermissibly bolstered the
4 prosecutor's credibility. (Memo at 58-60 (citing RT at 2026-31, 2172,
5 2424, 4189, 4279-80)).

6 Like many of Petitioner's other prosecutorial misconduct claims,
7 the California Supreme Court found that the prosecutor's comments
8 were not objectionable. *Fierro*, 1 Cal. 4th at 208. It found that the
9 prosecutor was factually correct in telling the jurors that the
10 state's obligation to provide discovery was not reciprocated by the
11 defense, and that the state's interest in criminal prosecution is not
12 simply to win the case, but to administer justice. *Id.* The court
13 concluded that the jury could not "reasonably have interpreted the
14 remarks as impugning the ethics of defense counsel, or as an improper
15 attempt to bolster the state's case." *Id.*

16 This Court agrees that there is simply no showing that the
17 prosecutor's brief remarks at the outset of the trial infected the
18 remainder of the proceedings with unfairness. The prosecutor's
19 statements were not designed to impute guilt to Petitioner or distort
20 the jury's understanding of the roles of the prosecutor or defense
21 counsel. Even if the prosecutor's statements were improper,
22 Petitioner is not entitled to habeas relief because there was no
23 prejudicial effect from the statements. The jury was instructed that
24 counsel's statements were not evidence, and there was significant
25 evidence supporting the jury's verdict. *See Brecht*, 507 U.S. at 623.

26 5. Vouching (Claims L and T)

27 Petitioner contends the prosecutor improperly vouched for the
28 quality of the police investigation, evidence presented at trial, and

1 credibility of the state's witnesses. (Memo at 59-60, 81-82).

2 One form of prosecutorial misconduct occurs when a prosecutor
3 vouches for the credibility of a witness. See *United States v. Young*,
4 470 U.S. 1, 18-19 (1985); *Lawn v. United States*, 355 U.S. 339, 359-60
5 n.15 (1958); *Berger v. United States*, 295 U.S. 78, 86-88 (1935).
6 "Vouching consists of placing the prestige of the government behind
7 a witness through personal assurances of the witness's veracity, or
8 suggesting that information not presented to the jury supports the
9 witness's testimony." *United States v. Necochea*, 986 F.2d 1273, 1276
10 (9th Cir. 1993) (citing *United States v. Roberts*, 618 F.2d 530, 533
11 (9th Cir. 1980)). Vouching constitutes misconduct because it may lead
12 the jury to convict on the basis of evidence not presented, and
13 carries with it the endorsement of the government, which may induce
14 the jury to adopt the government's judgment rather than its own. See
15 *Young*, 470 U.S. at 18.

16 During closing argument, the prosecutor commented on the
17 strength of the state's case, as follows:

18 This is an outstanding case. It was an outstanding murder
19 investigation. [¶] When you look at all of the evidence in
20 this case and you do your own analysis . . . thinking back
21 over the witnesses that have testified and their
22 credibility, and then match that with the law that covers
23 the crimes that this defendant is charged with, you, too,
24 will see very clearly and very obviously that the defendant
25 is guilty

26 (RT at 4189-90). Later, while discussing discrepancies in the
27 evidence, the prosecutor explained that the witnesses had given their
28 testimony after taking oaths to tell the truth:

1 The witnesses in this case that I have called have come in,
2 taken an oath to tell you the truth, and I believe in their
3 best fashion have tried to tell you what they saw
4 truthfully.

5 (RT at 4279-80). Petitioner asserts that the prosecutor's personal
6 endorsement of the state's investigation and witnesses constituted
7 a denial of due process. (Memo at 60, 81-82).

8 The California Supreme Court found that the prosecutor's remarks
9 regarding the strength of the state's case could not "reasonably have
10 been interpreted as a personal endorsement of the state's witnesses."
11 *Fierro*, 1 Cal. 4th at 211. The Court agrees with the state court's
12 reasoning and conclusion.

13 The prosecutor's challenged remarks did not improperly vouch for
14 the credibility of the state's witnesses or the strength of the
15 state's evidence. As the defense sought to challenge the adequacy of
16 the state's investigation, the prosecutor properly responded that the
17 defense critique was contrary to the evidence presented at trial.
18 *United States v. Sayetsitty*, 107 F.3d 1405, 1409 (9th Cir. 1997)
19 (prosecutor's statement during closing argument was an "invited
20 reply" to defense closing argument); (RT at 4237, 4262). The
21 prosecutor did not express his own belief as to the credibility of
22 any witnesses or imply that any information not in evidence supported
23 the witnesses's accounts or otherwise assured their credibility. The
24 prosecutor merely summarized relevant evidence in the record and used
25 it to offer reasonable inferences which supported the state's case,
26 i.e., the police performed competently and the witnesses testified
27 after taking an oath to the tell the truth. (RT at 4189-90, 4279-80).
28 Nothing the prosecutor said gave the impression that he was

1 personally aware of the witness's truthfulness. The challenged
2 statements fell within the wide latitude afforded to attorneys in
3 making closing arguments. *See Fields v. Brown*, 431 F.3d 1186, 1206
4 (9th Cir. 2005).

5 Even if the prosecutor engaged in the misconduct, there was no
6 prejudice. As noted with Petitioner's other prosecutorial misconduct
7 arguments, the jury was specifically instructed that statements by
8 the attorneys were not evidence, and the jury was faced with
9 considerable evidence supporting the verdict. (CT at 226). Petitioner
10 is not entitled to habeas relief on this claim.

11 **6. Dr. Hunter's False Testimony and Bad Reputation**
12 **(Claim Q)**

13 Petitioner asserts that the prosecutor committed misconduct by
14 allowing Dr. Hunter to give unreliable and false testimony and by
15 withholding evidence from the defense. (Memo at 49-50).

16 **a) False Testimony**

17 As discussed above, Dr. Hunter testified at trial that the first
18 bullet that struck Sam Alessie was fired at close range while he was
19 standing, and that the second bullet, which caused a contact wound
20 and lodged in Sam's back, was fired as Sam was lying on the ground.
21 (RT at 3387-88). Petitioner challenges as false Dr. Hunter's
22 testimony as to the sequence of shots and the positions that the body
23 was in when the shots were fired. (Memo at 50-51). In support of this
24 claim, Petitioner relies on the declarations of his retained experts,
25 pathologist Joseph Masters, M.D., and criminalist Allan Gilmore.
26 (SHE, Exh. 35, 41). Both experts questioned Dr. Hunter's procedures
27 and conclusions, and found inconsistencies in Dr. Hunter's report.
28 (SHE, Exh. 35, 41). Petitioner asserts that Dr. Hunter's false

1 testimony resulted in the jury's erroneous finding that Petitioner
2 intended to kill Sam.

3 A prosecutor's knowing presentation of false evidence violates
4 a defendant's right to due process. *Napue v. Illinois*, 360 U.S. 264,
5 269 (1959). "[A] conviction obtained by the knowing use of perjured
6 testimony is fundamentally unfair, and must be set aside if there is
7 any reasonable likelihood that the false testimony could have
8 affected the judgment of the jury." *United States v. Agurs*, 427 U.S.
9 97, 103 (1976) (citations omitted). Under *Napue*, "the knowing use of
10 false testimony to obtain a conviction violates due process
11 regardless of whether the prosecutor solicited the false testimony
12 or merely allowed it to go uncorrected when it appeared." *United*
13 *States v. Bagley*, 473 U.S. 667, 679 n.8 (1985).

14 Petitioner has failed to establish that the prosecution relied
15 on false or perjured testimony. See *Agurs*, 427 U.S. at 103. The mere
16 existence of inconsistencies in Dr. Hunter's report and potential
17 conflicts in the evidence do not establish that the prosecution
18 presented false testimony. At most, such conflicts suggest that Dr.
19 Hunter may have reasoned incorrectly, not that he was being
20 untruthful. Essentially, Petitioners's claim amounts to nothing more
21 than challenges to Dr. Hunter's credibility, which was explored at
22 trial and resolved by the jury. See *Carothers v. Rhay*, 594 F.2d 225,
23 229 (9th Cir. 1979) (rejecting use of perjured testimony claim and
24 request for evidentiary hearing where the issue of witness
25 credibility was properly presented to the jury). Petitioner has also
26 failed to establish that the prosecutor knew, or should have known,
27 that any of the challenged testimony was false. See *United States v.*
28 *Sherlock*, 962 F.2d 1349, 1364 (9th Cir. 1989) (where defendants

1 failed to allege that prosecutor knew that a witness's testimony was
2 false, defendants could not establish that prosecutor knowingly
3 presented perjured testimony). Accordingly, Petitioner is not
4 entitled to relief on this claim.

5 **b) Prosecutor's Failure to Disclose Impeachment**
6 **Evidence**

7 Petitioner contends that the prosecutor failed to disclose
8 impeachment evidence concerning Dr. Hunter's testimony in other
9 criminal investigations. Petitioner cites three internal memoranda
10 written by prosecutors from the Riverside County District Attorney's
11 Office that were critical of Dr. Hunter's work in other homicide
12 cases.¹³ (SHE, Exh. 12, 13, 14). The prosecutors complained that Dr.
13 Hunter did not properly review his reports prior to trial, gave dull
14 and confusing testimony, and had a careless approach to his reports.
15 (SHE, Exh. 12, 13, 14).

16 It is well settled that the prosecution has an affirmative duty
17 to disclose evidence favorable to a defendant. *Brady v. Maryland*, 373
18 U.S. 83, 86 (1963). "Favorable" evidence under *Brady* encompasses both
19 exculpatory and impeachment evidence and must be material before
20 disclosure is required. *Bagley*, 473 U.S. at 674; *Strickler v. Greene*,
21 527 U.S. 263, 281-82 (1999) ("The evidence at issue must be favorable
22 to the accused, either because it is exculpatory, or because it is
23 impeaching; that evidence must have been suppressed by the State,

24 ¹³ In one memorandum an assistant district attorney asserted
25 that Dr. Hunter had not obtained or read his autopsy notes before
26 testifying; gave testimony that conflicted with his notes, and was
27 "sloppy in procedure and careless in the preparation of reports." (SHE,
28 Exh. 13). The other two memoranda, written by different assistant
district attorneys, criticized Dr. Hunter's performance on the witness
stand in three other homicide cases. (SHE, Exh. 12, 14). They cited
discrepancies between Dr. Hunter's autopsy findings and his subsequent
testimony in court.

1 either willfully or inadvertently; and prejudice must have ensued.");
2 *Hamilton v. Ayers*, 583 F.3d 1100, 1110 (9th Cir. 2009).

3 In this case, Petitioner has not shown the prosecutor failed to
4 disclose favorable material evidence. Two of the memoranda were
5 written in 1989, and not in existence at the time of trial. (SHE,
6 Exh. 12, 13). The third memorandum, which was undated, criticized Dr.
7 Hunter's testimony in a 1985 homicide trial as conflicting with his
8 autopsy report. (SHE, Exh. 14). Petitioner does not even allege that
9 this memorandum was in existence at the time of Petitioner's trial
10 or that the prosecutor was actually aware of inconsistencies in Dr.
11 Hunter's testimony in the 1985 homicide case. But even if the
12 prosecutor had been in possession of this information, there was no
13 duty to disclose, as it was not material. The prosecutor's letter in
14 the other 1985 homicide case (SHE, Exh. 14) indicates that Dr.
15 Hunter's opinion concerning the cause of death was not a critical
16 issue in the case. Thus, any inconsistencies in Dr. Hunter's
17 testimony in that case would have had minimal impeachment value in
18 Petitioner's case. (SHE, Exh. 14); *Bagley*, 473 U.S. at 683; *Brady*,
19 373 U.S. at 87. Habeas relief should be denied on this claim.

20 **7. Statements Compelling Petitioner's Spouse to Invoke**
21 **Fifth Amendment (Claim R)**

22 Petitioner claims that the prosecutor committed misconduct by
23 calling Petitioner's wife, Laura Fierro, to testify at trial when he
24 knew she would assert her privilege against self-incrimination in
25 front of the jury. (Memo at 56-58).¹⁴ Petitioner's claim lacks merit.

26
27 ¹⁴ The prosecutor first informed the trial court that he
28 intended to call Laura to testify at trial in a pretrial hearing. (RT
at 2757-58). Morris argued that Laura was entitled to a spousal
privilege. (RT at 2757-58). The trial court ruled that the spousal

1 When Laura was called to the witness stand at trial, she
2 immediately invoked her privilege against self-incrimination. (RT at
3 3561). The prosecutor stated that he had not anticipated that Laura
4 would claim the privilege. (RT at 3652). After a brief recess, the
5 trial court informed the jury that the prosecutor did not intend to
6 continue the examination of Laura. (RT at 3653). The trial court
7 admonished the jury not to draw any inferences as to Laura's
8 credibility or as to the guilt or innocence of Petitioner, based on
9 Laura's refusal to testify.¹⁵ (RT at 3653).

10 On direct review, the California Supreme Court found that the
11 prosecutor did not commit misconduct. The prosecutor had no prior
12 knowledge that Laura would assert her testimonial privilege in front
13 of the jury, the prosecutor made no attempt to exploit the situation
14 by continuing to examine Laura and forcing her to repeatedly invoke
15 the privilege, and the trial court immediately admonished the jury
16 not to draw any inferences with respect to her credibility or
17 Petitioner's guilt or innocence. *Fierro*, 1 Cal. 4th at 233-34. The
18 state court's decision is consistent with federal law.

19 When it is known that a witness intends to invoke the Fifth
20 Amendment privilege, compelling the witness to testify may be
21 reversible error if: (1) the Government makes "a conscious and
22

23 privilege did not apply. (RT at 2798) (citing Cal. Evid. Code
24 § 972(f)).

25 ¹⁵ The trial court instructed the jury as follows:

26 When a witness refuses to testify as to any matter basing his
27 refusal on the constitutional privilege against self-
28 incrimination, you are not to draw from that fact any
inference as to the credibility of the witness or as to the
guilt or innocence of the defendant.

(RT at 3653).

1 flagrant attempt to build its case out of inferences arising from use
2 of the testimonial privilege;" or (2) inferences from a witness'
3 refusal to answer added "critical weight to the prosecution's case
4 in a form not subject to cross-examination." *Namet v. United States*,
5 373 U.S. 179, 186-87 (1963); see also *United States v. Peterson*, 549
6 F.2d 654, 658-59 (9th Cir. 1977). However, courts have declined to
7 find reversible error when such episodes were "no more than minor
8 lapses through a long trial." *Namet*, 373 U.S. at 187 (internal
9 quotations and citation omitted). Further, "even when the
10 objectionable inferences might have been found prejudicial, it has
11 been held that instructions to the jury to disregard them
12 sufficiently cured the error." *Id.*

13 The facts in this case do not constitute a "conscious and
14 flagrant" attempt by the government to build its case on Laura
15 Fierro's refusal to testify. *Namet*, 373 U.S. at 186. As determined
16 by the state court, the prosecutor did not know Laura would invoke
17 her Fifth Amendment privilege not to testify, the prosecutor did not
18 ask Laura any questions during the guilt phase of trial, and
19 Petitioner does not point to anything in the record to suggest that
20 the prosecutor attempted to build his case on references to Laura's
21 refusal to testify. Nor has Petitioner demonstrated that he suffered
22 prejudice as a result of Laura's assertion of the privilege. The
23 trial court gave the curative instruction so that the jury would not
24 consider Laura's exercise of the privilege in evaluating her
25 credibility or Petitioner's guilt or innocence. (RT at 3653). And,
26 any negative inferences to be drawn from Laura's refusal to testify
27 were merely cumulative to other evidence already established through
28 witnesses who were subject to cross-examination. *Namet*, 373 U.S. at

1 189. Petitioner has not demonstrated that he was denied a
2 fundamentally fair trial or that the trial court violated any of his
3 federal constitutional rights when it allowed the prosecutor to call
4 Laura to the witness stand at trial. Accordingly, Petitioner is not
5 entitled to federal habeas relief on this claim.

6 **8. Statements Maligning Defense Counsel (Claim T)**

7 Petitioner contends the prosecutor made a number of statements
8 during his rebuttal argument attacking the personal integrity of
9 Attorney Morris. (Memo at 79-81). During rebuttal, the prosecutor
10 asserted that Morris had no alternative but to attack the strength
11 of the state's case, as the defense had not offered any evidence to
12 support its theory. Petitioner cites as improper the prosecutor's
13 paraphrasing and criticisms of Morris's argument, as follows:

14 Mr. Morris has given you a very typical presentation
15 of a defense attorney who has nothing of substance to say.
16 (RT at 4269). In desperation, and because the defense
17 attorney is obliged to make an argument in behalf of his
18 client, Mr. Morris has to find something to say. And the
19 only thing that he has left to talk about is the People's
20 case, because nothing he put[] on was of any substance. (RT
21 at 4270). Mr. Morris, of course, doesn't choose to remind
22 you that Mr. Morris is on the payment [sic] of the State
23 of California and works for the same agency -- that I do
24 and these other people do. (RT at 4271-72). You don't
25 believe for a moment that if Mr. Morris could find somebody
26 out there who was an expert in those fields that would come
27 in and tell you the sorts of things that he's actually
28 trying to persuade you of out the thin air, that he

1 wouldn't have had those people there. (RT at 4273). Gee
2 folks, I don't know much about pathology, so it's really
3 hard for me, you see, to prove to you that Dr. Hunter is
4 lying because I don't know much about pathology. (RT at
5 4273). There is a saying in law . . . if you don't have the
6 facts, then you argue the law. If you don't have the law,
7 the you argue the facts. [¶] And the saying doesn't go on,
8 but I say in this case if you don't have either, then blow
9 smoke. And that's what you have seen for the last three
10 hours. (RT at 4277). I am sure if Mr. Morris had the chance
11 to come back, he'd come back and say, "Well, these photos
12 weren't really taken the night in question. We went out
13 there and set up special lights to get this effect." And
14 that's just bunk. (RT at 4288).

15 (Memo at 79-81).

16 The California Supreme Court found that the prosecutor "did not
17 cross the line of acceptable argument, which is traditionally
18 vigorous and therefore accorded wide latitude." *Fierro*, 1 Cal. 4th
19 at 212.¹⁶

20 The Court agrees that the prosecutor did not improperly malign

21
22 ¹⁶ The California Supreme Court determined that one of the
23 prosecutor's statements was intended as a rebuke to Morris's argument
24 that the state's witnesses might have altered their testimony to please
25 the prosecutor. (RT at 4276 ("I don't know if you are offended, I can
26 tell you that I am certainly offended at what I would consider the
27 duplicity of the argument. Mr Morris has spent the last three hours
28 saying that all of the witnesses got together and that the sheriff and
myself have coached them and molded them into a team to come to court
to say these things. And then actually has the gall to just before
sitting down say: Now, folks, I don't mean to in any way affirm -- or
infer that [the prosecutor] has done anything inappropriate.")). While
the state supreme court found that the prosecutor's argument was
"somewhat ad hominem," it concluded that there was "no realistic
likelihood" that it prejudiced Petitioner. *Fierro*, 1 Cal. 4th at 212-
13.

1 Morris's integrity. The prosecutor merely tried to show that Morris's
2 arguments about inconsistencies in the state's case were illusory and
3 any argument that the witnesses' testimony had been coached was
4 spurious. (RT at 4271-73, 4277). The prosecutor did not manipulate
5 or misstate the evidence, nor did he allow a negative inference
6 beyond those which the jury could have made on its own. See *United*
7 *States v. McChristian*, 47 F.3d 1499, 1507-08 (9th Cir. 1995); see
8 also *United States v. Hinton*, 31 F.3d 817, 824-25 (9th Cir. 1994).
9 As noted, prosecutors are afforded wide latitude in making closing
10 arguments. *Fields*, 431 F.3d at 1206. Further, in light of the entire
11 record, including the trial court's instructions and admonishments
12 to the jury, the prosecutor's remarks cannot be deemed to have so
13 infected Petitioner's trial with unfairness as to render his
14 conviction a violation of due process. See *Darden*, 477 U.S. at 181;
15 *Donnelly*, 416 U.S. at 643.

16 **H. Special Circumstance Instructions on Intent to Kill**
17 **(Claim V)**

18 Petitioner contends that the jury instructions on the robbery-
19 murder special circumstance allegation violated his right to due
20 process. (Memo at 82-86). Petitioner asserts that the instructions
21 that were given allowed the jury to convict him without finding that
22 he possessed the specific intent to kill, as required under *Carlos*
23 *v. Superior Court*, 35 Cal. 3d 131 (1983) (holding that intent to kill
24 is an element of the felony-murder special circumstance whether or
25 not the defendant was the actual killer), overruled by *People v.*
26
27
28

1 Anderson, 43 Cal. 3d 1104 (1987).¹⁷

2 At trial, the court gave the standard instructions on the
3 robbery-murder special circumstance allegation: CALJIC 8.80 and
4 8.81.17.¹⁸ (CT at 267-69; RT at 4327-29). In addition, Petitioner
5

6 ¹⁷ While Petitioner's appeal was pending, the California Supreme
7 Court overruled *Carlos* in *People v. Anderson*, 43 Cal. 3d 1104 (1987).
8 *Anderson* held that "intent to kill is not an element of the
9 felony-murder special circumstance; but when the defendant is an aider
and abettor rather than the actual killer, intent must be proved." *Id.*
at 1147.

10 ¹⁸ The trial court instructed the jury with CALJIC 8.80 (1984),
as follows:

11 If you find the defendant in this case guilty of murder
12 of the first degree, you must then determine if [one or more
of] the following special circumstances:

13 That the murder was committed while the defendant was
14 engaged in or was an accomplice to the commission or
attempted commission of a robbery in violation of Section 211
of the Penal Code.

15 A special circumstance must be proved beyond a
16 reasonable doubt. If you have a reasonable doubt as to
whether a special circumstance is true, it is your duty to
find that it is not true.

17 **If the defendant, David Rey Fierro, was an accomplice or**
18 **aider and abettor, but not the actual killer, it must be**
19 **proved beyond a reasonable doubt that he intended to aid in**
the killing of a human being before you are permitted to find
the alleged special circumstance of that first degree murder
to be true as to the defendant, David Rey Fierro.

20 In order to find the special circumstance charged in
21 this case to be true or untrue, you must agree unanimously.
You will include in your verdict, on a form that will be
22 supplied, your finding as to whether the special circumstance
is or is not true.

23 (CT at 267-68; RT at 4327-28) (emphasis added).

24 The trial court also instructed the jury with CALJIC 8.81.17
(1984):

25 To find that the special circumstance referred to in
26 these instructions as in the commission of a robbery is true,
it must be proved:

27 One, that the murder was committed while the defendant
28 was engaged in or was an accomplice in the commission or
attempted commission of a robbery; or that the murder was
committed during the immediate flight after the commission or
attempted commission of a robbery by the defendant or to

1 proposed a special instruction and an accompanying special verdict
2 form to pinpoint whether Petitioner was the person who actually shot
3 Sam Allessie or just an aider and abettor in the crime. (RT at 4339-
4 40; CT at 207, 292). The special instruction provided:

5 You are instructed if you find the defendant, David
6 Rey Fierro, guilty of murder, then you shall also make a
7 finding in one of the following forms of whether David Rey
8 Fierro was the man who actually shot and killed Samuel
9 Frank Allessie: Either

10 We, the jury in the above-entitled action, either find
11 that the defendant, David Rey Fierro, shot and killed Sam
12 Allessie, or

13 We, the jury in the above-entitled action, find that
14 the defendant, David Rey Fierro, did not shoot and kill Sam
15 Allessie.

16 (RT at 4339-40; CT at 292). Petitioner argued that a finding that
17 Petitioner was not the actual shooter might assist an appellate court
18 in determining whether to reduce a first degree felony-murder
19 conviction to murder in the second degree. (RT at 4136-37).

20 The prosecutor objected to the special circumstance pinpoint
21 instruction and the special verdict form as irrelevant. (RT at 4133).
22 He argued that the question of whether the accused was the actual

23 _____
24 which the defendant was an [] accomplice;

25 Two, that the defendant intended to kill a human being
26 or intended to aid another in the killing of a human being;

27 And three, that the murder was committed in order to
28 carry out or advance the commission of the crime of robbery
 or to facilitate the escape therefrom, or to avoid detection.

 In other words, the special circumstance referred to in
 these instructions is not established if the robbery was
 merely incidental to the commission of the murder.

(CT at 269; RT at 4328-29).

1 killer was not an element of the special circumstance murder charge.
2 (RT at 4133, 4136-37). Because intent to kill was an element of the
3 crime, the prosecutor proposed that the pinpoint instruction and
4 special verdict form be modified so that the jury would be asked to
5 determine whether Petitioner had the intent to kill and whether
6 Petitioner aided in the killing. (RT at 4137). Petitioner responded
7 that these issues were already addressed in other CALJIC
8 instructions. (RT at 4137).

9 The trial court agreed to use Petitioner's actual killer
10 pinpoint instruction and special verdict form, but recommended that
11 counsel advise the jury during closing argument that the special
12 verdict had nothing to do with whether the special circumstance
13 allegation was true and that the jury should not be misled by use of
14 the special verdict. (RT at 4136, 4138).

15 After deliberations, the jury returned the special verdict
16 finding that Petitioner was the person who shot and killed Sam
17 Allessie. (CT at 207, 215).

18 Petitioner now asserts that the special circumstance jury
19 instructions improperly suggested that the jury did not need to find
20 the intent to kill. (Memo at 82-86). Petitioner asserts that the
21 actual killer pinpoint instruction, when read together with CALJIC
22 8.80, the standard special circumstance jury instruction, left the
23 jury with the impression that if Petitioner was the actual shooter,
24 intent to kill need not be proven, as CALJIC 8.80 only mentioned
25 intent to kill in connection with accomplice liability. (Memo at 85-
26 86; RT at 4328). Petitioner contends that the trial court should have
27 given a special instruction defining the term "intent to kill" and
28 a special aider and abettor verdict, sua sponte. (Memo at 85; Reply

1 at 71). Petitioner further contends that the jury was improperly
2 instructed that they could find the special circumstance allegation
3 true if only two of the three elements were established, as the trial
4 court gave a modified version of CALJIC 8.81.17. *See* n.18, *supra*.
5 Petitioner asserts that the trial court improperly inserted the word
6 "and," between the second and third elements of the special
7 circumstance allegation, thereby allowing the jury to convict "if it
8 found either elements one or two[,] and element three" to be true.
9 (Memo at 86).

10 The California Supreme Court rejected Petitioner's instructional
11 error claims on direct review. *Fierro*, 1 Cal. 4th at 227-28. It found
12 that the jury had been properly instructed on the intent to kill
13 element. *Id.* It also found that the prosecutor's argument reinforced
14 the trial court's instruction on intent to kill. *Id.*

15 The Due Process Clause of the Fourteenth Amendment protects the
16 accused against conviction except upon proof beyond a reasonable
17 doubt of every fact necessary to constitute the crime with which he
18 is charged. *Winship*, 397 U.S. at 364. To obtain federal collateral
19 relief for instructional error, a petitioner must show that the
20 ailing instruction by itself so infected the entire trial that the
21 resulting conviction violates due process. *Estelle*, 502 U.S. at 72;
22 *Cupp v. Naughten*, 414 U.S. 141, 147 (1973). The instruction may not
23 be judged in artificial isolation, but must be considered in the
24 context of the instructions as a whole and the trial record. *Estelle*,
25 502 U.S. at 72. The federal habeas court must inquire whether there
26 is a "reasonable likelihood" that the jury has applied the challenged
27 instruction in a way that violates the Constitution. *Id.* Even if an
28 error is found, the petitioner must still demonstrate that the error

1 had a "substantial and injurious effect or influence in determining
2 the jury's verdict." *Brecht*, 507 U.S. at 637.

3 Under California law, the trial court had no duty to give a
4 special pinpoint instruction on intent to kill or a special verdict
5 on aider and abettor liability. *See, e.g., People v. Weaver*, 26 Cal.
6 4th 876, 969 (2001). If Petitioner wanted more precise instructions
7 on the meaning of intent to kill and aider and abettor liability, he
8 should have requested them. *See People v. Saille*, 54 Cal. 3d 1103,
9 1121 (1991). Instead, Petitioner requested the pinpoint instruction
10 and special verdict asking whether Petitioner was the actual killer.
11 (RT at 4136-37). When the prosecutor suggested giving the jury a
12 special instruction on intent to kill and aider and abettor
13 liability, Morris objected, claiming that the other instructions
14 adequately addressed these issues. (RT at 4137). Thus, Petitioner's
15 claim is without merit.

16 Further, the instructions as a whole fairly apprised the jury
17 of the requisite intent element of the special circumstance murder
18 charge. CALJIC No. 8.81.17 listed the three elements of the crime:
19 the murder was committed while Petitioner was engaged in a robbery;
20 the defendant had the intent to kill; and the murder was committed
21 to carry out the robbery. (CT at 269; RT at 4328-29). While
22 Petitioner complains that the trial court's insertion of the word
23 "and" between the second and third elements mislead the jury to
24 believe that they could convict Petitioner upon a finding of only two
25 of the elements, such an argument is entirely without merit. (Memo
26 at 86). Clearly, use of the conjunction "and" to join the second and
27 third elements indicated that a special circumstance finding was
28 dependent on the jury finding all three elements to be true.

1 The prosecutor also told the jury in closing that in order to
2 find the special circumstance murder charge true, Petitioner must
3 have intentionally killed Sam Alessie. The prosecutor read CALJIC
4 No. 8.81.17 to the jury and restated the elements of the special
5 circumstance allegation during closing argument. (RT at 4186-87). The
6 prosecutor specifically noted that the special circumstance robbery-
7 murder required a finding that Petitioner intended to kill in
8 carrying out the robbery. (RT at 4186-87, 4189). The prosecutor also
9 attempted to highlight the importance of the intent to kill element
10 by distinguishing first degree felony-murder from special
11 circumstance robbery-murder. The prosecutor instructed the jury that
12 in order to find Petitioner guilty of a special circumstance robbery-
13 murder, "you do need to determine if David Fierro intended to kill
14 Sam Alessie or intended to aid in the killing of Sam Alessie." (RT
15 at 4187).

16 Finally, there is nothing to suggest that the alleged
17 instructional errors had a substantial and injurious effect on the
18 jury's verdict. *Clark v. Brown*, 450 F.3d 898, 905 (9th Cir. 2006)
19 (citing *Brecht*, 507 U.S. at 637). The witness testimony establishing
20 that Petitioner inflicted a lethal contact wound into Sam's chest
21 after he had fallen to the ground provides substantial evidence of
22 intent to kill. Therefore, in light of the record as a whole, any
23 alleged instructional errors were harmless. *Brecht*, 507 U.S. at 637.
24 Petitioner is not entitled to habeas relief on this claim.

25 //

26 **I. Failure to Sever the Special Circumstance Murder Charge**
27 **(Claim W)**

28 Petitioner claims the trial court violated his right to due

1 process by denying his motion to sever the adjudication of the
2 special circumstance murder charge from the guilt phase of trial.
3 (Memo at 87-89; Reply at 93-96).

4 Prior to trial, Petitioner moved to bifurcate the trial on the
5 guilt phase and special circumstance allegation. (PMRT at 214-16).
6 Petitioner claimed a separate trial was necessary because his defense
7 to the robbery and murder charges (i.e., he was not present at the
8 crime scene) was inconsistent with a defense to the special
9 circumstance allegation (i.e., he lacked the specific intent to
10 kill). (PMRT at 214-16). The prosecutor objected to the motion to
11 bifurcate as unnecessary and as inconsistent with the special
12 circumstances statutory scheme. (PMRT at 216-17). The trial court
13 denied the motion. (PMRT J at 217).

14 On direct review, the California Supreme Court upheld the trial
15 court's ruling and noted that under the special circumstances
16 statutory scheme, "the same jury that determines guilt shall also at
17 the same time determine the truth of the special circumstance
18 allegation." *Fierro*, 1 Cal. 4th at 229 (citing Cal. Penal Code
19 § 190.1(a)).

20 Resolution of a motion to sever is generally a question of state
21 procedure, and ordinarily cannot form the basis for federal habeas
22 relief absent evidence that the defendant's due process right to a
23 fair trial was violated. See *Estelle*, 502 U.S. at 70; *Featherstone*
24 v. *Estelle*, 948 F.2d 1497, 1503 (9th Cir. 1991). Here, the
25 adjudication of the special circumstance murder charge with the other
26 charges did not render the trial fundamentally unfair. *Estelle*, 502
27 U.S. at 70; *Featherstone*, 948 F.2d at 1503. As determined by the
28 state court, the motion to sever was properly denied under state law.

1 *Fierro*, 1 Cal. 4th at 229. Moreover, the evidence introduced at trial
2 provided ample evidence to support the special circumstance murder
3 charge (i.e., Petitioner, while engaged in a robbery, fired two shots
4 at Sam Allesie, including a lethal contact wound to Sam's chest
5 after he had fallen to the ground). Thus, the denial of the motion
6 to sever did not "so infuse[] the trial with unfairness as to deny
7 [Petitioner] due process of law." *Estelle*, 502 U.S. at 75 (citation
8 omitted).

9 **J. Ineffective Assistance of Counsel Claims (Claims B, D, I,**
10 **Q)**

11 The Sixth Amendment entitles criminal defendants to the
12 "effective assistance of counsel." *Strickland*, 466 U.S. at 686. To
13 establish ineffective assistance of counsel, a petitioner must prove:
14 (1) deficient performance, *Id.* at 687-91; and (2) prejudice. *Id.* at
15 694.

16 **1. Failing to Challenge Petitioner's Competency**
17 **(Claim B)**

18 Petitioner contends Morris rendered ineffective assistance of
19 counsel by failing to challenge Petitioner's competency to stand
20 trial. (Memo at 5-6; Reply 8-15). "[C]ounsel has a duty to make
21 reasonable investigations or to make a reasonable decision that makes
22 particular investigations unnecessary." *Strickland*, 466 U.S. at 691.
23 "[S]trategic choices made after less than complete investigation are
24 reasonable precisely to the extent that reasonable professional
25 judgments support the limitations on investigation." *Id.* at 690-91.
26 In assessing the reasonableness of Morris's representation, the court
27 must be "highly deferential," avoid "the distorting effects of
28 hindsight," and "indulge a strong presumption that [his] conduct

1 falls within the wide range of reasonable professional assistance."
2 *Id.* at 689.

3 In this case, as discussed above, Dr. Hamed opined that
4 Petitioner was competent to stand trial in his detailed and reasoned
5 report. (Reply, Exh. A). Morris was entitled to rely on this report.
6 *Williams*, 384 F.3d at 611; *Hendricks v. Calderon*, 70 F.3d 1032, 1038
7 (9th Cir. 1995) ("In general, an attorney is entitled to rely on the
8 opinions of mental health experts in deciding whether to pursue an
9 insanity or diminished capacity defense."); *see also Harris v.*
10 *Vasquez*, 949 F.2d 1497, 1525 (9th Cir. 1990) ("It is certainly within
11 the 'wide range of professionally competent assistance' for an
12 attorney to rely on properly selected experts."). Thus, Morris
13 reasonably declined to request a competency hearing. Moreover, as
14 Petitioner has not established that he was tried while incompetent,
15 it is not reasonably probable that, but for Morris's alleged error,
16 the outcome of the trial would have been different. *Strickland*, 466
17 U.S. 694.

18 **2. Failing to Provide Dr. Hamed with Petitioner's**
19 **Records (Claim B)**

20 Petitioner asserts that Morris's enlistment of Dr. Hamed was
21 deficient because Morris did not provide Dr. Hamed with Petitioner's
22 court records, school records, or law enforcement reports discussing
23 Petitioner's drug use. (Memo at 6; Reply at 8). Petitioner, however,
24 does not provide these documents to the Court nor does he explain how
25 these documents would have changed Dr. Hamed's opinion as to
26 Petitioner's competency to stand trial. Petitioner's unsupported,
27 conclusory allegations are insufficient to support a claim for
28 federal habeas relief. *See Jones v. Gomez*, 66 F.3d 199, 204-05 (9th

1 Cir. 1995) (stating that conclusory allegations with no reference to
2 the record or other evidence do not warrant habeas relief). Moreover,
3 Morris had no obligation to supplement Dr. Hamed's evaluation with
4 information on Petitioner's background in the absence of any request
5 for such information. *Hendricks*, 70 F.3d at 1038-39 ("To require an
6 attorney, without interdisciplinary guidance, to provide a
7 psychiatric expert with all information necessary to reach a mental
8 health diagnosis demands that an attorney already be possessed of the
9 skill and knowledge of the expert."). Thus, Morris certainly fell
10 within the broad range of presumptively acceptable conduct when he
11 retained Dr. Hamed to evaluate Petitioner's competency to stand
12 trial, and relied on Dr. Hamed's unqualified conclusion that there
13 was no basis for a competency challenge.

14 Petitioner further claims that Morris was ineffective for
15 failing to secure additional psychological evaluations regarding
16 Petitioner's competency to stand trial. (Reply at 8). As noted above,
17 however, Morris was entitled to rely on Dr. Hamed's opinion that
18 Petitioner was competent to stand trial. *Williams*, 384 F.3d at 611.
19 As such, Morris was not deficient for failing to seek additional
20 mental health evaluations.

21 **3. Failing to Investigate Petitioner's Drug Use and**
22 **Mental State Defense (Claim D.4)**

23 Petitioner asserts that Morris was ineffective for failing to
24 investigate and present a mental state defense to challenge the
25 intent to kill element of the robbery-murder special circumstance
26 allegation. (Memo at 71-72; Reply at 61-68). Petitioner contends that
27 he did not and could not form the specific intent to kill due to his
28 mental retardation and history of illicit drug use. (Memo at 72;

1 Reply at 61-68).

2 According to Petitioner, there was substantial evidence
3 available to Morris at the time of trial suggesting that his mental
4 state prevented him from forming the intent to kill. (Reply at 63,
5 65-66). In support of this claim, Petitioner cites a declaration from
6 Morris prepared years after trial. (SHE, Exh. 44 at 6-7 ("Although
7 I had Mr. Fierro's school records in my possession I did not
8 undertake a systematic review of them before I arrived at the defense
9 presented during the guilt trial. Had I done so, I would have
10 realized the importance of a whole host of mental health issues that
11 relate to guilt and penalty issues and to Mr. Fierro's mental
12 capacity to stand trial.")). Petitioner contends that his school
13 records showed that he "'had been certified as mentally retarded, had
14 been placed in special education classes, and had significant
15 learning disabilities and emotional and psychological problems."
16 (Memo at 65-66; Reply at 72 (quoting Decl. of Robin Levinson, SHE,
17 Exh. 40 at 2)). Petitioner also asserts that Morris was aware of
18 Petitioner's heroin addiction.

19 While Morris belatedly concedes that he should have pursued a
20 more extensive mental state investigation, it is evident from the
21 record that the decision not to further pursue a mental defense was
22 reasonable at the time it was made and is entitled to deference. See
23 *Strickland*, 466 U.S. at 690-91 ("strategic choices made after less
24 than complete investigation are reasonable precisely to the extent
25 that reasonable professional judgments support the limitations on
26 investigation"). As discussed, Morris retained Dr. Hamed to evaluate
27 Petitioner's ability to stand to trial. (Reply, Exh. A). Dr. Hamed
28 estimated Petitioner's intelligence to be in the average range.

1 (Reply, Exh. A at 4). Although Dr. Hamed's assessment of Petitioner's
2 IQ was inconsistent with other evidence of record, Morris was
3 entitled to rely on this report and reasonably declined to pursue a
4 mental state defense. *Williams*, 384 F.3d at 611.

5 Further, a mental state defense would have conflicted with
6 Petitioner's chosen defense that he was not present at the crime
7 scene. (RT at 4191, 4207-10, 4235; SRT, 7/14/86, at 4367-68).
8 Originally, Morris recommended that Petitioner "direct his defense
9 towards the special circumstances issue" and admit participation in
10 the underlying crimes. (SRT, 7/14/86 at 4367). Petitioner adamantly
11 refused Morris's advice despite significant eyewitness testimony and
12 evidence placing Petitioner at the crime scene.¹⁹ (SRT, 7/14/86 at
13 4367). Given Petitioner's request and the California Supreme Court's
14 decision in *People v. Frierson*, 39 Cal. 3d 803, 816-17 (1985)²⁰,
15 Morris felt he had no choice but to present a factual innocence
16
17

18
19 ¹⁹ Morris explained to the trial court, as follows:

20 Morris: David has not agreed with that position, and it has
21 -- it has been his desire and his instructions to me all
22 the way through this trial that I should defend it on
23 the merits as to all the allegations.

24 David has been very insistent that we present a defense
25 not only directed to the special circumstance issue, but
26 that we also vigorously deny and defend against the
27 allegations that he had any participation whatsoever in
28 this crime.

(SRT, 7/14/86, at 4367-68).

29
30 ²⁰ In *Frierson*, the California Supreme Court held that when a
31 client exercises his personal right on a matter of fundamental
32 importance, such as choosing a defense to a special circumstance
33 allegation over counsel's contrary advice, "the attorney's obligation
34 is simply to provide the best representation that he can under the
35 circumstances." *Frierson*, 39 Cal. 3d at 816-17 (emphasis in original).

1 defense. (SRT, 7/14/86 at 4367-68; RT at 5022-23).²¹ Given
2 Petitioner's insistence that the defense vigorously deny all
3 involvement in the crime, he cannot now claim as erroneous the very
4 defense he demanded. *Id.* at 816-17; SRT, 7/14/86 at 4367-68). Once
5 Petitioner settled on the factual innocence defense, Morris
6 reasonably declined to investigate a conflicting mental state
7 defense. See, e.g., *Williams*, 384 F.3d at 611; *Correll v. Stewart*, 137
8 F.3d 1404, 1411 (9th Cir. 1998) (defense counsel was not ineffective
9 for failing to present psychiatric evidence that would have
10 contradicted the primary defense theory of misidentification).

11 Even if Morris was deficient for failing to investigate and
12 present a mental state defense to the special circumstance murder
13 charge, Petitioner has not established prejudice. *Strickland*, 466

14
15 ²¹ At Petitioner's sentencing hearing, Morris explained his
16 dilemma in deciding to forego alternative, stronger defense strategies:

17 I think the jury was angry at my client. I think the jury was
18 angry at me. And I think the reason for that was because of
19 what I consider to be a serious error in trial strategy which
20 I feel was forced on me; and that was, taking the position in
21 the face of overwhelming evidence that David Fierro was not
22 even there.

23 Now, I had to take that position, your Honor, because that's
24 the position my client wanted me to take. And to do anything
25 else would have -- for me, been tantamount to conceding my
26 client's guilt of first degree murder and robbery. I can't do
27 that. If my client wishes to fight these allegations, if he
28 wishes to defend these allegations, I cannot tell the jury,
"Look, my client has pled not guilty, he denies. He denies
any involvement or complicity with these acts, but I tell you
that I don't believe him and I already, for starters, concede
that he's guilty of first degree murder and robbery." I can't
do that.

And so I had no choice, your Honor, except to defend
against all the allegations. And I think that was fatal error
because I think it completely destroyed my credibility and
the credibility of the defense.

I think, your Honor, that this case was defensible. No
one knows what the conclusion would have been, but I think it
was defensible on the special circumstance issue.
(RT at 5022).

1 U.S. at 694. Petitioner argues that testimony from an expert, such
2 as psychiatrist Dr. Jackman, would have shown that Petitioner lacked
3 the ability to form the requisite intent for the special circumstance
4 robbery-murder finding. (Reply at 66). As stated in his 1993
5 declaration, Dr. Jackman opined that Petitioner's "altered state of
6 consciousness significantly interfered with his ability to think
7 logically and strategically and to understand the long term
8 consequences of his actions," and "caused him to lack the substantial
9 capacity both to appreciate the criminality of his conduct and to
10 conform his conduct to the requirement of the law." (SHE, Exh. 39 at
11 14; Reply at 66). Dr. Jackman's opinion does not support Petitioner's
12 claim, as the defense of diminished capacity had been abolished under
13 California law,²² and expert testimony as to whether Petitioner had
14 the capacity to form intent or whether he had the requisite intent
15 would have been inadmissible under state law. Cal. Penal Code §§ 25,
16 28, 29.

17 //

18 //

19 Although a defense of diminished actuality would have been
20
21

22 ²² California eliminated the defense of diminished capacity in
23 1981 by the Legislature and in 1982 by voter initiative. Cal. Penal
24 Code §§ 25(a) (prohibiting criminal defendants from offering evidence
25 of "intoxication, trauma, mental illness, disease, or defect to show or
26 negate capacity to form the particular purpose, intent, motive, malice
27 aforethought, knowledge, or other mental state required for the
28 commission of the crime charged"), 28(b) ("As a matter of public policy
there shall be no defense of diminished capacity, diminished
responsibility, or irresistible impulse in a criminal action"),
29 ("any expert testifying about a defendant's mental illness . . .
shall not testify as to whether the defendant had or did not have the
required mental states, which include . . . intent . . . for the crimes
charged); see *People v. Mejia-Lenares*, 135 Cal. App. 4th 1437, 1450
(2006).

1 permissible under California law,²³ Petitioner does not identify any
2 persuasive evidence that he *actually* lacked the intent to kill Sam
3 Allessie. *Mejia-Lenares*, 135 Cal. App. 4th at 1450 (recognizing that
4 although the defense of diminished capacity is no longer valid, a
5 defendant's mental condition may still be considered in deciding
6 whether a defendant actually formed the requisite intent).
7 Petitioner's school records showing that he had been certified as
8 mentally retarded, and evidence that Petitioner may have had a
9 history of drug use do not, by themselves, support such a conclusion.
10 (SHE, Exh. 40; MERE at 7; Motion to Expand Record, 5/15/12, Exh. 14);
11 *see Totten v. Merkle*, 137 F.3d 1172, 1175 (9th Cir. 1998). But even
12 if the defense had presented evidence suggesting that Petitioner did
13 not actually form the intent to kill, the overwhelming evidence of
14 the deliberate and intentional nature of the killing would have
15 undermined a diminished actuality defense. Confronted with the
16 powerful eyewitness testimony describing the shooting, there is no
17 reasonable likelihood that any error in investigating or presenting
18 a diminished actuality defense would have affected the jury's verdict
19 on the special circumstance robbery-murder charge. Petitioner is not
20 entitled to relief on this claim. *Strickland*, 466 U.S. at 694.

21 **4. Failing to Call Autopsy and Ballistics Experts (Claim**

22
23 ²³ Evidence of a mental defect or voluntary intoxication "is
24 relevant to the extent it bears upon the question whether the defendant
25 *actually* had the requisite specific mental state required for
26 commission of the crimes at issue." *People v. Horton*, 11 Cal. 4th 1068,
27 1119 (1995) (emphasis added); *see also Saille*, 54 Cal. 3d at 1119
28 (voluntary intoxication is not an affirmative defense; but it may be
considered in deciding whether defendant possessed the requisite
intent). Under a defense of "diminished actuality," a defendant is
limited to producing evidence demonstrating that he did not *actually*
have the requisite mental state or intent at the time he committed the
crime, due to "an abnormal mental condition." *People v. Wright*, 35 Cal.
4th 964, 978 (2005) (Brown, J., concurring).

1 D.1)

2 Petitioner contends that Morris provided ineffective assistance
3 by failing to retain a qualified pathologist or ballistics expert to
4 challenge the robbery-murder special circumstance allegation. (Memo
5 at 63-69; Reply at 54). Petitioner asserts that such testimony was
6 needed to rebut the prosecution theory that Petitioner shot Sam
7 Allessie "execution style."²⁴ (Memo at 63-69; Reply at 54).

8 The prosecution's case was based in part on Carole DiCenso's
9 eyewitness testimony that she saw the shooter fire two shots. DiCenso
10 described seeing a gunblast when the first shot was fired at Sam
11 Allessie as he was standing. (RT at 3240-43, 3248-49, 3267-68, 3290).
12 DiCenso testified that the shooter fired the second shot while
13 straddling and bending over the victim's body. (RT at 3247-49). As
14 noted earlier, Dr. Hunter's testimony supported DiCenso's description
15 of the shooting.

16 Petitioner asserts properly qualified experts would have cast
17 doubt about Dr. Hunter's autopsy procedures and presented an
18 alternative theory that the bullets were fired while Sam was either
19 standing or lunging forward, and not while he was lying on the
20 ground. (Memo at 65; SHE Exh. 35, 41). Petitioner notes that witness
21 testimony that the first shot sounded muffled suggested that the
22 first shot must have been the contact shot. (SHE, Exh. 35 at 2-3).
23 Petitioner relies on the declarations of forensic pathologist, Joseph
24 Masters, M.D., and criminalist, Allan Gilmore, to support his claim.
25 (SHE, Exh. 35, 41). While these experts identify purported flaws and
26 inconsistencies in Dr. Hunter's procedures and report, neither expert

27
28 ²⁴ As noted, Morris hired two experts who were found unqualified
to give an opinion by the trial court. (RT at 3920, 3935).

1 contest Dr. Hunter's findings that Sam Alessie was shot twice in the
2 chest and that one shot was a contact wound while the other shot was
3 fired at close range. (SHE, Exh. 35 and 41).

4 But even if Morris was deficient for failing to call qualified
5 ballistics and autopsy experts, Petitioner has not established
6 prejudice. *Strickland*, 466 U.S. at 694. During cross-examination and
7 in closing argument, trial counsel focused on the weaknesses of Dr.
8 Hunter's testimony that Sam Alessie was shot execution style after
9 he had fallen to the ground. On cross-examination, Dr. Hunter agreed
10 with the defense hypothesis that it was possible that the bullet
11 causing the contact wound could have been fired first, when Sam was
12 standing against a wall. (RT at 3407-08, 3413). Through effective
13 cross-examination of Dr. Hunter, Morris provided the jury with the
14 possibility of an alternate scenario of the shooting that Petitioner
15 now claims was crucial to his defense.

16 Furthermore, the expert declarations from Dr. Masters and
17 Gilmore, created over eight years after the incident, merely conclude
18 that Petitioner's theory about Sam's position when he was shot was
19 possible, but do not rule out conclusively DiCenso's eyewitness
20 testimony that the shooter fired the second shot while bending over
21 and straddling the victim's body. Based on the evidence introduced
22 at trial, it is not reasonably probable that testimony from a
23 qualified autopsy or ballistics expert would have resulted in a
24 different outcome at trial. *Strickland*, 466 U.S. at 694.

25 //

26 //

27 **5. Failure to Impeach Dr. Hunter (Claim Q)**

28 Petitioner next contends that Morris was ineffective for failing

1 to present evidence that Dr. Hunter "had a reputation of general
2 incompetence and had numerous complaints made against him for his
3 performance in autopsies and inaccurate testimony in court." (Memo
4 at 55); see also (SHE, Exh. 12, 13, 14).

5 As discussed above, complaints about Dr. Hunter's testimony in
6 unrelated cases, several of which occurred years after Petitioner's
7 trial, were not pertinent in Petitioner's case. While memoranda from
8 the district attorney's office portrayed Dr. Hunter in an
9 unflattering light, the memoranda would have done little to impeach
10 Dr. Hunter's explanation of how the shootings occurred in this case.
11 (SHE, Exh. 14). Nor does Petitioner explain how hearsay regarding Dr.
12 Hunter's performance as a witness in other criminal cases would have
13 been admissible at trial. Petitioner's mere speculation that Morris
14 could have introduced impeachment evidence challenging Dr. Hunter's
15 reputation is not enough to establish ineffective assistance. See
16 *Grisby v. Blodgett*, 130 F.3d 365, 373 (9th Cir. 1997). Accordingly,
17 Petitioner is not entitled to federal habeas relief on this claim.

18 **6. Failure to Raise a Third-Party Accomplice Defense**
19 **(Claim D.3)**

20 Petitioner contends that Morris was ineffective for failing to
21 investigate and present evidence of a third-party accomplice defense.
22 (Memo at 70-71; Reply at 57-61). Specifically, Petitioner contends
23 Morris should have offered evidence that a third-party, Tommy
24 Castrejon, was at the scene and the person actually responsible for
25 shooting and killing Sam Allessie. (Memo at 71). Petitioner notes
26 that there was evidence presented at trial that a second man was
27 involved in the robbery and murder. (Memo at 70; RT at 3245-51,
28 3707).

1 Petitioner cannot show the requisite "reasonable probability"
2 that the result would have been different at trial absent Morris's
3 asserted error. *Strickland*, 466 U.S. at 693-94. Even if Morris could
4 have obtained evidence that Castrejon had been the other man at the
5 scene, such evidence would not have established that he was the
6 shooter. Trudy Allessie testified that Petitioner was the man who had
7 robbed her, and that he had been wearing a white or light yellow t-
8 shirt at the time. (RT at 2878). Carole DiCenso was certain that the
9 man in the white t-shirt shot the victim. (RT at 3245-51). DiCenso
10 described the other suspect as wearing a black muscle t-shirt. (RT
11 at 3245-51). Gonzalez also positively identified Petitioner as the
12 shooter. (RT at 3159-60, 3479-80). Based on this eyewitness
13 testimony, there is no reasonable likelihood that presentation of
14 evidence as to the identity of an accomplice would have changed the
15 jury's verdict. *Strickland*, 466 U.S. at 694.

16 **7. Failing to Object to Prosecutor's Improper Comments**
17 **(Claim D.6)**

18 Petitioner contends that Morris was ineffective in failing to
19 object to the prosecutor's improper comments and arguments made
20 during voir dire and in closing and rebuttal arguments. (Memo at 74-
21 77). He asserts Morris erred by failing to object to the
22 prosecutor's: comments on the adversarial process; hypothetical
23 questions asking the jury to prejudge Petitioner's guilt; remarks
24 about hold-out jurors; improper vouching for the credibility of
25 witnesses and the quality of the police investigation; and statements
26 attacking the personal integrity of Morris. (Memo at 74-77).

27 As discussed above, Petitioner failed to establish that the
28 prosecutor's conduct was improper. Accordingly, Morris was not

1 ineffective for failing to object. See *Juan H.*, 408 F.3d at 1273
2 ("[T]rial counsel cannot have been ineffective for failing to raise
3 a meritless objection."); *James v. Borg*, 24 F.3d 20, 27 (9th Cir.
4 1994) (failure to make a futile objection does not constitute
5 ineffective assistance); *Boag*, 769 F.2d at 1344 ("Failure to raise
6 a meritless argument does not constitute ineffective assistance.").

7 **8. Exclusion of Jurors on the Basis of Race (Claim I)**

8 Petitioner contends that counsel was ineffective by failing to
9 assert that the prosecutor struck three Hispanic prospective jurors,
10 Rachel Brown, Valerie Figueroa, and Eugene Vasquez on the basis of
11 their race. See *Batson v. Kentucky*, 476 U.S. 79 (1986) ("*Batson*") and
12 *People v. Wheeler*, 22 Cal. 3d 258 (1978) ("*Wheeler*"). (Memo at 24-
13 27).²⁵ The allegation of ineffective assistance as to one of these
14 jurors, Rachel Brown, is unexhausted as it was never presented to the
15 state courts, and first raised in this court in Petitioner's Opening
16 Memorandum of Law filed in May 2012.²⁶ (Memo at 24, 26-27). See *Howard*
17 *v. Hedgpeth*, 2012 WL 3582588, at *13 (C.D. Cal. June 4, 2012)
18 (portion of *Batson* claim in federal petition based on prospective
19

20
21 ²⁵ Petitioner also raises an independent *Batson/Wheeler* claim by
22 asserting that the prosecutor excluded Hispanic jurors by peremptory
23 challenges on the basis of their race. (Amended Pet. at 68; Memo at 24;
24 Reply at 34-39). The Court resolved this issue in its January 26, 2012
25 minute order, concluding the claim is barred for failing to object to
26 the prosecutor's exclusion of the jurors at trial. The Court
27 incorporates by reference the reasoning of that order here. See *Haney*
28 *v. Adams*, 641 F.3d 1168, 1169 (9th Cir. 2011) ("a petitioner may not
raise a *Batson* claim in his habeas petition if the petitioner failed to
object to the prosecution's use of peremptory challenges at trial"),
cert. denied, --- U.S. ---, 132 S. Ct. 551 (2011), rehearing denied,
--- U.S. ---, 132 S. Ct. 1631 (2012); *Carrera v. Ayers*, 699 F.3d 1104,
1109 (9th Cir. 2012) (en banc) ("failure to make a *Wheeler* objection at
trial was a procedural default under state law").

28 ²⁶ Brown stated during voir dire that she is Hispanic and her
maiden name is Arias. (RT at 2473).

1 jurors not raised before the state supreme court is unexhausted),
2 report and recommendation adopted by 2012 WL 3580679 (C.D. Cal. Aug.
3 20, 2012). The Court will therefore limit its review to prospective
4 jurors Figueroa and Vasquez. Petitioner's factual support for this
5 claim is the declaration from Morris stating he had no tactical
6 reason for not objecting to the prosecutor's use of peremptory
7 challenges against those two jurors. (SHE, Exh. 44 at 8-9).
8 Petitioner has failed to show that counsel's performance was
9 deficient or that the deficient performance prejudiced the defense.
10 *Strickland*, 466 U.S. at 687-88, 694.

11 Purposeful discrimination on the basis of race or gender in the
12 exercise of peremptory challenges violates the Equal Protection
13 Clause of the United States Constitution. See *Batson*, 476 U.S. at 85.
14 *Batson* claims are evaluated pursuant to a three-step test. *Batson*,
15 476 U.S. at 96-98; *Hernandez v. New York*, 500 U.S. 352, 359 (1991);
16 *Johnson v. California*, 545 U.S. 162, 168 (2005). First, the moving
17 party "must make out a prima facie case 'by showing that the totality
18 of the relevant facts gives rise to an inference of discriminatory
19 purpose.'" *Johnson*, 545 U.S. at 168 (quoting *Batson*, 476 U.S. at 93-
20 94). Second, if a prima facie case of racial discrimination is
21 established, the burden shifts to the proponent of the strike to
22 articulate permissible, race-neutral explanations for the strike. *Id.*
23 at 94, 97. Third, if a race-neutral explanation is provided, the
24 trial court must then determine whether the moving party has proved
25 purposeful discrimination. *Id.* at 98; *Hernandez*, 500 U.S. at 358-59.
26 //

27 *Wheeler* is "the California counterpart to *Batson*." *Yee v.*
28 *Duncan*, 463 F.3d 893, 896 (9th Cir. 2006); see also *Haney*, 641 F.3d

1 at 1171 n.5.

2 Preliminarily, Respondent contends Petitioner's "death
3 qualification voir dire began April 23, 1986, a week before *Batson*
4 was decided on April 30, 1986." (Resp. at 43). Respondent contends
5 that "counsel may not have been aware of *Batson*, or may not have had
6 sufficient time to become familiar with *Batson* to appreciate the
7 differences between *Batson* and *Wheeler*." (Answer at 43). Respondent
8 also contends, because Morris's performance must be judged based on
9 the law and prevailing standards as they existed at trial, the claim
10 should be reviewed under *Wheeler* and related California case law.
11 (Answer at 43).

12 While an objection under *Wheeler* is the procedural equivalent
13 of an objection under *Batson* and the test under each is nearly
14 identical, one important distinction remains. A prima facie case
15 under *Wheeler* required the objecting party to "show a *strong*
16 *likelihood* that such persons are being challenged because of their
17 group association rather than because of any specific bias." *Wheeler*,
18 22 Cal. 3d at 280 (emphasis added). A prima facie case under *Batson*
19 requires only that the objecting party show "that the totality of the
20 relevant facts gives *rise to an inference* of discriminatory purpose."
21 *Batson*, 476 U.S. at 93-94 (emphasis added); see *Carrera*, 699 F.3d at
22 1110.

23 In 2003, the California Supreme Court concluded that the *Wheeler*
24 and *Batson* standards for making out a prima facie case were the same,
25 and that *Wheeler*'s "strong likelihood of discrimination" continued
26 to be the governing standard. See *People v. Johnson*, 30 Cal. 4th
27 1302, 1313-14 (2003). Two years later, the United States Supreme
28 Court disagreed with the California Supreme Court, holding that the

1 *Wheeler* and *Batson* standards are different, and that the less
2 demanding *Batson* standard controls. *Johnson*, 545 U.S. 162; see also
3 *Yee*, 463 F.3d at 896 n.1.

4 *Figueroa* and *Vasquez* were struck by the prosecutor on May 21,
5 1986, three weeks after *Batson* was decided. The Court need not decide
6 whether *Morris* was deficient by failing to object under *Batson* in
7 addition to *Wheeler* because, as explained below, assuming he should
8 have been aware of the landmark decision and objected under it,
9 Petitioner was not prejudiced because he would not have prevailed
10 even under the less demanding *Batson* standard. See *Strickland*, 466
11 U.S. at 697 ("If it is easier to dispose of an ineffectiveness claim
12 on the ground of lack of sufficient prejudice . . . that course
13 should be followed."); *Carrera*, 699 F.3d at 1107 (declining to
14 address whether counsel's performance was deficient by failing to
15 object to striking of prospective jurors because petitioner had not
16 met his burden of showing prejudice).

17 Because the Court is evaluating the likelihood of success of a
18 hypothetical *Batson* objection in the context of ineffective
19 assistance of counsel, Petitioner has the burden of showing under
20 *Strickland* that there is a reasonable probability he would have
21 prevailed on a *Batson* claim.²⁷ See *Carrera*, 699 F.3d at 1108.

22
23 ²⁷ On March 3, 2000, Judge Baird granted an evidentiary hearing
24 on Petitioner's *Batson* and ineffective assistance of claims as part of
25 a larger inquiry into guilt and penalty phase issues. In the order,
26 Judge Baird stated that although Petitioner's showing was "weak" and
27 "not compelling," she nonetheless concluded he had alleged a prima
28 facie case at least to prospective juror *Figueroa*. (See 3/3/00 Order at
94, 97, 100). However, Judge Baird was clear that this determination
was made without review of relevant portions of the state court
transcripts and it was largely based on the fact that the Respondent
had only alleged generic conclusions instead of specific non-
discriminatory reasons for exercising the peremptory challenges. (*Id.*
at 96-99). Judge Baird left open the possibility that Respondent could

1 At the outset, the Court notes that Petitioner has not alleged
2 how many jurors the prosecutor struck with a peremptory challenge,
3 how many of those jurors were Hispanic, how many of the jurors in the
4 venire were Hispanic, and how many Hispanic jurors actually sat on
5 his jury. Although a statistical analysis is not required, and
6 "[t]here is no magic number of challenged jurors" that automatically
7 establishes a prima facie case, *see United States v. Chinchilla*, 874
8 F.2d 695, 698 (9th Cir. 1989), courts have found it helpful in
9 evaluating a prima facie showing whether there is a statistical
10 showing that a party's peremptory strikes disproportionately affected
11 jurors of a particular race. *See Miller-El v. Cockrell*, 537 U.S. 322,
12 343, 345 (2003) ("*Miller-El I*"); *see also Boyd v. Newland*, 467 F.3d
13 1139, 1147 (9th Cir. 2006). Here, no such statistical disparity has
14 been alleged by Petitioner.

15 Rather, Petitioner bases his claim on the argument that the
16 prospective jurors's statements during voir dire did not provide
17 valid reasons for striking them, especially considering their answers
18 were not distinctive from answers provided by seated jurors. (Memo
19 at 24-30; Reply 35-41).

20 In evaluating whether Morris could have shown a prima facie case
21 that there was an inference of discriminatory purpose, courts may
22 examine whether the record suggests non-discriminatory reasons for
23 striking the prospective jurors. *Carrera*, 699 F.3d at 1108, 1111.
24 Further, a comparative analysis of jurors struck and those remaining

25 still rebut the prima facie showing on a motion for summary judgment
26 with citation to specific facts in the record. (*Id.* at 99, 100 n.39,
27 101). Because the evidentiary hearing contemplated by that order was
28 vacated on January 26, 2012, and Respondent has provided the necessary
factual and legal support to rebut Petitioner's claim in the Response,
the Court's prior determination no longer has bearing on whether
Petitioner has established a prima facie case.

1 is a "well-established tool" for exploring the possibility that
2 facially race-neutral reasons are a pretext for discrimination. See
3 *Turner v. Marshall*, 121 F.3d 1248, 1251-52 (9th Cir. 1997), overruled
4 on other grounds by *Tolbert v. Page*, 182 F.3d 677, 685 (9th Cir.
5 1999) (en banc); *Miller-El v. Dretke*, 545 U.S. 231, 241 (2005)
6 ("Miller-El II"). In *Boyd*, 467 F.3d at 1139, the Ninth Circuit
7 suggested that a comparative juror analysis should be undertaken at
8 the first step of *Batson* because such an analysis assists in the
9 determination of whether the totality of the circumstances gives rise
10 to an inference of discrimination. *Id.* at 1148-49. This is true even
11 where, as here, a comparative analysis is presented for the first
12 time in federal court. *Id.*; see also *Crittenden v. Ayers*, 624 F.3d
13 943, 956 (9th Cir. 2010) (employing a comparative juror analysis for
14 the first time in federal habeas proceedings to find that the
15 defendant made a prima facie showing); *Kesser v. Cambra*, 465 F.3d
16 351, 360 n.2 (9th Cir. 2006) (en banc).²⁸

17 The Court will therefore examine whether the record suggests
18 non-discriminatory reasons for striking the prospective jurors and
19 whether a comparative analysis reveals an inference of
20 discrimination.

21 //

22 **a. Valerie Figueroa**

23 The record shows that prospective juror Figueroa expressed
24 concerns about her ability to impose the death penalty, and admitted

25
26 ²⁸ California courts, on the other hand, have concluded that a
27 comparative analysis cannot be raised for the first time on appeal, and
28 such an analysis is a *Batson* step-three tool that reviewing courts need
not employ in a *Batson* step-one review. See, e.g., *People v. Taylor*, 48
Cal. 4th 574, 616-17 (2010); *People v. Lenix*, 44 Cal. 4th 602, 624
(2008).

1 to the prosecutor that she could not. When the prospective juror was
2 first asked by Morris about her viewpoints on the death penalty, she
3 said "right offhand I couldn't say. I'm for it. And at times . . .
4 there's no way you can. How can you have the right to kill somebody
5 . . . to take that into your hand and wish for him to be put away.
6 I -- I can't say. I need to have my burden of proof." (RT at 245).
7 She also stated that, if presented with two forms of punishment, the
8 death penalty or life without the possibility of parole, she would
9 "go for life without parole," but then admitted that she could vote
10 for the death penalty. (RT at 247-48). Upon questioning from the
11 prosecutor, she said she was "in favor" of the death penalty. (RT at
12 251). The prosecutor then pressed her on the issue, and Figueroa
13 stated that she could not render a verdict imposing the death
14 penalty, even if the facts and law warranted it. (RT at 257-58).

15 At that point, the prosecutor brought up the possibility of a
16 challenge for cause, and the judge told him that they would discuss
17 it outside the presence of the prospective juror. (RT at 258). The
18 trial court then appeared to deny a for cause challenge to the juror.
19 (RT at 259). Later, the prosecutor exercised a peremptory strike
20 against Valerie Figueroa. (RT at 2469).

21 A prospective juror's answers during voir dire, including her
22 admission that she could not impose the death penalty even where the
23 facts and law warranted it, is a valid, race-neutral,
24 nondiscriminatory reason for striking the juror. See *Carerra*, 699
25 F.3d at 1108 (in evaluating whether counsel was ineffective by
26 failing to object to striking of prospective juror, record suggested
27 there was an "obvious non-discriminatory reason" for striking the
28 juror when she "told the court at the beginning of her voir dire that

1 she could not impose the death penalty, though she later said that
2 she could do so").

3 In Petitioner's comparative analysis, he contends that
4 Figueroa's "family situation, employment status, and lack of prior
5 jury experience fail to distinguish her from the seated and alternate
6 jurors." (Memo at 25). However, Petitioner fails to show that
7 Figueroa's admission that she could not impose the death penalty
8 compared to any answer provided by a seated juror. (Memo at 25; Reply
9 at 35-37). In Petitioner's comparative analysis of prospective juror
10 Vasquez (Memo at 26), he points out that alternate juror Meyer said
11 that his thoughts on the death penalty were "mainly whether I felt
12 that I, myself, would have the right to convict somebody and put the
13 penalty, the death penalty on them." (RT at 1197). He also said "I
14 don't know whether I would have the right, you know, inside me, the
15 feelings." (RT at 1198). But Meyer also made clear that he was not
16 saying he could not sit on a jury that had to make a death penalty
17 determination. (RT at 1198). Moreover, unlike Figueroa, he never said
18 he could not vote for death even where the facts and the law
19 supported it. The answers provided by Figueroa and the alternate
20 juror were not sufficiently comparable to raise an inference of
21 purposeful discrimination. See, e.g., *Briggs v. Grounds*, 682 F.3d
22 1165, 1175-76 (2012) (prospective juror's answers not comparable to
23 seated jurors who provided similar answers but did not express the
24 same level of ambivalence).

25 //

26 **b. Eugene Vasquez**

27 The record shows that prospective juror Vasquez had been charged
28 with drunk driving and was dishonest about it. During voir dire, the

1 trial judge asked Vasquez whether "you or any close friend or
2 relative . . . [has] ever been charged with crimes? And I'm not
3 talking about traffic tickets or anything like that. I'm talking
4 about something more serious." (RT at 2286). Vasquez confirmed that
5 the question included himself, and then responded "No." (RT at 2286).
6 He also denied ever having "any dealings with" the district
7 attorney's office. (RT at 2291). Later, the prosecutor told Vasquez
8 that he thought he hesitated when the judge asked him the question.
9 (RT at 2296). At that point Vasquez said "[w]ell, I have been
10 arrested for drunk driving" about 15 years ago. (RT at 2297). The
11 prosecutor explained that was what they were looking for when the
12 question was initially asked. (RT at 2297). Further questioning
13 revealed that Vasquez was not just arrested, but that he was charged
14 with the crime and went to court over the matter. (RT at 2297). The
15 prospective juror's prior drunk driving charge, and his dishonesty
16 about it, is a valid, race-neutral, nondiscriminatory reason for
17 striking the juror. See *Carerra*, 699 F.3d at 1108 (in evaluating
18 whether counsel was ineffective by failing to object to the striking
19 of prospective juror, record suggested there was an "obvious non-
20 discriminatory reason" for striking the prospective juror because her
21 son had a criminal record); *Cook v. LaMarque*, 593 F.3d 810, 823 (9th
22 Cir. 2010) (failure to report criminal experience is an "extremely
23 persuasive reason for using a peremptory challenge").

24 In Petitioner's comparative analysis, he contends that Vasquez
25 was no different than seated juror Goularte who "got a drunk driving
26 ticket" 15 or 16 years before Petitioner's trial (RT at 2042). (Memo
27 at 26). Also, Petitioner points to juror Parker, who was convicted
28 of obstructing a police officer in the line of duty for declining to

1 give an officer her license after being pulled over for speeding (RT
2 at 2373-74). (Memo at 26). However, neither juror was initially
3 dishonest about their prior offenses, as Vasquez was. In fact, they
4 were quite frank in their admission and discussion about their prior
5 offenses. Because neither juror was similar to Petitioner, a
6 comparative analysis does not assist him here.

7 The record also shows that prospective juror Vasquez had
8 difficulty expressing himself audibly and following directions from
9 the court, staff, and the prosecutor. Vasquez could not give audible
10 responses to at least sixteen questions (RT at 627, 629, 632, 634,
11 2285-86, 2288, 2292, 2298), and when he did respond he often merely
12 mumbled "um-hum" or "[m]m-hmm" (RT at 627-29, 633-34, 2289, 2291,
13 2294-95, 2297). Vasquez's inaudible answers continued after the court
14 reporter repeatedly indicated he could not be heard (RT at 628-29,
15 2291), the prosecutor commented on his "very soft voice" and told him
16 to "try and remember to speak up" (RT at 630), and even immediately
17 after the trial judge instructed him to "answer out loud" (RT at
18 2285). The record also shows that the prosecutor was concerned about
19 whether the juror could follow the law. When asked whether the
20 prospective juror could follow the law that one witness is sufficient
21 for the proof of any fact, Vasquez responded "I think so." (RT at
22 2295). The prosecutor pointed out that the juror seemed hesitant and
23 appeared that he was "not sure [he] want[ed] to go along with that
24 idea." (RT at 2295).

25 //

26 On this point, Petitioner does not allege Vasquez was comparable
27 to any other juror, but rather states that "[h]e simply had a quiet
28 voice." (Reply at 37). The prospective juror's inability to answer

1 audibly would have an obvious impact on his ability to perform the
2 necessary juror function of communicating and deliberating with other
3 jurors, and is valid, race-neutral, nondiscriminatory reason for
4 striking the prospective juror. See, e.g., *Taylor v. Sisto*, 449 F.
5 App'x 665, 667 (9th Cir. 2011) (prosecutor properly struck
6 prospective juror who was inexperienced and soft-spoken). Moreover,
7 the prosecutor could have reasonably concluded that Vasquez's
8 inability to follow the court's directions during voir dire meant he
9 would not be able to follow the court's instruction on the law, a
10 point that was highlighted when Vasquez hesitated about his ability
11 to follow the law that one witness is sufficient for the proof of any
12 fact. This is an obvious, non-discriminatory reason for striking the
13 juror. See *Briggs*, 682 F.3d at 1175-76 (prospective juror's
14 suggestion that she would hesitate to convict on the word of one
15 witness alone is a valid, race-neutral reason for striking her).

16 Because there were obvious, nondiscriminatory reasons for
17 striking prospective jurors Figueroa and Vasquez, and Petitioner's
18 comparative analysis also does not raise an inference of purposeful
19 discrimination, Petitioner has not shown that a prima facie case
20 could have been established under *Batson*. Thus, he has not met his
21 burden of showing under *Strickland* that there is a reasonable
22 probability he would have prevailed on a *Batson* claim. See *Carrera*,
23 699 F.3d at 1108, 1111. Morris was not ineffective by failing to
24 object to the striking of the prospective jurors.

25 //

26 **K. Cumulative Error (Claim X)**

27 "The cumulative error doctrine in habeas recognizes that, even
28 if no single error were prejudicial, where there are several

1 substantial errors, their cumulative effect may nevertheless be so
2 prejudicial as to require reversal." *Parle v. Runnels*, 387 F.3d 1030,
3 1045 (9th Cir. 2004) (internal quotation marks and citation omitted).

4 Petitioner contends that the cumulative impact of his claims
5 asserting prosecutorial misconduct, ineffective assistance of
6 counsel, and evidentiary and instructional errors had a cumulative
7 prejudicial effect. (Memo at 106-07; Reply 77-78). However, because
8 this Court has found no merit to Petitioner's claims, Petitioner has
9 not shown cumulative error. See *Hayes v. Ayers*, 632 F.3d 500, 524
10 (9th Cir. 2011) ("Because we conclude that no error of constitutional
11 magnitude occurred, no cumulative prejudice is possible."); *Mancuso*,
12 292 F.3d at 957 ("Because there is no single constitutional error in
13 this case, there is nothing to accumulate to a level of a
14 constitutional violation.").

15 **L. Appellate Review of Petitioner's Case (Claim UU)**

16 In Claim UU, Petitioner contends that the California Supreme
17 Court did not provide him with a fair consideration of his automatic
18 appeal. (Memo at 91-106). Petitioner contends that this is so because
19 that court affirms a high percentage of death penalty cases before
20 it. (Memo at 91). To support this conclusion, Petitioner outlines
21 much of the history of the California Supreme Court's judicial
22 composition, and cites articles and other sources for the proposition
23 that the pre-1987 state supreme court, led by Chief Justice Rose
24 Bird, and the post-1987 court led by Chief Justice Malcolm Lewis,
25 sharply diverged in their handling of death penalty cases. (Memo at
26 92-101). Petitioner notes Chief Justice Bird and two other justices
27 were removed from the court because of their anti-death penalty
28 views, and argues that they were replaced by unfair justices who were

1 aware of the threat that failure to "implement" the death penalty
2 would result in their own ouster. (Memo at 94-100). Petitioner also
3 reviews the California Supreme Court's affirmance rate in capital
4 cases from 2005-2011, and concludes that the court "institutionally
5 denies capital defendants fair review of their case on appeal." (Memo
6 at 102, 105).

7 Petitioner's claim fails for the reason he seems to recognize:
8 while contending that he "was tried, convicted and sentenced to death
9 under a statutory scheme that is defective," he acknowledges at the
10 same time that he obtained post-conviction relief and his death
11 sentence was reversed. (Memo at 91). Having obtained relief from the
12 penalty and the very court decision he complains about, Petitioner's
13 challenge to the review process is unfounded. To the extent
14 Petitioner maintains that the court, due to fear that justices may
15 be removed, was also unfair in addressing his non-penalty phase
16 issues, his claim fails. He has made no showing that the individual
17 justices who decided his case were influenced by some outside
18 political influence to decide it a certain way. *See Carpenter v.*
19 *Martel*, No. C 00-3706 MMC, 2011 WL 5444165, at *15 (N.D. Cal. Nov.
20 9, 2011) (rejecting argument that California Supreme Court denied
21 meaningful appellate review because justices were removed from the
22 court in 1986 where petitioner could not demonstrate the justices who
23 considered his case were in any manner influenced by the fear of some
24 future challenge and removal from the bench).

25 //

26 Furthermore, Petitioner does not dispute that he was appointed
27 counsel, his case was fully briefed and argued, and the state supreme
28 court issued a 93 page opinion addressing his issues in detail.

1 Despite Petitioner's claim of overall bias and unfairness of court,
2 he garnered two dissenting votes. *Fierro*, 1 Cal. 4th at 255-66.
3 Petitioner also petitioned for rehearing, and again two justices
4 indicated he should be afforded relief.²⁹ *Id.* at 266. There is nothing
5 in this process indicating that the California Supreme court did not
6 meaningfully consider the claims, and Petitioner has pointed to no
7 error in the California Supreme court's opinion that this Court has
8 concluded warrants relief. See *Rowland v. Chappell*, No. C 94-3037
9 WHA, 2012 WL 4715262, at *33 (N.D. Cal. Oct. 2, 2012) ("there is
10 nothing in the California Supreme Court's lengthy and exhaustive
11 opinion on direct review indicating it did not meaningfully consider
12 petitioner's claims"); *Carpenter*, 2011 WL 5444165, at *14. Moreover,
13 the Ninth Circuit has stated that California's death penalty statute
14 "ensures meaningful appellate review." *Williams v. Calderon*, 52 F.3d
15 1465, 1484 (9th Cir. 1995).

16 Finally, because Petitioner was initially charged and convicted
17 of death, he received the benefit of automatic review by the state
18 high court. Had Petitioner received a lesser penalty, he would not
19 have been guaranteed review by the state supreme court,³⁰ the final
20 arbiter of his state law issues. See *Bates v. Jones*, 131 F.3d 843,
21

22
23 ²⁹ It is worth repeating that the very court Petitioner contends
24 was institutionally unfair later issued the order to show cause,
25 returnable in the state superior court, that ultimately led to a grant
26 of habeas relief and vacating of his death sentence under *Atkins v. Virginia*, 536 U.S. 304 (2002). See Petitioner's 10/29/10 Status Report
Following State Abeyance Proceedings, Ex. B; *In re Fierro*, No. S116793
(Cal. March 16, 2005) (order to show cause), text available at
<http://appellatecases.courtinfo.ca.gov/>.

27 ³⁰ Review in the California Supreme Court is automatic for capital
28 cases and discretionary for non-capital cases. *Fierro*, 1 Cal. 4th at
200 (citing Cal. Penal Code § 1239(b)); *California v. Freeman*, 488 U.S.
1311, 1312 (1989).

1 858 (9th Cir. 1997) (Rymer, J., concurring) ("The California Supreme
2 Court . . . [is] the final arbiter of state law, and a court quite
3 competent to decide federal constitutional law"); *Auto Equity*
4 *Sales, Inc. v. Superior Court*, 57 Cal. 2d 450, 455 (1962). Moreover,
5 he would not have benefitted from the heightened scrutiny of review
6 applicable to death penalty cases. See, e.g., *United States v. Mills*,
7 446 F. Supp. 2d 1115, 1140 (C.D. Cal. 2006) ("Because the death
8 penalty is uniquely different in its finality and severity, increased
9 scrutiny is required at every step of the capital process to ensure
10 that death is the appropriate penalty."); *Harmelin v. Michigan*, 501
11 U.S. 957, 994 (1991). Having profited from enhanced scrutiny, and
12 having utilized the very court he criticizes to obtain relief from
13 the ultimate punishment, Petitioner's argument that he was not
14 afforded meaningful review is completely without merit.

15
16 **V. Recommendation**

17 For the reasons stated above, it is recommended that the
18 Petition be **DENIED**.

19
20 DATED: March 22, 2013

21
22 

23 Marc L. Goldman
24 United States Magistrate Judge
25
26
27
28

Appendix D

George H. King
United States District Judge

Appendix E

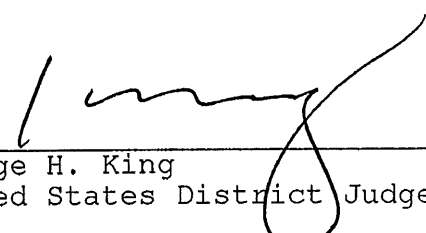
1
2
3
4
5
6
7
8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
10 WESTERN DIVISION

11 DAVID REY FIERRO,
12 Petitioner,
13 v.
14 GREG LEWIS, WARDEN,
15 Respondent.
16 _____

) Case No. CV 94-3198 GHK (AJW)
)
)
)
) JUDGMENT
)
)
)
)
)

17 It is hereby adjudged that the petition for a writ of habeas
18 corpus is denied.
19

20 Dated: 6/17/14
21

22 
23 _____
24 George H. King
25 United States District Judge
26
27
28

Appendix F

(June 25, 1948, ch. 646, 62 Stat. 967; May 24, 1949, ch. 139, §113, 63 Stat. 105; Oct. 31, 1951, ch. 655, §52, 65 Stat. 727.)

HISTORICAL AND REVISION NOTES

1948 ACT

Based on title 28, U.S.C., 1940 ed., §§463(a) and 466 (Mar. 10, 1908, ch. 76, 36 Stat. 40; Feb. 13, 1925, ch. 229, §§6, 13, 43 Stat. 940, 942; June 29, 1938, ch. 806, 52 Stat. 1232).

This section consolidates paragraph (a) of section 463, and section 466 of title 28, U.S.C., 1940 ed.

The last two sentences of section 463(a) of title 28, U.S.C., 1940 ed., were omitted. They were repeated in section 452 of title 28, U.S.C., 1940 ed. (See reviser's note under section 2241 of this title.)

Changes were made in phraseology.

1949 ACT

This section corrects a typographical error in the second paragraph of section 2253 of title 28.

AMENDMENTS

1951—Act Oct. 31, 1951, substituted “to remove, to another district or place for commitment or trial, a person charged with a criminal offense against the United States, or to test the validity of his” for “of removal issued pursuant to section 3042 of Title 18 or the” in second par.

1949—Act May 24, 1949, substituted “3042” for “3041” in second par.

FEDERAL RULES OF CRIMINAL PROCEDURE

Commitment to another district; removal, see Rule 40, Title 18, Appendix, Crimes and Criminal Procedure.

§ 2254. State custody; remedies in Federal courts

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

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(f) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(June 25, 1948, ch. 646, 62 Stat. 967; Nov. 2, 1966, Pub. L. 89-711, §2, 80 Stat. 1105.)

HISTORICAL AND REVISION NOTES

This new section is declaratory of existing law as affirmed by the Supreme Court. (See *Ex parte Hawk*, 1944, 64 S. Ct. 448, 321, U.S. 114, 88L. Ed. 572.)

SENATE REVISION AMENDMENTS

Senate amendment to this section, Senate Report No. 1559, amendment No. 47, has three declared purposes, set forth as follows:

"The first is to eliminate from the prohibition of the section applications in behalf of prisoners in custody under authority of a State officer but whose custody has not been directed by the judgment of a State court. If the section were applied to applications by persons detained solely under authority of a State officer it would unduly hamper Federal courts in the protection of Federal officers prosecuted for acts committed in the course of official duty.

"The second purpose is to eliminate, as a ground of Federal jurisdiction to review by habeas corpus judgments of State courts, the proposition that the State court has denied a prisoner a 'fair adjudication of the legality of his detention under the Constitution and laws of the United States.' The Judicial Conference believes that this would be an undesirable ground for Federal jurisdiction in addition to exhaustion of State remedies or lack of adequate remedy in the State courts because it would permit proceedings in the Federal court on this ground before the petitioner had exhausted his State remedies. This ground would, of course, always be open to a petitioner to assert in the Federal court after he had exhausted his State remedies or if he had no adequate State remedy.

"The third purpose is to substitute detailed and specific language for the phrase 'no adequate remedy available.' That phrase is not sufficiently specific and precise, and its meaning should, therefore, be spelled out in more detail in the section as is done by the amendment."

AMENDMENTS

1966—Pub. L. 89-711 substituted "Federal courts" for "State Courts" in section catchline, added subsec. (a), designated existing paragraphs as subsecs. (b) and (c), and added subsecs. (d) to (f).

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 18 section 3006A; title 21 section 848.

APPROVAL AND EFFECTIVE DATE OF RULES GOVERNING SECTION 2254 CASES AND SECTION 2255 PROCEEDINGS FOR UNITED STATES DISTRICT COURTS

Pub. L. 94-426, §1, Sept. 28, 1976, 90 Stat. 1334, provided: "That the rules governing section 2254 cases in the United States district courts and the rules governing section 2255 proceedings for the United States district courts, as proposed by the United States Supreme Court, which were delayed by the Act entitled 'An Act to delay the effective date of certain proposed amendments to the Federal Rules of Criminal Procedure and certain other rules promulgated by the United States Supreme Court' (Public Law 94-349), are approved with the amendments set forth in section 2 of this Act and shall take effect as so amended, with respect to petitions under section 2254 and motions under section 2255 of title 28 of the United States Code filed on or after February 1, 1977."

POSTPONEMENT OF EFFECTIVE DATE OF PROPOSED RULES GOVERNING PROCEEDINGS UNDER SECTIONS 2254 AND 2255 OF THIS TITLE

Rules and forms governing proceedings under sections 2254 and 2255 of this title proposed by Supreme Court order of Apr. 26, 1976, effective 30 days after adjournment sine die of 94th Congress, or until and to the extent approved by Act of Congress, whichever is earlier, see section 2 of Pub. L. 94-349, set out as a note under section 2074 of this title.

RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS

(Effective February 1, 1977, as amended to January 16, 1996)

Rule

1. Scope of rules.
2. Petition.
3. Filing petition.
4. Preliminary consideration by judge.
5. Answer; contents.
6. Discovery.
7. Expansion of record.
8. Evidentiary hearing.
9. Delayed or successive petitions.
10. Powers of magistrates.
11. Federal Rules of Civil Procedure; extent of applicability.

APPENDIX OF FORMS

Model form for use in applications for habeas corpus under 28 U.S.C. §2254.

Model form for use in 28 U.S.C. §2254 cases involving a Rule 9 issue.

EFFECTIVE DATE OF RULES; EFFECTIVE DATE OF 1975 AMENDMENT

Rules governing Section 2254 cases, and the amendments thereto by Pub. L. 94-426, Sept. 28, 1976, 90 Stat. 1334, effective with respect to petitions under section 2254 of this title and motions under section 2255 of this title filed on or after Feb. 1, 1977, see section 1 of Pub. L. 94-426, set out as a note above.

Rule 1. Scope of Rules

(a) APPLICABLE TO CASES INVOLVING CUSTODY PURSUANT TO A JUDGMENT OF A STATE COURT. These rules govern the procedure in the United States district courts on applications under 28 U.S.C. §2254:

(1) by a person in custody pursuant to a judgment of a state court, for a determination that such custody is in violation of the Constitution, laws, or treaties of the United States; and

(2) by a person in custody pursuant to a judgment of either a state or a federal court, who makes application for a determination that custody to which he may be subject in the future under a judgment of a state court will be in violation of the Constitution, laws, or treaties of the United States.

(b) OTHER SITUATIONS. In applications for habeas corpus in cases not covered by subdivision (a), these rules may be applied at the discretion of the United States district court.

ADVISORY COMMITTEE NOTE

Rule 1 provides that the habeas corpus rules are applicable to petitions by persons in custody pursuant to a judgment of a state court. See *Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973). Whether the rules ought to apply to other situations (e.g., person in active military service, *Glazier v. Hackel*, 440 F.2d 592 (9th Cir. 1971); or a reservist called to active duty but not reported, *Hammond v. Lenfest*, 398 F.2d 705 (2d Cir. 1968)) is left to the discretion of the court.

The basic scope of habeas corpus is prescribed by statute. 28 U.S.C. §2241(c) provides that the "writ of habeas corpus shall not extend to a prisoner unless * * * (h) is in custody in violation of the Constitution." 28 U.S.C. §2254 deals specifically with state custody, providing that habeas corpus shall apply only "in behalf of a person in custody pursuant to a judgment of a state court * * *."

In *Preiser v. Rodriguez*, *supra*, the court said: "It is clear . . . that the essence of habeas corpus is an attack by a person in custody upon the legality of that custody, and that the traditional function of the writ is to secure release from illegal custody." 411 U.S. at 484.

Initially the Supreme Court held that habeas corpus was appropriate only in those situations in which petitioner's claim would, if upheld, result in an immediate release from a present custody. *McNally v. Hill*, 293 U.S. 131 (1934). This was changed in *Peyton v. Rowe*, 391 U.S. 54 (1968), in which the court held that habeas corpus was a proper way to attack a consecutive sentence to be served in the future, expressing the view that consecutive sentences resulted in present custody under both judgments, not merely the one imposing the first sentence. This view was expanded in *Carafas v. LaVallee*, 391 U.S. 234 (1968), to recognize the propriety of habeas corpus in a case in which petitioner was in custody when the petition had been originally filed but had since been unconditionally released from custody. See also *Preiser v. Rodriguez*, 411 U.S. at 486 et seq.

Since *Carafas*, custody has been construed more liberally by the courts so as to make a § 2255 motion or habeas corpus petition proper in more situations. "In custody" now includes a person who is: on parole, *Jones v. Cunningham*, 371 U.S. 236 (1963); at large on his own recognizance but subject to several conditions pending execution of his sentence, *Hensley v. Municipal Court*, 411 U.S. 345 (1973); or released on bail after conviction pending final disposition of his case, *Lefkowitz v. Newsome*, 95 S.Ct. 886 (1975). See also *United States v. Re*, 372 F.2d 641 (2d Cir.), cert. denied, 388 U.S. 912 (1967) (on probation); *Walker v. North Carolina*, 262 F.Supp. 102 (W.D.N.C. 1966), aff'd per curiam, 372 F.2d 129 (4th Cir.), cert. denied, 388 U.S. 917 (1967) (recipient of a conditionally suspended sentence); *Burris v. Ryan*, 397 F.2d 563 (7th Cir. 1968); *Marden v. Purdy*, 409 F.2d 784 (5th Cir. 1969) (free on bail); *United States ex rel. Smith v. Dibella*, 314 F.Supp. 446 (D.Conn. 1970) (release on own recognizance); *Choung v. California*, 320 F.Supp. 625 (E.D.Cal. 1970) (federal stay of state court sentence); *United States ex rel. Meadows v. New York*, 428 F.2d 1176 (2d Cir. 1970), cert. denied, 401 U.S. 941 (1971) (subject to parole detainer warrant); *Capler v. City of Greenville*, 422 F.2d 299 (5th Cir. 1970) (released on appeal bond); *Glover v. North Carolina*, 301 F.Supp. 364 (E.D.N.C. 1969) (sentence served, but as convicted felon disqualified from engaging in several activities).

The courts are not unanimous in dealing with the above situations, and the boundaries of custody remain somewhat unclear. In *Morgan v. Thomas*, 321 F.Supp. 565 (S.D.Miss. 1970), the court noted:

It is axiomatic that actual physical custody or restraint is not required to confer habeas jurisdiction. Rather, the term is synonymous with restraint of liberty. The real question is how much restraint of one's liberty is necessary before the right to apply for the writ comes into play. * * *

It is clear however, that something more than moral restraint is necessary to make a case for habeas corpus.

321 F.Supp. at 573

Hammond v. Lenfest, 398 F.2d 705 (2d Cir. 1968), reviewed prior "custody" doctrine and reaffirmed a generalized flexible approach to the issue. In speaking about 28 U.S.C. § 2241, the first section in the habeas corpus statutes, the court said:

While the language of the Act indicates that a writ of habeas corpus is appropriate only when a petitioner is "in custody," * * * the Act "does not attempt to mark the boundaries of 'custody' nor in any way other than by use of that word attempt to limit the situations in which the writ can be used." * * * And, recent Supreme Court decisions have made clear that "[i]t [habeas corpus] is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose—the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty."

* * * "[B]esides physical imprisonment, there are other restraints on a man's liberty, restraints not shared by the public generally, which have been thought sufficient in the English-speaking world to support the issuance of habeas corpus."

398 F.2d at 710-711

There is, as of now, no final list of the situations which are appropriate for habeas corpus relief. It is not the intent of these rules or notes to define or limit "custody."

It is, however, the view of the Advisory Committee that claims of improper conditions of custody or confinement (not related to the propriety of the custody itself), can better be handled by other means such as 42 U.S.C. § 1983 and other related statutes. In *Withwording v. Swanson*, 404 U.S. 249 (1971), the court treated a habeas corpus petition by a state prisoner challenging the conditions of confinement as a claim for relief under 42 U.S.C. § 1983, the Civil Rights Act. Compare *Johnson v. Avery*, 393 U.S. 483 (1969).

The distinction between duration of confinement and conditions of confinement may be difficult to draw. Compare *Preiser v. Rodriguez*, 411 U.S. 475 (1973), with *Clutchette v. Proctor*, 497 F.2d 809 (9th Cir. 1974), modified, 510 F.2d 613 (1975).

Rule 2. Petition

(a) APPLICANTS IN PRESENT CUSTODY. If the applicant is presently in custody pursuant to the state judgment in question, the application shall be in the form of a petition for a writ of habeas corpus in which the state officer having custody of the applicant shall be named as respondent.

(b) APPLICANTS SUBJECT TO FUTURE CUSTODY. If the applicant is not presently in custody pursuant to the state judgment against which he seeks relief but may be subject to such custody in the future, the application shall be in the form of a petition for a writ of habeas corpus with an added prayer for appropriate relief against the judgment which he seeks to attack. In such a case the officer having present custody of the applicant and the attorney general of the state in which the judgment which he seeks to attack was entered shall each be named as respondents.

(c) FORM OF PETITION. The petition shall be in substantially the form annexed to these rules, except that any district court may by local rule require that petitions filed with it shall be in a form prescribed by the local rule. Blank petitions in the prescribed form shall be made available without charge by the clerk of the district court to applicants upon their request. It shall specify all the grounds for relief which are available to the petitioner and of which he has or by the exercise of reasonable diligence should have knowledge and shall set forth in summary form the facts supporting each of the grounds thus specified. It shall also state the relief requested. The petition shall be typewritten or legibly handwritten and shall be signed under penalty of perjury by the petitioner.

(d) PETITION TO BE DIRECTED TO JUDGMENTS OF ONE COURT ONLY. A petition shall be limited to the assertion of a claim for relief against the judgment or judgments of a single state court (sitting in a county or other appropriate political subdivision). If a petitioner desires to attack the validity of the judgments of two or more state courts under which he is in custody or may

be subject to future custody, as the case may be, he shall do so by separate petitions.

(e) RETURN OF INSUFFICIENT PETITION. If a petition received by the clerk of a district court does not substantially comply with the requirements of rule 2 or rule 3, it may be returned to the petitioner, if a judge of the court so directs, together with a statement of the reason for its return. The clerk shall retain a copy of the petition.

(As amended Pub. L. 94-426, §2(1), (2), Sept. 28, 1976, 90 Stat. 1334; Apr. 28, 1982, eff. Aug. 1, 1982.)

ADVISORY COMMITTEE NOTE

Rule 2 describes the requirements of the actual petition, including matters relating to its form, contents, scope, and sufficiency. The rule provides more specific guidance for a petitioner and the court than 28 U.S.C. §2242, after which it is patterned.

Subdivision (a) provides that an applicant challenging a state judgment, pursuant to which he is presently in custody, must make his application in the form of a petition for a writ of habeas corpus. It also requires that the state officer having custody of the applicant be named as respondent. This is consistent with 28 U.S.C. §2242, which says in part, "[Application for a writ of habeas corpus] shall allege * * * the name of the person who has custody over [the applicant] * * *." The proper person to be served in the usual case is either the warden of the institution in which the petitioner is incarcerated (*Sanders v. Bennett*, 148 F.2d 19 (D.C.Cir. 1945)) or the chief officer in charge of state penal institutions.

Subdivision (b) prescribes the procedure to be used for a petition challenging a judgment under which the petitioner will be subject to custody in the future. In this event the relief sought will usually not be released from present custody, but rather for a declaration that the judgment being attacked is invalid. Subdivision (b) thus provides for a prayer for "appropriate relief." It is also provided that the attorney general of the state of the judgment as well as the state officer having actual custody of the petitioner shall be named as respondents. This is appropriate because no one will have custody of the petitioner in the state of the judgment being attacked, and the habeas corpus action will usually be defended by the attorney general. The attorney general is in the best position to inform the court as to who the proper party respondent is. If it is not the attorney general, he can move for a substitution of party.

Since the concept of "custody" requisite to the consideration of a petition for habeas corpus has been enlarged significantly in recent years, it may be worthwhile to spell out the various situations which might arise and who should be named as respondent(s) for each situation.

(1) The applicant is in jail, prison, or other actual physical restraint due to the state action he is attacking. The named respondent shall be the state officer who has official custody of the petitioner (for example, the warden of the prison).

(2) The applicant is on probation or parole due to the state judgment he is attacking. The named respondents shall be the particular probation or parole officer responsible for supervising the applicant, and the official in charge of the parole or probation agency, or the state correctional agency, as appropriate.

(3) The applicant is in custody in any other manner differing from (1) and (2) above due to the effects of the state action he seeks relief from. The named respondent should be the attorney general of the state wherein such action was taken.

(4) The applicant is in jail, prison, or other actual physical restraint but is attacking a state action which will cause him to be kept in custody in the future rather than the government action under which he is presently confined. The named respondents shall be the state or federal officer who has official custody of him

at the time the petition is filed and the attorney general of the state whose action subjects the petitioner to future custody.

(5) The applicant is in custody, although not physically restrained, and is attacking a state action which will result in his future custody rather than the government action out of which his present custody arises. The named respondent(s) shall be the attorney general of the state whose action subjects the petitioner to future custody, as well as the government officer who has present official custody of the petitioner if there is such an officer and his identity is ascertainable.

In any of the above situations the judge may require or allow the petitioner to join an additional or different party as a respondent if to do so would serve the ends of justice.

As seen in rule 1 and paragraphs (4) and (5) above, these rules contemplate that a petitioner currently in federal custody will be permitted to apply for habeas relief from a state restraint which is to go into effect in the future. There has been disagreement in the courts as to whether they have jurisdiction of the habeas application under these circumstances (compare *Piper v. United States*, 306 F.Supp. 1259 (D.Conn. 1969), with *United States ex rel. Meadows v. New York*, 426 F.2d 1176 (2d Cir. 1970), cert. denied, 401 U.S. 941 (1971)). This rule seeks to make clear that they do have such jurisdiction.

Subdivision (c) provides that unless a district court requires otherwise by local rule, the petition must be in the form annexed to these rules. Having a standard prescribed form has several advantages. In the past, petitions have frequently contained mere conclusions of law, unsupported by any facts. Since it is the relationship of the facts to the claim asserted that is important, these petitions were obviously deficient. In addition, lengthy and often illegible petitions, arranged in no logical order, were submitted to judges who have had to spend hours deciphering them. For example, in *Passic v. Michigan*, 98 F.Supp. 1015, 1016 (E.D.Mich. 1951), the court dismissed a petition for habeas corpus, describing it as "two thousand pages of irrational, prolix and redundant pleadings * * *."

Administrative convenience, of benefit to both the court and the petitioner, results from the use of a prescribed form. Judge Hubert L. Will briefly described the experience with the use of a standard form in the Northern District of Illinois:

Our own experience, though somewhat limited, has been quite satisfactory. * * *

In addition, [petitions] almost always contain the necessary basic information * * *. Very rarely do we get the kind of hybrid federal-state habeas corpus petition with civil rights allegations thrown in which were not uncommon in the past. * * * [W]hen a real constitutional issue is raised it is quickly apparent * * *.

33 F.R.D. 363, 384

Approximately 65 to 70% of all districts have adopted forms or local rules which require answers to essentially the same questions as contained in the standard form annexed to these rules. All courts using forms have indicated the petitions are time-saving and more legible. The form is particularly helpful in getting information about whether there has been an exhaustion of state remedies or, at least, where that information can be obtained.

The requirement of a standard form benefits the petitioner as well. His assertions are more readily apparent, and a meritorious claim is more likely to be properly raised and supported. The inclusion in the form of the ten most frequently raised grounds in habeas corpus petitions is intended to encourage the applicant to raise all his asserted grounds in one petition. It may better enable him to recognize if an issue he seeks to raise is cognizable under habeas corpus and hopefully inform him of those issues as to which he must first exhaust his state remedies.

Some commentators have suggested that the use of forms is of little help because the questions usually are

too general, amounting to little more than a restatement of the statute. They contend the blanks permit a prisoner to fill in the same ambiguous answers he would have offered without the aid of a form. See Comment, Developments in the Law—Federal Habeas Corpus, 83 Harv.L.Rev. 1038, 1177–1178 (1970). Certainly, as long as the statute requires factual pleading, the adequacy of a petition will continue to be affected largely by the petitioner's intelligence and the legal advice available to him. On balance, however, the use of forms has contributed enough to warrant mandating their use.

Giving the petitioner a list of often-raised grounds may, it is said, encourage perjury. See Comment, Developments in the Law—Federal Habeas Corpus, 83 Harv.L.Rev. 1038, 1178 (1970). Most inmates are aware of, or have access to, some common constitutional grounds for relief. Thus, the risk of perjury is not likely to be substantially increased and the benefit of the list for some inmates seems sufficient to outweigh any slight risk that perjury will increase. There is a penalty for perjury, and this would seem the most appropriate way to try to discourage it.

Legal assistance is increasingly available to inmates either through paraprofessional programs involving law students or special programs staffed by members of the bar. See Jacob and Sharma, Justice After Trial: Prisoners' Need for Legal Services in the Criminal-Correctional Process, 18 Kan.L.Rev. 493 (1970). In these situations, the prescribed form can be filled out more competently, and it does serve to ensure a degree of uniformity in the manner in which habeas corpus claims are presented.

Subdivision (c) directs the clerk of the district court to make available to applicants upon request, without charge, blank petitions in the prescribed form.

Subdivision (c) also requires that all available grounds for relief be presented in the petition, including those grounds of which, by the exercise of reasonable diligence, the petitioner should be aware. This is reinforced by rule 9(b), which allows dismissal of a second petition which fails to allege new grounds or, if new grounds are alleged, the judge finds an inexcusable failure to assert the ground in the prior petition.

Both subdivision (c) and the annexed form require a legibly handwritten or typewritten petition. As required by 28 U.S.C. § 2242, the petition must be signed and sworn to by the petitioner (or someone acting in his behalf).

Subdivision (d) provides that a single petition may assert a claim only against the judgment or judgments of a single state court (i.e., a court of the same county or judicial district or circuit). This permits, but does not require, an attack in a single petition on judgments based upon separate indictments or on separate counts even though sentences were imposed on separate days by the same court. A claim against a judgment of a court of a different political subdivision must be raised by means of a separate petition.

Subdivision (e) allows the clerk to return an insufficient petition to the petitioner, and it must be returned if the clerk is so directed by a judge of the court. Any failure to comply with the requirements of rule 2 or 3 is grounds for insufficiency. In situations where there may be arguable noncompliance with another rule, such as rule 9, the judge, not the clerk, must make the decision. If the petition is returned it must be accompanied by a statement of the reason for its return. No petitioner should be left to speculate as to why or in what manner his petition failed to conform to these rules.

Subdivision (e) also provides that the clerk shall retain one copy of the insufficient petition. If the prisoner files another petition, the clerk will be in a better position to determine the sufficiency of the new petition. If the new petition is insufficient, comparison with the prior petition may indicate whether the prisoner has failed to understand the clerk's prior explanation for its insufficiency, so that the clerk can make another, hopefully successful, attempt at transmitting

this information to the petitioner. If the petitioner insists that the original petition was in compliance with the rules, a copy of the original petition is available for the consideration of the judge. It is probably better practice to make a photocopy of a petition which can be corrected by the petitioner, thus saving the petitioner the task of completing an additional copy.

1982 AMENDMENT

Subdivision (c). The amendment takes into account 28 U.S.C. § 1746, enacted after adoption of the § 2254 rules. Section 1746 provides that in lieu of an affidavit an unsworn statement may be given under penalty of perjury in substantially the following form if executed within the United States, its territories, possessions or commonwealths: "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature)." The statute is "intended to encompass prisoner litigation," and the statutory alternative is especially appropriate in such cases because a notary might not be readily available. *Carter v. Clark*, 616 F.2d 228 (5th Cir. 1980). The § 2254 forms have been revised accordingly.

AMENDMENTS

1976—Subd. (c). Pub. L. 94-426, § 2(1), inserted "substantially" after "The petition shall be in", and struck out requirement that the petition follow the prescribed form.

Subd. (e). Pub. L. 94-426, § 2(2), inserted "substantially" after "district court does not", and struck out provision which permitted the clerk to return a petition for noncompliance without a judge so directing.

Rule 3. Filing Petition

(a) PLACE OF FILING; COPIES; FILING FEE. A petition shall be filed in the office of the clerk of the district court. It shall be accompanied by two conformed copies thereof. It shall also be accompanied by the filing fee prescribed by law unless the petitioner applies for and is given leave to prosecute the petition in forma pauperis. If the petitioner desires to prosecute the petition in forma pauperis, he shall file the affidavit required by 28 U.S.C. § 1915. In all such cases the petition shall also be accompanied by a certificate of the warden or other appropriate officer of the institution in which the petitioner is confined as to the amount of money or securities on deposit to the petitioner's credit in any account in the institution, which certificate may be considered by the court in acting upon his application for leave to proceed in forma pauperis.

(b) FILING AND SERVICE. Upon receipt of the petition and the filing fee, or an order granting leave to the petitioner to proceed in forma pauperis, and having ascertained that the petition appears on its face to comply with rules 2 and 3, the clerk of the district court shall file the petition and enter it on the docket in his office. The filing of the petition shall not require the respondent to answer the petition or otherwise move with respect to it unless so ordered by the court.

ADVISORY COMMITTEE NOTE

Rule 3 sets out the procedures to be followed by the petitioner and the court in filing the petition. Some of its provisions are currently dealt with by local rule or practice, while others are innovations. Subdivision (a) specifies the petitioner's responsibilities. It requires that the petition, which must be accompanied by two conformed copies thereof, be filed in the office of the clerk of the district court. The petition must be accompanied by the filing fee prescribed by law (presently \$5;

see 28 U.S.C. § 1914(a)), unless leave to prosecute the petition in forma pauperis is applied for and granted. In the event the petitioner desires to prosecute the petition in forma pauperis, he must file the affidavit required by 28 U.S.C. § 1915, together with a certificate showing the amount of funds in his institutional account.

Requiring that the petition be filed in the office of the clerk of the district court provides an efficient and uniform system of filing habeas corpus petitions.

Subdivision (b) requires the clerk to file the petition. If the filing fee accompanies the petition, it may be filed immediately, and, if not, it is contemplated that prompt attention will be given to the request to proceed in forma pauperis. The court may delegate the issuance of the order to the clerk in those cases in which it is clear from the petition that there is full compliance with the requirements to proceed in forma pauperis.

Requiring the copies of the petition to be filed with the clerk will have an impact not only upon administrative matters, but upon more basic problems as well. In districts with more than one judge, a petitioner under present circumstances may send a petition to more than one judge. If no central filing system exists for each district, two judges may independently take different action on the same petition. Even if the action taken is consistent, there may be needless duplication of effort.

The requirement of an additional two copies of the form of the petition is a current practice in many courts. An efficient filing system requires one copy for use by the court (central file), one for the respondent (under 3(b)), the respondent receives a copy of the petition whether an answer is required or not), and one for petitioner's counsel, if appointed. Since rule 2 provides that blank copies of the petition in the prescribed form are to be furnished to the applicant free of charge, there should be no undue burden created by this requirement.

Attached to copies of the petition supplied in accordance with rule 2 is an affidavit form for the use of petitioners desiring to proceed in forma pauperis. The form requires information concerning the petitioner's financial resources.

In forma pauperis cases, the petition must also be accompanied by a certificate indicating the amount of funds in the petitioner's institution account. Usually the certificate will be from the warden. If the petitioner is on probation or parole, the court might want to require a certificate from the supervising officer. Petitions by persons on probation or parole are not numerous enough, however, to justify making special provision for this situation in the text of the rule.

The certificate will verify the amount of funds credited to the petitioner in an institution account. The district court may by local rule require that any amount credited to the petitioner, in excess of a stated maximum, must be used for the payment of the filing fee. Since prosecuting an action in forma pauperis is a privilege (see *Smart v. Heinze*, 347 F.2d 114, 116 (9th Cir. 1965)), it is not to be granted when the petitioner has sufficient resources.

Subdivision (b) details the clerk's duties with regard to filing the petition. If the petition does not appear on its face to comply with the requirements of rules 2 and 3, it may be returned in accordance with rule 2(e). If it appears to comply, it must be filed and entered on the docket in the clerk's office. However, under this subdivision the respondent is not required to answer or otherwise move with respect to the petition unless so ordered by the court.

Rule 4. Preliminary Consideration by Judge

The original petition shall be presented promptly to a judge of the district court in accordance with the procedure of the court for the assignment of its business. The petition shall be examined promptly by the judge to whom it is

assigned. If it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court, the judge shall make an order for its summary dismissal and cause the petitioner to be notified. Otherwise the judge shall order the respondent to file an answer or other pleading within the period of time fixed by the court or to take such other action as the judge deems appropriate. In every case a copy of the petition and any order shall be served by certified mail on the respondent and the attorney general of the state involved.

ADVISORY COMMITTEE NOTE

Rule 4 outlines the options available to the court after the petition is properly filed. The petition must be promptly presented to and examined by the judge to whom it is assigned. If it plainly appears from the face of the petition and any exhibits attached thereto that the petitioner is not entitled to relief in the district court, the judge must enter an order summarily dismissing the petition and cause the petitioner to be notified. If summary dismissal is not ordered, the judge must order the respondent to file an answer or to otherwise plead to the petition within a time period to be fixed in the order.

28 U.S.C. § 2243 requires that the writ shall be awarded, or an order to show cause issued, "unless it appears from the application that the applicant or person detained is not entitled thereto." Such consideration may properly encompass any exhibits attached to the petition, including, but not limited to, transcripts, sentencing records, and copies of state court opinions. The judge may order any of these items for his consideration if they are not yet included with the petition. See 28 U.S.C. § 753(f) which authorizes payment for transcripts in habeas corpus cases.

It has been suggested that an answer should be required in every habeas proceeding, taking into account the usual petitioner's lack of legal expertise and the important functions served by the return. See Developments in the Law—Federal Habeas Corpus, 83 Harv.L.Rev. 1038, 1178 (1970). However, under § 2243 it is the duty of the court to screen out frivolous applications and eliminate the burden that would be placed on the respondent by ordering an unnecessary answer. *Allen v. Perini*, 424 F.2d 134, 141 (6th Cir. 1970). In addition, "notice" pleading is not sufficient, for the petition is expected to state facts that point to a "real possibility of constitutional error." See *Aubut v. State of Maine*, 431 F.2d 688, 689 (1st Cir. 1970).

In the event an answer is ordered under rule 4, the court is accorded greater flexibility than under § 2243 in determining within what time period an answer must be made. Under § 2243, the respondent must make a return within three days after being so ordered, with additional time of up to forty days allowed under the Federal Rules of Civil Procedure, Rule 81(a)(2), for good cause. In view of the widespread state of work overload in prosecutors' offices (see, e.g., *Allen*, 424 F.2d at 141), additional time is granted in some jurisdictions as a matter of course. Rule 4, which contains no fixed time requirement, gives the court the discretion to take into account various factors such as the respondent's workload and the availability of transcripts before determining a time within which an answer must be made.

Rule 4 authorizes the judge to "take such other action as the judge deems appropriate." This is designed to afford the judge flexibility in a case where either dismissal or an order to answer may be inappropriate. For example, the judge may want to authorize the respondent to make a motion to dismiss based upon information furnished by respondent, which may show that petitioner's claims have already been decided on the merits in a federal court; that petitioner has failed to exhaust state remedies; that the petitioner is not in custody within the meaning of 28 U.S.C. § 2254; or that

a decision in the matter is pending in state court. In these situations, a dismissal may be called for on procedural grounds, which may avoid burdening the respondent with the necessity of filing an answer on the substantive merits of the petition. In other situations, the judge may want to consider a motion from respondent to make the petition more certain. Or the judge may want to dismiss some allegations in the petition, requiring the respondent to answer only those claims which appear to have some arguable merit.

Rule 4 requires that a copy of the petition and any order be served by certified mail on the respondent and the attorney general of the state involved. See 28 U.S.C. § 2252. Presently, the respondent often does not receive a copy of the petition unless the court directs an answer under 28 U.S.C. § 2243. Although the attorney general is served, he is not required to answer if it is more appropriate for some other agency to do so. Although the rule does not specifically so provide, it is assumed that copies of the court orders to respondent will be mailed to petitioner by the court.

Rule 5. Answer; Contents

The answer shall respond to the allegations of the petition. In addition it shall state whether the petitioner has exhausted his state remedies including any post-conviction remedies available to him under the statutes or procedural rules of the state and including also his right of appeal both from the judgment of conviction and from any adverse judgment or order in the post-conviction proceeding. The answer shall indicate what transcripts (of pretrial, trial, sentencing, and post-conviction proceedings) are available, when they can be furnished, and also what proceedings have been recorded and not transcribed. There shall be attached to the answer such portions of the transcripts as the answering party deems relevant. The court on its own motion or upon request of the petitioner may order that further portions of the existing transcripts be furnished or that certain portions of the non-transcribed proceedings be transcribed and furnished. If a transcript is neither available nor procurable, a narrative summary of the evidence may be submitted. If the petitioner appealed from the judgment of conviction or from an adverse judgment or order in a post-conviction proceeding, a copy of the petitioner's brief on appeal and of the opinion of the appellate court, if any, shall also be filed by the respondent with the answer.

ADVISORY COMMITTEE NOTE

Rule 5 details the contents of the "answer". (This is a change in terminology from "return," which is still used below when referring to prior practice.) The answer plays an obviously important role in a habeas proceeding:

The return serves several important functions: it permits the court and the parties to uncover quickly the disputed issues; it may reveal to the petitioner's attorney grounds for release that the petitioner did not know; and it may demonstrate that the petitioner's claim is wholly without merit.

Developments in the Law—Federal Habeas Corpus, 83 Harv.L.Rev. 1083, 1178 (1970).

The answer must respond to the allegations of the petition. While some districts require this by local rule (see, e.g., E.D.N.C.R. 17(B)), under 28 U.S.C. § 2243 little specificity is demanded. As a result, courts occasionally receive answers which contain only a statement certifying the true cause of detention, or a series of delaying motions such as motions to dismiss. The requirement of the proposed rule that the "answer shall

respond to the allegations of the petition" is intended to ensure that a responsive pleading will be filed and thus the functions of the answer fully served.

The answer must also state whether the petitioner has exhausted his state remedies. This is a prerequisite to eligibility for the writ under 28 U.S.C. § 2254(b) and applies to every ground the petitioner raises. Most form petitions now in use contain questions requiring information relevant to whether the petitioner has exhausted his remedies. However, the exhaustion requirement is often not understood by the unrepresented petitioner. The attorney general has both the legal expertise and access to the record and thus is in a much better position to inform the court on the matter of exhaustion of state remedies. An alleged failure to exhaust state remedies as to any ground in the petition may be raised by a motion by the attorney general, thus avoiding the necessity of a formal answer as to that ground.

The rule requires the answer to indicate what transcripts are available, when they can be furnished, and also what proceedings have been recorded and not transcribed. This will serve to inform the court and petitioner as to what factual allegations can be checked against the actual transcripts. The transcripts include pretrial transcripts relating, for example, to pretrial motions to suppress; transcripts of the trial or guilty plea proceeding; and transcripts of any post-conviction proceedings which may have taken place. The respondent is required to furnish those portions of the transcripts which he believes relevant. The court may order the furnishing of additional portions of the transcripts upon the request of petitioner or upon the court's own motion.

Where transcripts are unavailable, the rule provides that a narrative summary of the evidence may be submitted.

Rule 5 (and the general procedure set up by this entire set of rules) does not contemplate a traverse to the answer, except under special circumstances. See advisory committee note to rule 9. Therefore, the old common law assumption of verity of the allegations of a return until impeached, as codified in 28 U.S.C. § 2248, is no longer applicable. The meaning of the section, with its exception to the assumption "to the extent that the judge finds from the evidence that they (the allegations) are not true," has given attorneys and courts a great deal of difficulty. It seems that when the petition and return pose an issue of fact, no traverse is required; *Stewart v. Overholser*, 186 F.2d 339 (D.C. Cir. 1950).

We read § 2248 of the Judicial Code as not requiring a traverse when a factual issue has been clearly framed by the petition and the return or answer. This section provides that the allegations of a return or answer to an order to show cause shall be accepted as true if not traversed, except to the extent the judge finds from the evidence that they are not true. This contemplates that where the petition and return or answer do present an issue of fact material to the legality of detention, evidence is required to resolve that issue despite the absence of a traverse. This reference to evidence assumes a hearing on issues raised by the allegations of the petition and the return or answer to the order to show cause.

186 F.2d at 342, n. 5

In actual practice, the traverse tends to be a mere pro forma refutation of the return, serving little if any expository function. In the interests of a more streamlined and manageable habeas corpus procedure, it is not required except in those instances where it will serve a truly useful purpose. Also, under rule 11 the court is given the discretion to incorporate Federal Rules of Civil Procedure when appropriate, so civil rule 15(a) may be used to allow the petitioner to amend his petition when the court feels this is called for by the contents of the answer.

Rule 5 does not indicate who the answer is to be served upon, but it necessarily implies that it will be mailed to the petitioner (or to his attorney if he has

one). The number of copies of the answer required is left to the court's discretion. Although the rule requires only a copy of petitioner's brief on appeal, respondent is free also to file a copy of respondent's brief. In practice, courts have found it helpful to have a copy of respondent's brief.

Rule 6. Discovery

(a) **LEAVE OF COURT REQUIRED.** A party shall be entitled to invoke the processes of discovery available under the Federal Rules of Civil Procedure if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise. If necessary for effective utilization of discovery procedures, counsel shall be appointed by the judge for a petitioner who qualifies for the appointment of counsel under 18 U.S.C. § 3006A(g).

(b) **REQUESTS FOR DISCOVERY.** Requests for discovery shall be accompanied by a statement of the interrogatories or requests for admission and a list of the documents, if any, sought to be produced.

(c) **EXPENSES.** If the respondent is granted leave to take the deposition of the petitioner or any other person the judge may as a condition of taking it direct that the respondent pay the expenses of travel and subsistence and fees of counsel for the petitioner to attend the taking of the deposition.

ADVISORY COMMITTEE NOTE

This rule prescribes the procedures governing discovery in habeas corpus cases. Subdivision (a) provides that any party may utilize the processes of discovery available under the Federal Rules of Civil Procedure (rules 26-37) if, and to the extent that, the judge allows. It also provides for the appointment of counsel for a petitioner who qualifies for this when counsel is necessary for effective utilization of discovery procedures permitted by the judge.

Subdivision (a) is consistent with *Harris v. Nelson*, 394 U.S. 286 (1969). In that case the court noted,

[I]t is clear that there was no intention to extend to habeas corpus, as a matter of right, the broad discovery provisions * * * of the new [Federal Rules of Civil Procedure].

394 U.S. at 295

However, citing the lack of methods for securing information in habeas proceedings, the court pointed to an alternative.

Clearly, in these circumstances * * * the courts may fashion appropriate modes of procedure, by analogy to existing rules or otherwise in conformity with judicial usage. * * * Their authority is expressly confirmed in the All Writs Act, 28 U.S.C. § 1651.

394 U.S. at 299

The court concluded that the issue of discovery in habeas corpus cases could best be dealt with as part of an effort to provide general rules of practice for habeas corpus cases:

In fact, it is our view that the rulemaking machinery should be invoked to formulate rules of practice with respect to federal habeas corpus and § 2255 proceedings, on a comprehensive basis and not merely one confined to discovery. The problems presented by these proceedings are materially different from those dealt with in the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure, and reliance upon usage and the opaque language of Civil Rule 81(a)(2) is transparently inadequate. In our view the results of a meticulous formulation and adoption of special rules for federal habeas corpus and § 2255 proceedings would promise much benefit.

394 U.S. at 301 n. 7

Discovery may, in appropriate cases, aid in developing facts necessary to decide whether to order an evidentiary hearing or to grant the writ following an evidentiary hearing:

We are aware that confinement sometimes induces fantasy which has its basis in the paranoia of prison rather than in fact. But where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is confined illegally and is therefore entitled to relief, it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry. Obviously, in exercising this power, the court may utilize familiar procedures, as appropriate, whether these are found in the civil or criminal rules or elsewhere in the "usages and principles."

Granting discovery is left to the discretion of the court, discretion to be exercised where there is a showing of good cause why discovery should be allowed. Several commentators have suggested that at least some discovery should be permitted without leave of court. It is argued that the courts will be burdened with weighing the propriety of requests to which the discovered party has no objection. Additionally, the availability of protective orders under Fed.R.Civ.R., Rules 30(b) and 31(d) will provide the necessary safeguards. See *Developments in the Law—Federal Habeas Corpus*, 83 Harv.L.Rev. 1038, 1186-87 (1970); *Civil Discovery in Habeas Corpus*, 67 Colum.L.Rev. 1296, 1310 (1967).

Nonetheless, it is felt the requirement of prior court approval of all discovery is necessary to prevent abuse, so this requirement is specifically mandated in the rule.

While requests for discovery in habeas proceedings normally follow the granting of an evidentiary hearing, there may be instances in which discovery would be appropriate beforehand. Such an approach was advocated in *Wagner v. United States*, 418 F.2d 618, 621 (9th Cir. 1969), where the opinion stated the trial court could permit interrogatories, provide for deposing witnesses, "and take such other prehearing steps as may be appropriate." While this was an action under § 2255, the reasoning would apply equally well to petitions by state prisoners. Such pre-hearing discovery may show an evidentiary hearing to be unnecessary, as when there are "no disputed issues of law or fact." 83 Harv. L.Rev. 1038, 1181 (1970). The court in *Harris* alluded to such a possibility when it said "the court may * * * authorize such proceedings with respect to development, before or in conjunction with the hearing of the facts * * *." [emphasis added] 394 U.S. at 300. Such pre-hearing discovery, like all discovery under rule 6, requires leave of court. In addition, the provisions in rule 7 for the use of an expanded record may eliminate much of the need for this type of discovery. While probably not as frequently sought or granted as discovery in conjunction with a hearing, it may nonetheless serve a valuable function.

In order to make pre-hearing discovery meaningful, subdivision (a) provides that the judge should appoint counsel for a petitioner who is without counsel and qualifies for appointment when this is necessary for the proper utilization of discovery procedures. Rule 8 provides for the appointment of counsel at the evidentiary hearing stage (see rule 8(b) and advisory committee note), but this would not assist the petitioner who seeks to utilize discovery to stave off dismissal of his petition (see rule 9 and advisory committee note) or to demonstrate that an evidentiary hearing is necessary. Thus, if the judge grants a petitioner's request for discovery prior to making a decision as to the necessity for an evidentiary hearing, he should determine whether counsel is necessary for the effective utilization of such discovery and, if so, appoint counsel for the petitioner if the petitioner qualifies for such appointment.

This rule contains very little specificity as to what types and methods of discovery should be made available to the parties in a habeas proceeding, or how, once

made available, these discovery procedures should be administered. The purpose of this rule is to get some experience in how discovery would work in actual practice by letting district court judges fashion their own rules in the context of individual cases. When the results of such experience are available it would be desirable to consider whether further, more specific codification should take place.

Subdivision (b) provides for judicial consideration of all matters subject to discovery. A statement of the interrogatories, or requests for admission sought to be answered, and a list of any documents sought to be produced, must accompany a request for discovery. This is to advise the judge of the necessity for discovery and enable him to make certain that the inquiry is relevant and appropriately narrow.

Subdivision (c) refers to the situation where the respondent is granted leave to take the deposition of the petitioner or any other person. In such a case the judge may direct the respondent to pay the expenses and fees of counsel for the petitioner to attend the taking of the deposition, as a condition granting the respondent such leave. While the judge is not required to impose this condition subdivision (c) will give the court the means to do so. Such a provision affords some protection to the indigent petitioner who may be prejudiced by his inability to have counsel, often court-appointed, present at the taking of a deposition. It is recognized that under 18 U.S.C. § 3006A(g), court-appointed counsel in a § 2254 proceeding is entitled to receive up to \$250 and reimbursement for expenses reasonably incurred. (Compare Fed.R. Crim.P. 15(c).) Typically, however, this does not adequately reimburse counsel if he must attend the taking of depositions or be involved in other pre-hearing proceedings. Subdivision (c) is intended to provide additional funds, if necessary, to be paid by the state government (respondent) to petitioner's counsel.

Although the rule does not specifically so provide, it is assumed that a petitioner who qualifies for the appointment of counsel under 18 U.S.C. § 3006A(g) and is granted leave to take a deposition will be allowed witness costs. This will include recording and transcription of the witness's statement. Such costs are payable pursuant to 28 U.S.C. § 1825. See Opinion of Comptroller General, February 28, 1974.

Subdivision (c) specifically recognizes the right of the respondent to take the deposition of the petitioner. Although the petitioner could not be called to testify against his will in a criminal trial, it is felt the nature of the habeas proceeding, along with the safeguards accorded by the Fifth Amendment and the presence of counsel, justify this provision. See 83 Harv.L.Rev. 1038, 1183-84 (1970).

Rule 7. Expansion of Record

(a) **DIRECTION FOR EXPANSION.** If the petition is not dismissed summarily the judge may direct that the record be expanded by the parties by the inclusion of additional materials relevant to the determination of the merits of the petition.

(b) **MATERIALS TO BE ADDED.** The expanded record may include, without limitation, letters predating the filing of the petition in the district court, documents, exhibits, and answers under oath, if so directed, to written interrogatories propounded by the judge. Affidavits may be submitted and considered as a part of the record.

(c) **SUBMISSION TO OPPOSING PARTY.** In any case in which an expanded record is directed, copies of the letters, documents, exhibits, and affidavits proposed to be included shall be submitted to the party against whom they are to be offered, and he shall be afforded an opportunity to admit or deny their correctness.

(d) **AUTHENTICATION.** The court may require the authentication of any material under subdivision (b) or (c).

ADVISORY COMMITTEE NOTE

This rule provides that the judge may direct that the record be expanded. The purpose is to enable the judge to dispose of some habeas petitions not dismissed on the pleadings, without the time and expense required for an evidentiary hearing. An expanded record may also be helpful when an evidentiary hearing is ordered.

The record may be expanded to include additional material relevant to the merits of the petition. While most petitions are dismissed either summarily or after a response has been made, of those that remain, by far the majority require an evidentiary hearing. In the fiscal year ending June 30, 1970, for example, of 8,423 § 2254 cases terminated, 8,231 required court action. Of these, 7,812 were dismissed before a prehearing conference and 469 merited further court action (e.g., expansion of the record, prehearing conference, or an evidentiary hearing). Of the remaining 469 cases, 403 required an evidentiary hearing, often time-consuming, costly, and, at least occasionally, unnecessary. See Director of the Administrative Office of the United States Courts, Annual Report, 245a-245c (table C4) (1970). In some instances these hearings were necessitated by slight omissions in the state record which might have been cured by the use of an expanded record.

Authorizing expansion of the record will, hopefully, eliminate some unnecessary hearings. The value of this approach was articulated in *Raines v. United States*, 423 F.2d 526, 529-530 (4th Cir. 1970):

Unless it is clear from the pleadings and the files and records that the prisoner is entitled to no relief, the statute makes a hearing mandatory. We think there is a permissible intermediate step that may avoid the necessity for an expensive and time consuming evidentiary hearing in every Section 2255 case. It may instead be perfectly appropriate, depending upon the nature of the allegations, for the district court to proceed by requiring that the record be expanded to include letters, documentary evidence, and, in an appropriate case, even affidavits. *United States v. Carlino*, 400 F.2d 56 (2nd Cir. 1968); *Mirra v. United States*, 379 F.2d 782 (2nd Cir. 1967); *Accardi v. United States*, 379 F.2d 312 (2nd Cir. 1967). When the issue is one of credibility, resolution on the basis of affidavits can rarely be conclusive, but that is not to say they may not be helpful.

In *Harris v. Nelson*, 394 U.S. 286, 300 (1969), the court said:

At any time in the proceedings * * * either on [the court's] own motion or upon cause shown by the petitioner, it may issue such writs and take or authorize such proceedings * * * before or in conjunction with the hearing of the facts * * * [emphasis added]

Subdivision (b) specifies the materials which may be added to the record. These include, without limitation, letters predating the filing of the petition in the district court, documents, exhibits, and answers under oath directed to written interrogatories propounded by the judge. Under this subdivision affidavits may be submitted and considered part of the record. Subdivision (b) is consistent with 28 U.S.C. §§ 2246 and 2247 and the decision in *Raines* with regard to types of material that may be considered upon application for a writ of habeas corpus. See *United States v. Carlino*, 400 F.2d 56, 58 (2d Cir. 1968), and *Machibroda v. United States*, 368 U.S. 487 (1962).

Under subdivision (c) all materials proposed to be included in the record must be submitted to the party against whom they are to be offered.

Under subdivision (d) the judge can require authentication if he believes it desirable to do so.

Rule 8. Evidentiary Hearing

(a) **DETERMINATION BY COURT.** If the petition is not dismissed at a previous stage in the proceeding, the judge, after the answer and the transcript and record of state court proceedings are filed, shall, upon a review of those proceedings

and of the expanded record, if any, determine whether an evidentiary hearing is required. If it appears that an evidentiary hearing is not required, the judge shall make such disposition of the petition as justice shall require.

(b) FUNCTION OF THE MAGISTRATE.

(1) When designated to do so in accordance with 28 U.S.C. § 636(b), a magistrate may conduct hearings, including evidentiary hearings, on the petition, and submit to a judge of the court proposed findings of fact and recommendations for disposition.

(2) The magistrate shall file proposed findings and recommendations with the court and a copy shall forthwith be mailed to all parties.

(3) Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court.

(4) A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify in whole or in part any findings or recommendations made by the magistrate.

(c) APPOINTMENT OF COUNSEL; TIME FOR HEARING. If an evidentiary hearing is required the judge shall appoint counsel for a petitioner who qualifies for the appointment of counsel under 18 U.S.C. § 3006A(g) and the hearing shall be conducted as promptly as practicable, having regard for the need of counsel for both parties for adequate time for investigation and preparation. These rules do not limit the appointment of counsel under 18 U.S.C. § 3006A at any stage of the case if the interest of justice so requires.

(As amended Pub. L. 94-426, § 2(5), Sept. 28, 1976, 90 Stat. 1334; Pub. L. 94-577, § 2(a)(1), (b)(1), Oct. 21, 1976, 90 Stat. 2730, 2731.)

ADVISORY COMMITTEE NOTE

This rule outlines the procedure to be followed by the court immediately prior to and after the determination of whether to hold an evidentiary hearing.

The provisions are applicable if the petition has not been dismissed at a previous stage in the proceeding [including a summary dismissal under rule 4; a dismissal pursuant to a motion by the respondent; a dismissal after the answer and petition are considered; or a dismissal after consideration of the pleadings and an expanded record].

If dismissal has not been ordered, the court must determine whether an evidentiary hearing is required. This determination is to be made upon a review of the answer, the transcript and record of state court proceedings, and if there is one, the expanded record. As the United States Supreme Court noted in *Townsend v. Sam*, 372 U.S. 293, 319 (1963):

Ordinarily [the complete state-court] record—including the transcript of testimony (or if unavailable some adequate substitute, such as a narrative record), the pleadings, court opinions, and other pertinent documents—is indispensable to determining whether the habeas applicant received a full and fair state-court evidentiary hearing resulting in reliable findings.

Subdivision (a) contemplates that all of these materials, if available, will be taken into account. This is especially important in view of the standard set down in *Townsend* for determining when a hearing in the federal habeas proceeding is mandatory.

The appropriate standard * * * is this: Where the facts are in dispute, the federal court in habeas cor-

pus must hold an evidentiary hearing if the habeas applicant did not receive a full and fair evidentiary hearing in a state court, either at the time of the trial or in a collateral proceeding.

372 U.S. at 312

The circumstances under which a federal hearing is mandatory are now specified in 28 U.S.C. § 2254(d). The 1966 amendment clearly places the burden on the petitioner, when there has already been a state hearing, to show that it was not a fair or adequate hearing for one or more of the specifically enumerated reasons, in order to force a federal evidentiary hearing. Since the function of an evidentiary hearing is to try issues of fact (372 U.S. at 309), such a hearing is unnecessary when only issues of law are raised. See, e.g., *Yeaman v. United States*, 326 F.2d 293 (9th Cir. 1963).

In situations in which an evidentiary hearing is not mandatory, the judge may nonetheless decide that an evidentiary hearing is desirable:

The purpose of the test is to indicate the situations in which the holding of an evidentiary hearing is mandatory. In all other cases where the material facts are in dispute, the holding of such a hearing is in the discretion of the district judge.

372 U.S. at 318

If the judge decides that an evidentiary hearing is neither required nor desirable, he shall make such a disposition of the petition "as justice shall require." Most habeas petitions are dismissed before the prehearing conference stage (see Director of the Administrative Office of the United States Courts, Annual Report 245a-245c (table C4) (1970)) and of those not dismissed, the majority raise factual issues that necessitate an evidentiary hearing. If no hearing is required, most petitions are dismissed, but in unusual cases the court may grant the relief sought without a hearing. This includes immediate release from custody or nullification of a judgment under which the sentence is to be served in the future.

Subdivision (b) provides that a magistrate, when so empowered by rule of the district court, may recommend to the district judge that an evidentiary hearing be held or that the petition be dismissed, provided he gives the district judge a sufficiently detailed description of the facts so that the judge may decide whether or not to hold an evidentiary hearing. This provision is not inconsistent with the holding in *Wingo v. Wedding*, 418 U.S. 461 (1974), that the Federal Magistrates Act did not change the requirement of the habeas corpus statute that federal judges personally conduct habeas evidentiary hearings, and that consequently a local district court rule was invalid insofar as it authorized a magistrate to hold such hearings. 28 U.S.C. § 636(b) provides that a district court may by rule authorize any magistrate to perform certain additional duties, including preliminary review of applications for posttrial relief made by individuals convicted of criminal offenses, and submission of a report and recommendations to facilitate the decision of the district judge having jurisdiction over the case as to whether there should be a hearing.

As noted in *Wingo*, review "by Magistrates of applications for post-trial relief is thus limited to review for the purpose of proposing, not holding, evidentiary hearings."

Utilization of the magistrate as specified in subdivision (b) will aid in the expeditious and fair handling of habeas petitions.

A qualified, experienced magistrate will, it is hoped, acquire an expertise in examining these [post-conviction review] applications and summarizing their important contents for the district judge, thereby facilitating his decisions. Law clerks are presently charged with this responsibility by many judges, but judges have noted that the normal 1-year clerkship does not afford law clerks the time or experience necessary to attain real efficiency in handling such applications.

S. Rep. No. 371, 90th Cong., 1st Sess., 26 (1967)

Under subdivision (c) there are two provisions that differ from the procedure set forth in 28 U.S.C. §2243. These are the appointment of counsel and standard for determining how soon the hearing will be held.

If an evidentiary hearing is required the judge must appoint counsel for a petitioner who qualified for appointment under the Criminal Justice Act. Currently, the appointment of counsel is not recognized as a right at any stage of a habeas proceeding. See, e.g., *United States ex rel. Marshall v. Wilkins*, 338 F.2d 404 (2d Cir. 1964). Some district courts have, however, by local rule, required that counsel must be provided for indigent petitioners in cases requiring a hearing. See, e.g., D.N.M.R. 21(f), E.D. N.Y.R. 26(d). Appointment of counsel at this stage is mandatory under subdivision (c). This requirement will not limit the authority of the court to provide counsel at an earlier stage if it is thought desirable to do so as is done in some courts under current practice. At the evidentiary hearing stage, however, an indigent petitioner's access to counsel should not depend on local practice and, for this reason, the furnishing of counsel is made mandatory.

Counsel can perform a valuable function benefiting both the court and the petitioner. The issues raised can be more clearly identified if both sides have the benefit of trained legal personnel. The presence of counsel at the prehearing conference may help to expedite the evidentiary hearing or make it unnecessary, and counsel will be able to make better use of available prehearing discovery procedures. Compare ABA Project on Standards for Criminal Justice, Standards Relating to Post-Conviction Remedies §4.4, p. 66 (Approved Draft 1968). At a hearing, the petitioner's claims are more likely to be effectively and properly presented by counsel.

Under 18 U.S.C. §3006A(g), payment is allowed counsel up to \$250, plus reimbursement for expenses reasonably incurred. The standards of indigency under this section are less strict than those regarding eligibility to prosecute a petition in forma pauperis, and thus many who cannot qualify to proceed under 28 U.S.C. §1915 will be entitled to the benefits of counsel under 18 U.S.C. §3006A(g). Under rule 6(c), the court may order the respondent to reimburse counsel from state funds for fees and expenses incurred as the result of the utilization of discovery procedures by the respondent.

Subdivision (c) provides that the hearing shall be conducted as promptly as possible, taking into account "the need of counsel for both parties for adequate time for investigation and preparation." This differs from the language of 28 U.S.C. §2243, which requires that the day for the hearing be set "not more than five days after the return unless for good cause additional time is allowed." This time limit fails to take into account the function that may be served by a prehearing conference and the time required to prepare adequately for an evidentiary hearing. Although "additional time" is often allowed under §2243, subdivision (c) provides more flexibility to take account of the complexity of the case, the availability of important materials, the workload of the attorney general, and the time required by appointed counsel to prepare.

While the rule does not make specific provision for a prehearing conference, the omission is not intended to cast doubt upon the value of such a conference:

The conference may limit the questions to be resolved, identify areas of agreement and dispute, and explore evidentiary problems that may be expected to arise. * * * [S]uch conferences may also disclose that a hearing is unnecessary * * *.

ABA Project on Standards for Criminal Justice, Standards Relating to Post-Conviction Remedies §4.6, commentary pp. 74-75. (Approved Draft, 1968.) See also Developments in the Law—Federal Habeas Corpus, 83 Harv.L.Rev. 1038, 1188 (1970).

The rule does not contain a specific provision on the subpoenaing of witnesses. It is left to local practice to determine the method for doing this. The implementation of 28 U.S.C. §1825 on the payment of witness fees

is dealt with in an opinion of the Comptroller General, February 28, 1974.

AMENDMENTS

1976—Subd. (b). Pub. L. 94-577, §2(a)(1), substituted provisions which authorized magistrates, when designated to do so in accordance with section 636(b) of this title, to conduct hearings, including evidentiary hearings, on the petition and to submit to a judge of the court proposed findings of fact and recommendations for disposition, which directed the magistrate to file proposed findings and recommendations with the court with copies furnished to all parties, which allowed parties thus served 10 days to file written objections thereto, and which directed a judge of the court to make de novo determinations of the objected-to portions and to accept, reject, or modify the findings or recommendations for provisions under which the magistrate had been empowered only to recommend to the district judge that an evidentiary hearing be held or that the petition be dismissed.

Subd. (c). Pub. L. 94-577, §2(b)(1), substituted "and the hearing shall be conducted" for "and shall conduct the hearing".

Pub. L. 94-426 provided that these rules not limit the appointment of counsel under section 3006A of title 18, if the interest of justice so require.

EFFECTIVE DATE OF 1976 AMENDMENT

Section 2(c) of Pub. L. 94-577 provided that: "The amendments made by this section [amending subdvs. (b) and (c) of this rule and Rule 8(b), (c) of the Rules Governing Proceedings Under Section 2255 of this title] shall take effect with respect to petitions under section 2254 and motions under section 2255 of title 28 of the United States Code filed on or after February 1, 1977."

Rule 9. Delayed or Successive Petitions

(a) **DELAYED PETITIONS.** A petition may be dismissed if it appears that the state of which the respondent is an officer has been prejudiced in its ability to respond to the petition by delay in its filing unless the petitioner shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred.

(b) **SUCCESSIVE PETITIONS.** A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

(As amended Pub. L. 94-426, §2(7), (8), Sept. 28, 1976, 90 Stat. 1335.)

ADVISORY COMMITTEE NOTE

This rule is intended to minimize abuse of the writ of habeas corpus by limiting the right to assert stale claims and to file multiple petitions. Subdivision (a) deals with the delayed petition. Subdivision (b) deals with the second or successive petition.

Subdivision (a) provides that a petition attacking the judgment of a state court may be dismissed on the grounds of delay if the petitioner knew or should have known of the existence of the grounds he is presently asserting in the petition and the delay has resulted in the state being prejudiced in its ability to respond to the petition. If the delay is more than five years after the judgment of conviction, prejudice is presumed, although this presumption is rebuttable by the petitioner. Otherwise, the state has the burden of showing such prejudice.

The assertion of stale claims is a problem which is not likely to decrease in frequency. Following the deci-

sions in *Jones v. Cunningham*, 371 U.S. 236 (1963), and *Benson v. California*, 328 F.2d 159 (9th Cir. 1964), the concept of custody expanded greatly, lengthening the time period during which a habeas corpus petition may be filed. The petitioner who is not unconditionally discharged may be on parole or probation for many years. He may at some date, perhaps ten or fifteen years after conviction, decide to challenge the state court judgment. The grounds most often troublesome to the courts are ineffective counsel, denial of right of appeal, plea of guilty unlawfully induced, use of a coerced confession, and illegally constituted jury. The latter four grounds are often interlocked with the allegation of ineffective counsel. When they are asserted after the passage of many years, both the attorney for the defendant and the state have difficulty in ascertaining what the facts are. It often develops that the defense attorney has little or no recollection as to what took place and that many of the participants in the trial are dead or their whereabouts unknown. The court reporter's notes may have been lost or destroyed, thus eliminating any exact record of what transpired. If the case was decided on a guilty plea, even if the record is intact, it may not satisfactorily reveal the extent of the defense attorney's efforts in behalf of the petitioner. As a consequence, there is obvious difficulty in investigating petitioner's allegations.

The interest of both the petitioner and the government can best be served if claims are raised while the evidence is still fresh. The American Bar Association has recognized the interest of the state in protecting itself against stale claims by limiting the right to raise such claims after completion of service of a sentence imposed pursuant to a challenged judgment. See ABA Standards Relating to Post-Conviction Remedies §2.4 (c), p. 45 (Approved Draft, 1968). Subdivision (a) is not limited to those who have completed their sentence. Its reach is broader, extending to all instances where delay by the petitioner has prejudiced the state, subject to the qualifications and conditions contained in the subdivision.

In *McMann v. Richardson*, 397 U.S. 759 (1970), the court made reference to the issue of the stale claim:

What is at stake in this phase of the case is not the integrity of the state convictions obtained on guilty pleas, but whether, years later, defendants must be permitted to withdraw their pleas, which were perfectly valid when made, and be given another choice between admitting their guilt and putting the State to its proof. [Emphasis added.]

397 U.S. at 773

The court refused to allow this, intimating its dislike of collateral attacks on sentences long since imposed which disrupt the state's interest in finality of convictions which were constitutionally valid when obtained.

Subdivision (a) is not a statute of limitations. Rather, the limitation is based on the equitable doctrine of laches. "Laches is such delay in enforcing one's rights as works disadvantage to another." 30A C.J.S. Equity §112, p. 19. Also, the language of the subdivision, "a petition may be dismissed" [emphasis added], is permissive rather than mandatory. This clearly allows the court which is considering the petition to use discretion in assessing the equities of the particular situation.

The use of a flexible rule analogous to laches to bar the assertion of stale claims is suggested in ABA Standards Relating to Post-Conviction Remedies §2.4, commentary at 48 (Approved Draft, 1968). Additionally, in *Fay v. Noia*, 372 U.S. 391 (1963), the Supreme Court noted:

Furthermore, habeas corpus has traditionally been regarded as governed by equitable principles. *United States ex rel. Smith v. Baldi*, 344 U.S. 561, 573 (dissenting opinion). Among them is the principle that a suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks.

372 U.S. at 438

Finally, the doctrine of laches has been applied with reference to another postconviction remedy, the writ of coram nobis. See 24 C.J.S. Criminal Law §1606(25), p. 779.

The standard used for determining if the petitioner shall be barred from asserting his claim is consistent with that used in laches provisions generally. The petitioner is held to a standard of reasonable diligence. Any inference or presumption arising by reason of the failure to attack collaterally a conviction may be disregarded where (1) there has been a change of law or fact (new evidence) or (2) where the court, in the interest of justice, feels that the collateral attack should be entertained and the prisoner makes a proper showing as to why he has not asserted a particular ground for relief.

Subdivision (a) establishes the presumption that the passage of more than five years from the time of the judgment of conviction to the time of filing a habeas petition is prejudicial to the state. "Presumption" has the meaning given it by Fed.R.Evid. 301. The prisoner has "the burden of going forward with evidence to rebut or meet the presumption" that the state has not been prejudiced by the passage of a substantial period of time. This does not impose too heavy a burden on the petitioner. He usually knows what persons are important to the issue of whether the state has been prejudiced. Rule 6 can be used by the court to allow petitioner liberal discovery to learn whether witnesses have died or whether other circumstances prejudicial to the state have occurred. Even if the petitioner should fail to overcome the presumption of prejudice to the state, he is not automatically barred from asserting his claim. As discussed previously, he may proceed if he neither knew nor, by the exercise of reasonable diligence, could have known of the grounds for relief.

The presumption of prejudice does not come into play if the time lag is not more than five years.

The time limitation should have a positive effect in encouraging petitioners who have knowledge of it to assert all their claims as soon after conviction as possible. The implementation of this rule can be substantially furthered by the development of greater legal resources for prisoners. See ABA Standards Relating to Post-Conviction Remedies §3.1, pp. 49-50 (Approved Draft, 1968).

Subdivision (a) does not constitute an abridgement or modification of a substantive right under 28 U.S.C. §2072. There are safeguards for the hardship case. The rule provides a flexible standard for determining when a petition will be barred.

Subdivision (b) deals with the problem of successive habeas petitions. It provides that the judge may dismiss a second or successive petition (1) if it fails to allege new or different grounds for relief or (2) if new or different grounds for relief are alleged and the judge finds the failure of the petitioner to assert those grounds in a prior petition is inexcusable.

In *Sanders v. United States*, 373 U.S. 1 (1963), the court, in dealing with the problem of successive applications, stated:

Controlling weight may be given to denial of a prior application for federal habeas corpus or §2255 relief only if (1) the same ground presented in the subsequent application was determined adversely to the applicant on the prior application, (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the subsequent application. [Emphasis added.]

373 U.S. at 15

The requirement is that the prior determination of the same ground has been on the merits. This requirement is in 28 U.S.C. §2244(b) and has been reiterated in many cases since *Sanders*. See *Gains v. Allgood*, 391 F.2d 692 (5th Cir. 1968); *Hutchinson v. Craven*, 415 F.2d 278 (9th Cir. 1969); *Brown v. Peyton*, 435 F.2d 1352 (4th Cir. 1970).

With reference to a successive application asserting a new ground or one not previously decided on the merits, the court in *Sanders* noted:

In either case, full consideration of the merits of the new application can be avoided only if there has been an abuse of the writ * * * and this the Government has the burden of pleading. * * *

Thus, for example, if a prisoner deliberately withholds one of two grounds for federal collateral relief at the time of filing his first application, * * * he may be deemed to have waived his right to a hearing on a second application presenting the withheld ground.

373 U.S. at 17-18

Subdivision (b) has incorporated this principle and requires that the judge find petitioner's failure to have asserted the new grounds in the prior petition to be inexcusable.

Sanders, 18 U.S.C. § 2244, and subdivision (b) make it clear that the court has discretion to entertain a successive application.

The burden is on the government to plead abuse of the writ. See *Sanders v. United States*, 373 U.S. 1, 10 (1963); *Dixon v. Jacobs*, 427 F.2d 589, 596 (D.C.Cir. 1970); cf. *Johnson v. Copinger*, 420 F.2d 395 (4th Cir. 1969). Once the government has done this, the petitioner has the burden of proving that he has not abused the writ. In *Price v. Johnston*, 334 U.S. 266, 292 (1948), the court said:

[I]f the Government chooses * * * to claim that the prisoner has abused the writ of *habeas corpus*, it rests with the Government to make that claim with clarity and particularity in its return to the order to show cause. That is not an intolerable burden. The Government is usually well acquainted with the facts that are necessary to make such a claim. Once a particular abuse has been alleged, the prisoner has the burden of answering that allegation and of proving that he has not abused the writ.

Subdivision (b) is consistent with the important and well established purpose of *habeas corpus*. It does not eliminate a remedy to which the petitioner is rightfully entitled. However, in *Sanders*, the court pointed out:

Nothing in the traditions of *habeas corpus* requires the federal courts to tolerate needless piecemeal litigation, or to entertain collateral proceedings whose only purpose is to vex, harass, or delay.

373 U.S. at 18

There are instances in which petitioner's failure to assert a ground in a prior petition is excusable. A retroactive change in the law and newly discovered evidence are examples. In rare instances, the court may feel a need to entertain a petition alleging grounds that have already been decided on the merits. *Sanders*, 373 U.S. at 1, 16. However, abusive use of the writ should be discouraged, and instances of abuse are frequent enough to require a means of dealing with them. For example, a successive application, already decided on the merits, may be submitted in the hope of getting before a different judge in multijudge courts. A known ground may be deliberately withheld in the hope of getting two or more hearings or in the hope that delay will result in witnesses and records being lost. There are instances in which a petitioner will have three or four petitions pending at the same time in the same court. There are many hundreds of cases where the application is at least the second one by the petitioner. This subdivision is aimed at screening out the abusive petitions from this large volume, so that the more meritorious petitions can get quicker and fuller consideration.

The form petition, supplied in accordance with rule 2(c), encourages the petitioner to raise all of his available grounds in one petition. It sets out the most common grounds asserted so that these may be brought to his attention.

Some commentators contend that the problem of abuse of the writ of *habeas corpus* is greatly overstated:

Most prisoners, of course, are interested in being released as soon as possible; only rarely will one inexcusably neglect to raise all available issues in his first federal application. The purpose of the "abuse" bar is apparently to deter repetitious applications from those few bored or vindictive prisoners * * *.

cusably neglect to raise all available issues in his first federal application. The purpose of the "abuse" bar is apparently to deter repetitious applications from those few bored or vindictive prisoners * * *.

83 Harv.L.Rev. at 1153-1154

See also ABA Standards Relating to Post-Conviction Remedies §6.2, commentary at 92 (Approved Draft, 1968), which states: "The occasional, highly litigious prisoner stands out as the rarest exception." While no recent systematic study of repetitious applications exists, there is no reason to believe that the problem has decreased in significance in relation to the total number of § 2254 petitions filed. That number has increased from 584 in 1949 to 12,088 in 1971. See Director of the Administrative Office of the United States Courts, Annual Report, table 16 (1971). It is appropriate that action be taken by rule to allow the courts to deal with this problem, whatever its specific magnitude. The bar set up by subdivision (b) is not one of rigid application, but rather is within the discretion of the courts on a case-by-case basis.

If it appears to the court after examining the petition and answer (where appropriate) that there is a high probability that the petition will be barred under either subdivision of rule 9, the court ought to afford petitioner an opportunity to explain his apparent abuse. One way of doing this is by the use of the form annexed hereto. The use of a form will ensure a full airing of the issue so that the court is in a better position to decide whether the petition should be barred. This conforms with *Johnson v. Copinger*, 420 F.2d 395 (4th Cir. 1969), where the court stated:

[T]he petitioner is obligated to present facts demonstrating that his earlier failure to raise his claims is excusable and does not amount to an abuse of the writ. However, it is inherent in this obligation placed upon the petitioner that he must be given an opportunity to make his explanation, if he has one. If he is not afforded such an opportunity, the requirement that he satisfy the court that he has not abused the writ is meaningless. Nor do we think that a procedure which allows the imposition of a forfeiture for abuse of the writ, without allowing the petitioner an opportunity to be heard on the issue, comports with the minimum requirements of fairness.

420 F.2d at 399

Use of the recommended form will contribute to an orderly handling of *habeas* petitions and will contribute to the ability of the court to distinguish the excusable from the inexcusable delay or failure to assert a ground for relief in a prior petition.

AMENDMENTS

1976—Subd. (a). Pub. L. 94-426, §2(7), struck out provision which established a rebuttable presumption of prejudice to the state if the petition was filed more than five years after conviction and started the running of the five year period, where a petition challenged the validity of an action after conviction, from the time of the order of such action.

Subd. (b). Pub. L. 94-426, §2(8), substituted "constituted an abuse of the writ" for "is not excusable".

Rule 10. Powers of Magistrates

The duties imposed upon the judge of the district court by these rules may be performed by a United States magistrate pursuant to 28 U.S.C. § 636.

(As amended Pub. L. 94-426, §2(11), Sept. 28, 1976, 90 Stat. 1335; Apr. 30, 1979, eff. Aug. 1, 1979.)

ADVISORY COMMITTEE NOTE

Under this rule the duties imposed upon the judge of the district court by rules 2, 3, 4, 6, and 7 may be performed by a magistrate if and to the extent he is em-

powered to do so by a rule of the district court. However, when such duties involve the making of an order under rule 4 disposing of the petition, that order must be made by the court. The magistrate in such instances must submit to the court his report as to the facts and his recommendation with respect to the order.

The Federal Magistrates Act allows magistrates, when empowered by local rule, to perform certain functions in proceedings for post-trial relief. See 28 U.S.C. § 636(b)(3). The performance of such functions, when authorized, is intended to "afford some degree of relief to district judges and their law clerks, who are presently burdened with burgeoning numbers of habeas corpus petitions and applications under 28 U.S.C. § 2255." Committee on the Judiciary, The Federal Magistrates Act, S.Rep. No. 371, 90th Cong., 1st sess., 26 (1967).

Under 28 U.S.C. § 636(b), any district court, by the concurrence of a majority of all the judges of such district court, may establish rules pursuant to which any full-time United States magistrate * * * may be assigned within the territorial jurisdiction of such court such additional duties as are not inconsistent with the Constitution and laws of the United States.

The proposed rule recognizes the limitations imposed by 28 U.S.C. § 636(b) upon the powers of magistrates to act in federal postconviction proceedings. These limitations are: (1) that the magistrate may act only pursuant to a rule passed by the majority of the judges in the district court in which the magistrate serves, and (2) that the duties performed by the magistrate pursuant to such rule be consistent with the Constitution and laws of the United States.

It has been suggested that magistrates be empowered by law to hold hearings and make final decisions in habeas proceedings. See Proposed Reformation of Federal Habeas Corpus Procedure: Use of Federal Magistrates, 54 Iowa L.Rev. 1147, 1158 (1969). However, the Federal Magistrates Act does not authorize such use of magistrates. *Wingo v. Wedding*, 418 U.S. 461 (1974). See advisory committee note to rule 8. While the use of magistrates can help alleviate the strain imposed on the district courts by the large number of unmeritorious habeas petitions, neither 28 U.S.C. § 636(b) nor this rule contemplate the abdication by the court of its decision-making responsibility. See also Developments in the Law—Federal Habeas Corpus, 83 Harv. L.Rev. 1038, 1188 (1970).

Where a full-time magistrate is not available, the duties contemplated by this rule may be assigned to a part-time magistrate.

1979 AMENDMENT

This amendment conforms the rule to subsequently enacted legislation clarifying and further defining the duties which may be assigned to a magistrate, 18 U.S.C. § 636, as amended in 1976 by Pub. L. 94-577. To the extent that rule 10 is more restrictive than § 636, the limitations are of no effect, for the statute expressly governs "[n]otwithstanding any provision of law to the contrary."

The reference to particular rules is stricken, as under § 636(b)(1)(A) a judge may designate a magistrate to perform duties under other rules as well (e.g., order that further transcripts be furnished under rule 5; appoint counsel under rule 8). The reference to "established standards and criteria" is stricken, as § 636(4) requires each district court to "establish rules pursuant to which the magistrates shall discharge their duties." The exception with respect to a rule 4 order dismissing a petition is stricken, as that limitation appears in § 636(b)(1)(B) and is thereby applicable to certain other actions under these rules as well (e.g., determination of a need for an evidentiary hearing under rule 8; dismissal of a delayed or successive petition under rule 9).

AMENDMENTS

1976—Pub. L. 94-426 inserted "and to the extent the district court has established standards and criteria for

the performance of such duties" after "rule of the district court".

CHANGE OF NAME

Reference to United States magistrate or to magistrate deemed to refer to United States magistrate judge pursuant to section 321 of Pub. L. 101-650, set out as a note under section 631 of this title.

Rule 11. Federal Rules of Civil Procedure; Extent of Applicability

The Federal Rules of Civil Procedure, to the extent that they are not inconsistent with these rules, may be applied, when appropriate, to petitions filed under these rules.

ADVISORY COMMITTEE NOTE

Habeas corpus proceedings are characterized as civil in nature. See e.g., *Fisher v. Baker*, 203 U.S. 174, 181 (1906). However, under Fed.R.Civ.P. 81(a)(2), the applicability of the civil rules to habeas corpus actions has been limited, although the various courts which have considered this problem have had difficulty in setting out the boundaries of this limitation. See *Harris v. Nelson*, 394 U.S. 286 (1969) at 289, footnote 1. Rule 11 is intended to conform with the Supreme Court's approach in the *Harris* case. There the court was dealing with the petitioner's contention that Civil Rule 33 granting the right to discovery via written interrogatories is wholly applicable to habeas corpus proceedings. The court held:

We agree with the Ninth Circuit that Rule 33 of the Federal Rules of Civil Procedure is not applicable to habeas corpus proceedings and that 28 U.S.C. § 2246 does not authorize interrogatories except in limited circumstances not applicable to this case; but we conclude that, in appropriate circumstances, a district court, confronted by a petition for habeas corpus which establishes a prima facie case for relief, may use or authorize the use of suitable discovery procedures, including interrogatories, reasonably fashioned to elicit facts necessary to help the court to "dispose of the matter as law and justice require" 28 U.S.C. § 2243.

394 U.S. at 290

The court then went on to consider the contention that the "conformity" provision of Rule 81(a)(2) should be rigidly applied so that the civil rules would be applicable only to the extent that habeas corpus practice had conformed to the practice in civil actions at the time of the adoption of the Federal Rules of Civil Procedure on September 16, 1938. The court said:

Although there is little direct evidence, relevant to the present problem, of the purpose of the "conformity" provision of Rule 81(a)(2), the concern of the draftsmen, as a general matter, seems to have been to provide for the continuing applicability of the "civil" rules in their new form to those areas of practice in habeas corpus and other enumerated proceedings in which the "specified" proceedings had theretofore utilized the modes of civil practice. Otherwise, those proceedings were to be considered outside of the scope of the rules without prejudice, of course, to the use of particular rules by analogy or otherwise, where appropriate.

394 U.S. at 294

The court then reiterated its commitment to judicial discretion in formulating rules and procedures for habeas corpus proceedings by stating:

[T]he habeas corpus jurisdiction and the duty to exercise it being present, the courts may fashion appropriate modes of procedure, by analogy to existing rules or otherwise in conformity with judicial usage. Where their duties require it, this is the inescapable obligation of the courts. Their authority is expressly confirmed in the All Writs Act, 28 U.S.C. § 1651.

394 U.S. at 299

Rule 6 of these proposed rules deals specifically with the issue of discovery in habeas actions in a manner consistent with *Harris*. Rule 11 extends this approach to allow the court considering the petition to use any of the rules of civil procedure (unless inconsistent with these rules of habeas corpus) when in its discretion the court decides they are appropriate under the circumstances of the particular case. The court does not have to rigidly apply rules which would be inconsistent or inequitable in the overall framework of habeas corpus. Rule 11 merely recognizes and affirms their discretionary power to use their judgment in promoting the ends of justice.

Rule 11 permits application of the civil rules only when it would be appropriate to do so. Illustrative of an inappropriate application is that rejected by the Supreme Court in *Pittches v. Davis*, 95 S.Ct. 1748 (1975), holding that Fed.R.Civ.P. 60(b) should not be applied in a habeas case when it would have the effect of altering the statutory exhaustion requirement of 28 U.S.C. § 2254.

APPENDIX OF FORMS

MODEL FORM FOR USE IN APPLICATIONS FOR HABEAS CORPUS UNDER 28 U.S.C. § 2254

Name _____
Prison number _____

Place of confinement _____
United States District Court _____ District of _____

Case No. _____
(To be supplied by Clerk of U.S. District Court)
_____, PETITIONER
(Full name)

v.

_____, RESPONDENT
(Name of Warden, Superintendent, Jailor, or authorized person having custody of petitioner)

and

THE ATTORNEY GENERAL OF THE STATE OF _____, ADDITIONAL RESPONDENT.

(If petitioner is attacking a judgment which imposed a sentence to be served in the future, petitioner must fill in the name of the state where the judgment was entered. If petitioner has a sentence to be served in the future under a federal judgment which he wishes to attack, he should file a motion under 28 U.S.C. § 2255, in the federal court which entered the judgment.)

PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

Instructions—Read Carefully

- (1) This petition must be legibly handwritten or typewritten, and signed by the petitioner under penalty of perjury. Any false statement of a material fact may serve as the basis for prosecution and conviction for perjury. All questions must be answered concisely in the proper space on the form.
- (2) Additional pages are not permitted except with respect to the facts which you rely upon to support your grounds for relief. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.
- (3) Upon receipt of a fee of \$5 your petition will be filed if it is in proper order.
- (4) If you do not have the necessary filing fee, you may request permission to proceed *in forma pauperis*, in which event you must execute the declaration on the last page, setting forth information establishing your inability to prepay the fees and costs or give security therefor. If you wish to proceed *in forma pauperis*, you must have an authorized officer

at the penal institution complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution. If your prison account exceeds \$_____, you must pay the filing fee as required by the rule of the district court.

- (5) Only judgments entered by one court may be challenged in a single petition. If you seek to challenge judgments entered by different courts either in the same state or in different states, you must file separate petitions as to each court.
- (6) Your attention is directed to the fact that you must include all grounds for relief and all facts supporting such grounds for relief in the petition you file seeking relief from any judgment of conviction.
- (7) When the petition is fully completed, the *original* and *two copies* must be mailed to the Clerk of the United States District Court whose address is _____
- (8) Petitions which do not conform to these instructions will be returned with a notation as to the deficiency.

PETITION

1. Name and location of court which entered the judgment of conviction under attack _____

2. Date of judgment of conviction _____

3. Length of sentence _____

4. Nature of offense involved (all counts) _____

5. What was your plea? (Check one)

(a) Not guilty ☐(b) Guilty ☐(c) Nolo contendere ☐

If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details:

6. Kind of trial: (Check one)

(a) Jury ☐(b) Judge only ☐

7. Did you testify at the trial?

Yes ☐ No ☐

8. Did you appeal from the judgment of conviction?

Yes ☐ No ☐

9. If you did appeal, answer the following:

(a) Name of court _____

(b) Result _____

(c) Date of result _____

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal?

Yes ☐ No ☐

11. If your answer to 10 was "yes," give the following information:

(a) (1) Name of court _____

(2) Nature of proceeding _____

(3) Grounds raised _____

- _____
- _____
- _____
- (4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ☐ No ☐
- (5) Result _____
- (6) Date of result _____
- (c) As to any third petition, application or motion, give the same information:
- (1) Name of court _____
- (2) Nature of proceeding _____
- (3) Grounds raised _____
- _____
- (4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ☐ No ☐
- (5) Result _____
- (6) Date of result _____
- (d) Did you appeal to the highest state court having jurisdiction the result of action taken on any petition, application or motion?
- (1) First petition, etc. Yes ☐ No ☐
- (2) Second petition, etc. Yes ☐ No ☐
- (3) Third petition, etc. Yes ☐ No ☐
- (e) If you did *not* appeal from the adverse action on any petition, application or motion, explain briefly why you did not:
- _____
- _____
12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the *facts* supporting each ground. If necessary, you may attach pages stating additional grounds and *facts* supporting same.
- Caution: In order to proceed in the federal court, you must ordinarily first exhaust your state court remedies as to each ground on which you request action by the federal court. If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date.
- For your information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed if you have exhausted your state court remedies with respect to them. However, *you should raise in this petition all available grounds* (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.
- Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The petition will be returned to you if you merely check (a) through (j) or any one of these grounds.
- (a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.
- (b) Conviction obtained by use of coerced confession.
- (c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.
- (d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.
- (e) Conviction obtained by a violation of the privilege against self-incrimination.
- (f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.
- (g) Conviction obtained by a violation of the protection against double jeopardy.

- (h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.
- (i) Denial of effective assistance of counsel.
- (j) Denial of right of appeal.

A. Ground one: _____

Supporting FACTS (tell your story *briefly* without citing cases or law): _____

B. Ground two: _____

Supporting FACTS (tell your story *briefly* without citing cases or law): _____

C. Ground three: _____

Supporting FACTS (tell your story *briefly* without citing cases or law): _____

D. Ground four: _____

Supporting FACTS (tell your story *briefly* without citing cases or law): _____

13. If any of the grounds listed in 12A, B, C, and D were not previously presented in any other court, state or federal, state *briefly* what grounds were not so presented, and give your reasons for not presenting them:
- _____
- _____

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack?

Yes ☐ No ☐

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing _____

(b) At arraignment and plea _____

(c) At trial _____

(d) At sentencing _____

(e) On appeal _____

(f) In any post-conviction proceeding _____

(g) On appeal from any adverse ruling in a post-conviction proceeding _____

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?

Yes ☐ No ☐

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?

Yes ☐ No ☐

(a) If so, give name and location of court which imposed sentence to be served in the future:

(b) And give date and length of sentence to be served in the future:

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?

Yes ☐ No ☐

Wherefore, petitioner prays that the Court grant petitioner relief to which he may be entitled in this proceeding.

Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on _____ (date)

Signature of Petitioner

IN FORMA PAUPERIS DECLARATION

[Insert appropriate court]

(Petitioner)

v.

(Respondent(s))

DECLARATION IN SUPPORT OF REQUEST TO PROCEED IN FORMA PAUPERIS

I, _____, declare that I am the petitioner in the above entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to relief.

1. Are you presently employed? Yes ☐ No ☐

a. If the answer is "yes," state the amount of your salary or wages per month, and give the name and address of your employer.

b. If the answer is "no," state the date of last employment and the amount of the salary and wages per month which you received.

2. Have you received within the past twelve months any money from any of the following sources?

a. Business, profession or form of self-employment? Yes ☐ No ☐

b. Rent payments, interest or dividends? Yes ☐ No ☐

c. Pensions, annuities or life insurance payments? Yes ☐ No ☐

d. Gifts or inheritances? Yes ☐ No ☐

e. Any other sources? Yes ☐ No ☐

If the answer to any of the above is "yes," describe each source of money and state the amount received from each during the past twelve months.

3. Do you own cash, or do you have money in a checking or savings account?

Yes ☐ No ☐ (Include any funds in prison accounts.)

If the answer is "yes," state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

Yes ☐ No ☐

If the answer is "yes," describe the property and state its approximate value.

5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute toward their support.

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on _____ (date)

Signature of Petitioner

Certificate

I hereby certify that the petitioner herein has the sum of \$ _____ on account to his credit at the _____ institution where he is confined. I further certify that petitioner likewise has the following securities to his credit according to the records of said _____ institution:

Authorized Officer of
Institution

(As amended Apr. 28, 1982, eff. Aug. 1, 1982.)

MODEL FORM FOR USE IN 28 U.S.C. § 2254 CASES INVOLVING A RULE 9 ISSUE

Form No. 9

United States District Court,

District of _____

Case No. _____

_____, PETITIONER

v.

_____, RESPONDENT

and

_____, ADDITIONAL RESPONDENT

Petitioner's Response as to Why His Petition Should Not Be Barred Under Rule 9

Explanation and Instructions—Read Carefully

(I) Rule 9. Delayed or successive petitions.

(a) **Delayed petitions.** A petition may be dismissed if it appears that the state of which the respondent is an officer has been prejudiced in its ability to respond to the petition by delay in its filing unless the petitioner shows that it is based on grounds of which he could not

have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred.

(b) **Successive petitions.** A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

(II) Your petition for habeas corpus has been found to be subject to dismissal under rule 9() for the following reason(s):

(III) This form has been sent so that you may explain why your petition contains the defect(s) noted in (II) above. It is required that you fill out this form and send it back to the court within _____ days. Failure to do so will result in the automatic dismissal of your petition.

(IV) When you have fully completed this form, the original and two copies must be mailed to the Clerk of the United States District Court whose address is _____

(V) This response must be legibly handwritten or typewritten, and signed by the petitioner, under penalty of perjury. Any false statement of a material fact may serve as the basis for prosecution and conviction for perjury. All questions must be answered concisely in the proper space on the form.

(VI) Additional pages are not permitted except with respect to the *facts* which you rely upon in item 4 or 5 in the response. Any citation of authorities should be kept to an absolute minimum and is only appropriate if there has been a change in the law since the judgment you are attacking was rendered.

(VII) Respond to 4 or 5 below, not to both, unless (II) above indicates that you must answer both sections.

RESPONSE

1. Have you had the assistance of an attorney, other law-trained personnel, or writ writers since the conviction your petition is attacking was entered? Yes ☐ No ☐

2. If you checked "yes" above, specify as precisely as you can the period(s) of time during which you received such assistance, up to and including the present.

3. Describe the nature of the assistance, including the names of those who rendered it to you.

4. If your petition is in jeopardy because of delay prejudicial to the state under rule 9(a), explain why you feel the delay has not been prejudicial and/or why the delay is excusable under the terms of 9(a). This should be done by relying upon FACTS, not your opinions or conclusions.

5. If your petition is in jeopardy under rule 9(b) because it asserts the same grounds as a previous petition, explain why you feel it deserves a reconsideration. If its fault under rule 9(b) is that it asserts new grounds which should have been included in a prior petition, explain why you are raising these grounds

now rather than previously. Your explanation should rely on FACTS, not your opinions or conclusions.

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on _____ (date)

Signature of Petitioner

(As amended Apr. 28, 1982, eff. Aug. 1, 1982.)

§ 2255. Federal custody; remedies on motion attacking sentence

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

Appendix G

SAYED K. HAMED, M.D.
PSYCHIATRY

909 NORTH D STREET, SUITE 8
POST OFFICE BOX 1364
SAN BERNARDINO, CALIFORNIA 92402

TELEPHONE (714) 885-2553

May 9, 1986

Mr. John I. Morris
Deputy Public Defender
3536 Tenth Street
Riverside, California 92501

Re: David Fierro

Dear Mr. Morris:

Pursuant to your telephone communication, and request to evaluate the above captioned defendant, he was interviewed at the Riverside County Jail on April 28, 1986 for a period of two hours. The purpose of the examination is to determine the defendant's present mental capacity, pursuant to Section 1368 of the Penal Code.

PSYCHIATRIC-LEGAL ISSUES:

1. Whether the defendant is presently able to understand the nature and purpose of the proceedings taken against him.
2. Whether the defendant is presently able to cooperate in a rational manner with counsel in presenting a defense.
3. Whether the defendant is presently able to prepare and conduct his own defense in a rational manner without counsel.

OPINION:

1. At the present, the defendant is able to understand the nature and purpose of the proceedings taken against him.
2. At the present, the defendant is able to cooperate in a rational manner with counsel in presenting a defense.
3. At the present, the defendant is able to prepare and conduct his own defense in a rational manner without counsel.

Page -2- David Fierro

FAMILY HISTORY:

The defendant was born in Los Angeles, California. His parents separated eight or nine years ago. His father is fifty-seven years old, works as a welder, and is living in New Mexico. His mother is fifty-five years old and works cleaning homes for old people.

The defendant has four brothers and four sisters. Ray, thirty years old, works pouring cement for construction companies. Tesiera, twenty-eight, is a beautician and housewife. Dianna, twenty-seven, is married, and housewife. Steven, twenty-six, works for Waco as a painter. Patsy, twenty-four, is married, and is a housewife. Joseph, twenty-three is incarcerated at the San Quentin prison. Albert, is twenty-two, works with Steven as a painter. Tina, twenty-one is married. According to the defendant all his brothers except Steven, have had trouble with the law. None of his sisters had any problems with the law. Following the separation of their parents, the children stayed to live with their mother.

EDUCATION:

The defendant attended school in Fontana, California, he completed the ninth grade, at the age of fifteen or sixteen. He related that he was a slow learner in school; he required special classes in all subjects, since he was in the fourth grade. His grades were C's, D's, and F's. His worst subjects were reading, spelling. He stated, "I never liked school".

DRUG AND ALCOHOL HISTORY:

The defendant related that he began drinking beer and wine at the age of thirteen. He explained that his drinking was usually after school hours, and did not drink while at school. He has used speed, but not regularly, he has used heroin since the age of fifteen. He maintained that he used heroin sparingly (Chipping,) and never became addicted to it.

OCCUPATIONAL HISTORY:

The defendant worked with his maternal uncle, doing upholstery in La Puente and Gardena, California.

SEXUAL AND MARITAL HISTORY:

The defendant met Laura in 1980 and they lived together in Fontana. They were married December 4, 1985. They have three children, Sonia, was born in 1982 and twins were born one year ago. The family are supported by welfare benefits.

Page -3- David Fierro

LEGAL HISTORY:

The defendant related that his earliest involvement with the law was around the age of fifteen years, when he was arrested for being drunk in public. He was taken to the Juvenile Hall, in San Bernardino, then was sent home to his mother. Since his initial visit to the Juvenile Hall, he was placed there about four to five times. According to the defendant his charges included a minor in possession of alcohol, having open container of alcoholic beverage. He also was charged with robbery, and Grand Theft Auto, but was not convicted.

In 1977-78 around the age of sixteen or seventeen, he was charged, and convicted of burglary. He was placed at the Twin Pines Boys Ranch, where he stayed for eight months. Sometime following his release, he was arrested with He related that he had a gun in his pants, and was found to be in violation of probation. He was placed at the Twin Pine boys Ranch.

In 1982, at the age of twenty-one, the defendant was convicted of First Degree Burglary. He was incarcerated at the Chino Prison, then transferred to Camp Sierra, where he stayed for twenty-three months.

MENTAL STATUS EXAMINATION:

The defendant is a twenty-five years old Caucasian male who appears his stated age. He is five feet eight inches tall and weighs one hundred and forty pounds. He was dressed in institutional gown, and was tidy in his appearance. His personal hygiene was average.

ATTITUDE AND BEHAVIOR DURING THE INTERVIEW: The defendant was Pleasant and cooperative throughout the interview. He maintained a cautious and calculating approach. The defendant spoke clearly, expressed his feelings freely. He walked with a well coordinated gait, and demonstrated good motor coordination. No hostility or violence was demonstrated during the interview.

FORM OF THOUGHT: The defendant was alert, and his conversation spontaneous. No dissociation of ideas was demonstrated during the interview. No other evidence of thinking disorder demonstrated. His concentration and attention span are normal. Reaction time was within normal limits.

MOOD AND AFFECT: The defendant was expressive of his feelings. His predominant mood was that of being cautious and calculating. The defendant gave no history of suicide attempts. He was not despondent, no psychomotor agitation or retardation noted. His appetite is good. He gave no history to suggest manic episodes.

Page -4- David Fierro

CONTENT OF THOUGHT: The defendant talked in general about the sequence of events leading to the charges against him. His narration demonstrated good cognitive functions. The defendant was somewhat defensive, but did not demonstrate any delusional thinking. No hypochondriacal ideas demonstrated. The defendant gave no history of experiencing auditory or visual hallucinations, especially when upset and depressed. He admitted to alcohol abuse, and use of illicit drugs. Reality testing is satisfactory.

SENSORIUM AND MENTAL GRASP: The defendant was oriented in all spheres. His memory for recent and remote events is adequate, especially when evaluated by neutral subjects. Registration, retention, and recall are normal. The defendant's general fund of information is below average. He demonstrated a limited ability for abstract thinking. His intelligence is estimated to be in the average range. His judgment is fair and his insight is fair.

IMPRESSION:

Axis I: Alcohol Dependence.
 Mixed Substance Abuse.

Axis II: Antisocial Personality Disorder.

ANALYSIS:

The defendant gives a history of alcohol intake. He apparently was arrested for public intoxication, in the past. The clinical history and the demonstrated clinical picture are compatible with the diagnosis of Substance Use Disorder, Alcohol Abuse and possibly Dependence, and Mixed Substance Abuse.

On the present evaluation, the defendant is noted to be alert and oriented. He was somewhat defensive, calculating in his approach, and frequently became inappropriately demanding. He demonstrated minimal or no anxiety throughout the interview. His impulse control is considered poor. His reality testing is considered satisfactory, and his judgment is considered fair.

The defendant has been involved in various criminal activities. His criminal activities included such offenses as Grand Theft, and petty theft. He has history of repeated arrests, and was incarcerated more than once. The clinical history and the present clinical picture reveal a pattern of antisocial behavior, in which the rights of others were violated. He has demonstrated failure to sustain good job performance. He has been involved in the use of alcohol and illicit drugs. He has demonstrated failure to accept social norms with respect to lawful behavior. These are parameters which indicates Antisocial Personality Disorder.

Page -5- David Fierro

Regarding the defendant's mental capacity at the present time, he demonstrated his ability to understand the nature of the charges against him. He also demonstrated his understanding of the proceedings taken against him. He understands the role of different court officials. He also understands the role of his attorney.

At the present, the defendant is able to understand the nature and purpose of the proceedings taken against him. He is able to cooperate in a rational manner with counsel in presenting a defense. The defendant is able to prepare and conduct his own defense in a rational manner without counsel, he would be limited in that aspect as any other person with his personal experiences, educational background, and intellectual capacity.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Sayed K. Hamed', with a stylized flourish at the end.

Sayed K. Hamed, M. D.
Diplomate, American Board of
Psychiatry and Neurology

Diplomate, American Board of
Forensic Psychiatry

Appendix H

FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF RIVERSIDE

JUL 21 2010

M. Ruiz

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF RIVERSIDE**

IN RE DAVID REY FIERRO

On Habeas Corpus.

Petitioner,

Supreme Court: S116793
Sup. Ct.: RIC 440182 / CR 23644

DEATH PENALTY CASE

FINDINGS AND DECISION

In this matter, which is before the Court upon return of the Order to Show Cause issued by the California Supreme Court on March 16, 2005 in California Supreme Court Case No. S116793, the Court makes the following findings:

I. PROCEDURAL HISTORY.

1. California Penal Code section 1376(a) defines mental retardation as the condition of significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested before the age of 18.

2. Significantly subaverage intellectual functioning does not incorporate a fixed intelligence score. The question of how to measure intellectual functioning is one of fact to be resolved on all the relevant evidence.

3. Adaptive behavior is the set of learned skills that people generally need to function in age-appropriate activities in their communities. Those skill areas include conceptual, social, and practical skills.

4. The current American Association of Intellectual and Developmental Disabilities ("AAIDD") manual, (Robert L. Schalock, Ph.D. et al., Intellectual Disability: Definition, Classification, and Systems of Supports (11th ed. 2010)) discusses what examiners should do when standardized tests cannot be used. Direct observations, review of school records, and interviews with persons who knew the person and had opportunity to observe the person in the

community are accepted approaches.

5. California Superior Courts have broad discretion in resolving the issue of whether individuals are mentally retarded under Penal Code section 1376.

6. On June 18, 2003, Petitioner filed his Petition for Writ of Habeas Corpus in the California Supreme Court along with the declarations of Karen Froming, Ph.D., Jay Jackman, M.D., and Miguel Ramirez, L.C.S.W. based on claims arising under *Atkins v. Virginia* (2002) 536 U.S. 304.

7. On March 16, 2005, the California Supreme Court issued an order stating that Petitioner had made a prima facie showing that he is mentally retarded and directing the Director of the California Department of Corrections and Rehabilitation to show cause why Petitioner's death sentence should not be vacated and Petitioner sentenced to life imprisonment without the possibility of parole on the ground that he is mentally retarded within the meaning of *Atkins*, and returning the petition to the Riverside County Superior Court for that purpose.

8. The parties have proceeded to investigate and litigate the claims and issues related to Petitioner's *Atkins*-based Petition in further proceedings before the Riverside County Superior Court, Honorable Ronald L. Taylor.

II. BACKGROUND.

9. Petitioner was evaluated by mental health professionals prior to 1993.

10. The results of mental health testing of Petitioner referenced in Finding no. 9 have been exchanged by the parties.

11. Dr. Martha Rogers, a mental health professional, was retained by the Riverside District Attorney's Office, for the purpose of determining if Petitioner, by a preponderance of the evidence, is mentally retarded within the meaning of *Atkins*, *In re Hawthorne* (2005) 35 Cal. 4th 40, and California Penal Code section 1376.

12. Dr. Rogers was provided school records, declarations filed with Petitioner's Motion for Summary Judgment, or In the Alternative, Summary Adjudication, declarations filed with Petitioner's Writ of Habeas Corpus before the California Supreme Court, including the declarations of Froming, Jackman, and Ramirez, and a proffer of adaptive behavior information

from Petitioner's counsel.

13. Dr. Rogers' Report of Review Regarding *Atkins* Issues, dated July 13, 2010, has been exchanged by the parties.

III. PETITIONER'S DEVELOPMENTAL HISTORY.

14. Petitioner was born on February 5, 1961 in Los Angeles, California.

15. There are multiple factors during the prenatal, perinatal, and neonatal period, and in development that have implicated Petitioner's level of functioning. Petitioner's mother suffered from severe uncontrolled asthma and pulmonary disease that resulted in decreased oxygenation of blood. The added detrimental effects of smoking and malnutrition compounded her already hypoxic state. These latter factors are known precursors to hypoxia in utero and increased birth risk.

16. As a six-week-old infant, Petitioner suffered a severe case of chickenpox. Infants surviving the bout with infantile chickenpox may develop central nervous system dysfunction that is not readily apparent until preschool years.

17. Petitioner grew up living in poverty, functioned at a low intellectual capacity, and received little support from his parents.

18. Petitioner received the harshest abuse of any of the children in his household. He was frequently beaten for doing chores incorrectly and not following orders. Petitioner was visibly shaken when his father came home or was nearby.

19. Throughout his childhood, Petitioner was taunted by his father for being slow. His father called him "retard," and "dumb."

20. Petitioner's father told Petitioner that he was not his son, and that he was his least favorite child. Petitioner was treated as the outcast of his family.

21. In 1969, when Petitioner was in third grade, he was living in a home with 12 others, including four brothers and four sisters.

22. Petitioner was slower than the rest of his siblings and cousins.

23. Petitioner attended public schools in Fontana, California until 1977.

24. In 1965, when Petitioner was four years old, Petitioner was placed in a Headstart

class in Fontana.

25. In 1966, when Petitioner was five years old and in first grade, he tested in the low average range with a 1-6 month delay in both arithmetic and language on the Lee Clark RR Test. This revealed that Petitioner was substantially below his classmates.

26. In 1969, when Petitioner was eight years old and in third grade, he was first referred to guidance services. Within the first month of the school year, Petitioner's teacher reported that he could not read, was unable to perform at his grade level, and exhibited adjustment problems during classroom instruction and recess. Petitioner exhibited extreme difficulties engaging appropriately with other children. This type of behavior is not uncommon among students with learning disabilities and psychological problems.

27. Dr. Dennis Wayne Ruble, Dr. Patrocinio Clemente, Dr. Lucile Casalaina, Ruth Love, and Dorothy Mizysak, were qualified to assess the presence of intellectual deficits.

28. Petitioner's teachers and psychologists observed his deficits, errors and strengths and by clinical observation in testing and classroom situations were able to specify why his achievement levels were so low.

29. In their psychological reports of Petitioner, school professionals described Petitioner's behaviors clinically.

30. In 1969, the school nurse examined Petitioner and interviewed his mother for details on Petitioner's developmental history. She noted that Petitioner only entered into class activities "if forced," and that he was not successful in any area, and least successful in reading, arithmetic, and writing.

31. In 1969, Petitioner was evaluated by school psychologist Dr. Lucille Casalaina.

32. In 1969, Petitioner's Flynn adjusted Full Scale IQ was 72.

33. In 1969, Petitioner's Wide Range Achievement Test ("WRAT") scores indicated that, while in 3rd grade, he was spelling at a 1.4 grade level, reading at a 1.4 grade level, and doing math at a 2.8 grade level.

34. Dr. Casalaina stated that Petitioner's WRAT math score of 2.8 was "a bit high for the math that [Petitioner] understands."

35. Dr. Casalaina indicated that he was "unable to read simple sentences because of lack of basic skills."

36. Dr. Casalaina concluded that Petitioner was of "borderline intelligence," and that "eight of the twelve scaled scores fall within the EMR [or Educable Mentally Retarded] range."

37. Dr. Casalaina concluded that Petitioner was functioning at too low a mental level to meet the State of California Education Department's criteria for placement in an Educationally Handicapped ("EH") program, and recommended that he be placed in the Educable Mentally Retarded ("EMR") program.

38. Petitioner's mother was unable to take Petitioner to the doctor to receive a required physical examination before enrolling in the EH program because Petitioner's father forbid the doctor visit.

39. After Petitioner's father went to prison, Petitioner's mother was able to take Petitioner to the required physical examination.

40. When Petitioner was eight years old, Petitioner did not know how to feed and comb his family's horses properly. On one occasion, his cousin, Richard instructed him how to brush a horse. Petitioner stood next to him as he demonstrated the proper brushing motion, and the proper way to remove the hairs from the brush. Petitioner's cousin handed Petitioner the brush, and Petitioner stood idle with the brush in his hand. He did not brush the horse as instructed. In order for Petitioner to brush the horse, his cousin had to guide Petitioner's hand with his own. All of Petitioner's brothers could feed and comb horses properly at this age.

41. At the same time, Petitioner could not straighten a quilt properly on a bed. On one occasion, his cousin, Yolanda Garcia stood at the foot of the bed with Petitioner and showed him that the sides of the quilt hanging over the bed needed to be equidistant from the floor. She instructed Petitioner that when one side of the quilt was hanging lower than the other, he needed to pull on the opposite side to even out the quilt. When Petitioner attempted to straighten the quilt on his own, he overcompensated his adjustments, and the quilt remained uneven. Without visually checking his work by standing at the foot of the bed and assessing the quilt's evenness, Petitioner believed he had finished the task successfully. When Yolanda pointed out his mistake

to him, he repeated this behavior several times until he became frustrated and pulled the quilt off the bed.

42. Petitioner did not comprehend the rules of baseball while participating on a Little League team at ages eight and nine. His coach would instruct him to throw to a specific base, and Petitioner threw to the wrong base. The other children on his team threw to the correct bases.

43. In 1970, when Petitioner was 9 years old and in 3rd grade, school officials noted his possible neurological problems.

44. In 1971, when Petitioner was 10 years old and in 4th grade, his teacher, Mr. Demarco, reported that petitioner needed improvement respecting school regulations, working well with others, dependability, using courteous habits, making good use of time, taking care of books and materials, working independently, and keeping neat and clean.

45. In 1971, when Petitioner was 10 years old and in 4th grade, his teacher, Mr. Demarco, noted that speech problems may be causing Petitioner difficulty.

46. In 1971, when Petitioner was 10 years old, his mother, Delores Fierro, informed the school nurse that Petitioner was unable to "pronounce words right."

47. In 1971, his school principal, Dean Gahre, noted that Petitioner was too far behind for the materials in the Educationally Handicapped ("EH") program, and recommended placement in the Educable Mentally Retarded ("EMR") program.

48. In 1972, school officials placed Petitioner in the EMR program.

49. In 1972, when Petitioner was 11 years old and in 5th grade, his teacher, Hilah E. Towell, noted that Petitioner needed improvement respecting school regulations, working well with others, using courteous habits, making good use of time, and working independently.

50. Teacher, Hilah E. Towell reported that Petitioner struggled to make sense of situations.

51. In 1972, Petitioner was administered the California Achievement Test ("CAT"). His CAT scores were: Reading at grade 1.8, Language grade 2.2, Spelling 1.7, and Math 3.2.

52. In 1972, school officials approved Petitioner's continuation in the EMR program.

53. In 1973, teacher, Clyde Springer noted that Petitioner could profit from another year in his 6th grade EMR class. Mr. Springer recommended that Petitioner not be advanced to the 7th grade.

54. Despite Mr. Springer's recommendation, Petitioner was advanced to the 7th grade.

55. In 1973, when Petitioner was 12 years old and in 7th grade, he was evaluated by school psychologist Ruth Love.

56. In 1973, Petitioner was administered the WISC test, and his Flynn adjusted Full Scale IQ was 68.

57. In 1973, when Petitioner was 12 years old and in 7th grade, his WRAT scores indicated that he was spelling at a 2.5 grade level, reading at a 2.8 grade level, and doing math at a 3.9 grade level.

58. In 1973, school psychologist Ruth Love noted that Petitioner's verbal performance was "almost identical this year to that three years ago" and that he declined on performance (non-verbal) tests which were more difficult; he was penalized by extremely slow work as well as "lack of insight into solutions."

59. Ms. Love recommended that Petitioner remain in the EMR program.

60. In 1973, when Petitioner was 12 years old and in 7th grade, Ms. Love certified that Petitioner was mentally retarded.

61. In 1973, school officials approved continuation of placement in the EMR program.

62. In 1975, when Petitioner was 14 years old and in 9th grade, he was evaluated by school psychologist Patrocinio Clemente.

63. Ms. Clemente concluded that Petitioner was mentally retarded, but it was her practice then to avoid the use of that term.

64. In 1975, when Petitioner was 14 years old and in 9th grade, his Flynn adjusted Full Scale IQ was 62.

65. In 1975, Petitioner's IQ standing in comparison to an older group continued to

decline, and he was not advancing cognitively at the same rate as his peers.

66. In 1975, when Petitioner was 14 years old and in 9th grade, his WRAT scores indicated that he was spelling at a 3.0 grade level, reading at a 1.8 grade level, and doing math at a 2.9 grade level.

67. In 1975, when Petitioner was 14 years old, his WRAT scores indicated that his thinking and comprehension were significantly below average.

68. In 1975, Ms. Clemente indicated that his academic achievements "are at the primary level," that "standard scores...are at the deficient levels," and his "abilities in the different learning areas are all below average."

69. In 1975, school officials noted his weak "conceptual and verbal comprehension."

70. In 1975, school officials identified his handicap as "an inability to cope with the requirements of a regular education due to a possible mental deficiency and emotional problems."

71. In 1975, school officials recommended his continued placement in the EMR program.

72. During 1976, Petitioner spent a short time attending school in Long Beach, California. In the fall of 1976, Petitioner returned to the Fontana school system where he attended Fontana High School. Petitioner's intellectual impairments had not diminished. His attendance was poor, and his academic achievement was negligible. Petitioner failed all of his classes.

73. In 1977, school psychologist Dennis Wayne Ruble recommended that Petitioner be evaluated by a mental health professional at the Southern California Permanente Medical Group in Fontana. As a result, Petitioner was seen by Gene Schmidt, a licensed clinical social worker in the Department of Psychiatry.

74. In 1977, Gene Schmidt observed that Petitioner appeared to evidence significantly below age expectancy levels of attention span and ability to concentrate, and that Petitioner's reasoning and thinking were "rather concrete" which may be consistent with borderline intellectuality or mental retardation. He also said that Petitioner's judgment was "rather simple

in terms of the logic used" which may suggest low functioning.

75. The social worker urged Petitioner and his mother to pursue ongoing counseling, but ongoing counseling was not pursued.

76. In 1977, when Petitioner was 16 years old and in 11th grade, he was evaluated by Dorothy Mizysak.

77. In 1977, when Petitioner was 16 years old and in 11th grade, his Verbal IQ on the Peabody Picture Vocabulary Test ("PPVT") was 66. This score is consistent with mental retardation. Verbal IQ impinges particularly on those traits cited in *Atkins* as bearing on the issue of the constitutionality of the death penalty for persons with mental retardation.

78. In 1977, when Petitioner was in 11th grade, his WRAT scores indicated that he was spelling at a 2.5 grade level, reading at a 2.1 grade level, and doing math at a 3.2 grade level.

79. In 1977, Ms. Mizysak noted that Petitioner's intellectual capacity was "below average," and his academic achievement was "below expectancy."

80. Ms. Mizysak identified "academic potential" and "significant academic retardation" as problems Petitioner faced.

81. Ms. Mizysak identified that Petitioner "lacked the academic skills to perform at grade level, was easily frustrated by his inability to learn, and exhibited social and emotional immaturity."

82. In 1977, Ms. Mizysak recommended placement in the EMR program.

83. As a result, Petitioner was placed in the EMR Program. His difficulties conforming to a classroom situation quickly resulted in placing him on home instruction.

84. In 1977, when Petitioner was 16 years old and in 11th grade, Ms. Mizysak recommend against his integration into regular programs for the remainder of high school.

85. When Petitioner was 16 years old, he could not read and understand his driver's license written examination. His friend (now current brother-in-law) Raymond Duran took the test for him in the bathroom of the DMV, and Petitioner obtained his license as a result.

86. Within his peer group when he was a teenager, Petitioner was a follower. He did whatever others in the peer group asked him to do.

87. Petitioner was easily manipulated by others. When he was a child, he was the only one of the five Fierro brothers, and two male cousins, that would agree to do the girls' chores if asked. The other boys would not do the girls' chores because their father would punish them, often physically, if he saw them doing these chores. Petitioner however, did not understand the connection between doing the girls' chores and the risk of punishment from his father. He would be lulled into doing the chores by his sisters and female cousins, and then would get in trouble.

88. As a teenager, Petitioner worked on a house demolition job for a few days with his friend, now brother-in-law, Raymond Duran. One day, Petitioner and Raymond were on the roof removing its surface. Raymond pointed out a certain portion of the roof that was marked with yellow tape to Petitioner, and described to him that this section was unsafe to walk on. Shortly thereafter, Petitioner walked onto this section of roof and fell through.

89. As a teenager, Petitioner worked at his uncle's auto upholstery shop. His responsibilities were simple tasks, such as sweeping and cleaning the shop and taking out the trash. Petitioner did not have a set schedule, but rather, worked only when extra help was needed at the shop.

90. Petitioner's intermittent work entailed supervised low-level assisting or training positions in semi-skilled occupations. The types of work described would be within the capabilities of an intellectually impaired individual working under supervision.

91. When Petitioner was 21, he was administered the CAT test in State prison. He tested at the 2nd grade level and his functioning was regarded as essentially illiterate.

92. The testing done in prison at age 21 was consistent with the CAT scores at age 11.

93. Throughout his childhood, Petitioner lived in dilapidated housing and was frequently exposed to multiple sources of lead and other known neurotoxins. During Petitioner's preschool years, he and his family moved to Fontana, California, to a location that was exposed to a wide range of toxic chemicals. Of critical importance are the early to late childhood years when Petitioner lived in, raised animals (often for food) and played in the area surrounding industrial plants. The likelihood of exposure through skin, lungs and gastrointestinal tract is

likely. In 1989, the California Department of Health Services and other county, state, and federal regulatory/enforcement agencies targeted the Henry J. Kaiser Steel Site as a toxic hazard. Listed among the identifiable toxic chemicals, some of which are potent neurotoxins are chromic acid, calcium carbide, polychlorinated biphenyls (PCB's), chromic hydroxide, asbestos, hydrochloric acid, and ferric chloride.

94. Petitioner suffered numerous head traumas prior to the age of 18, any one of which could have permanently damaged his frontal lobes. As a small child, Petitioner's father forced Petitioner to engage in boxing matches with his older siblings. Family accounts indicate that Petitioner was often beaten severely during these encounters. In addition, Petitioner sustained serious head traumas after falling off of horses, out of trees, and off of roofs. On at least one occasion, Petitioner lost consciousness for several minutes and had to be revived by his brothers.

95. In 1992, when Petitioner was 31 years old, Petitioner was administered a complete neuropsychological test battery over the course of four days, comprising over fifteen hours of testing and evaluation, and reviewed extensive documentary evidence regarding his birth, education, medical, psychological, and psychiatric history, and mental health evaluations.

96. In 1992, Petitioner was evaluated in a quiet test surrounding. He demonstrated good rapport with the examiner, expended good effort, and showed no evidence of malingering. The neuropsychological test battery that was administered is routinely relied upon by mental health experts in evaluating a person's mental functioning. Hence, the evaluation results are valid indicators of Petitioner's mental functioning.

97. In 1992, Dr. Froming found that Petitioner suffers from severe cognitive deficits. Intelligence testing revealed that Petitioner is functioning in the mentally retarded range and has intellectual abilities that are equivalent to those possessed by an eleven-year-old child.

98. Dr. Froming's evaluation is consistent with previous examinations and mental health conclusions and Petitioner's lifelong history of low intellectual ability. His school records indicate persistent poor achievement and failure. School personnel, psychologists, counselors, neighbors, friends, and family members report that Petitioner was always mentally impaired. For example, his family and friends referred to Petitioner as "slow," "clumsy," "a retard," "disabled,"

and "accident prone" from an early age. Petitioner "floundered" in school, was "unable to learn from his previous experiences," and was incapable of maintaining his peers' developmental and learning level. Indeed, throughout his schooling, Petitioner was developmentally and emotionally delayed.

99. Dr. Froming's descriptions are consistent with the many references in his files by professionals concerning impaired intellectual functioning. School personnel who administered intelligence testing found that Petitioner's Flynn adjusted Full Scale IQ scores ranged from 62 to 72, and he consistently scored years behind his classmates on achievement and placement tests.

100. Dr. Froming's neuropsychological testing placed Petitioner in the moderately severe range of neurocognitive impairment. His deficits were most pronounced with respect to his ability to process, understand, and respond to verbal information.

101. In 1992, Petitioner's receptive vocabulary intellectual measure placed him on the level of an eleven-year old child. Petitioner's ability to comprehend novel or multisyllabic words was quite limited. Similarly, Petitioner's ability to express his thoughts was impaired.

102. Dr. Froming's testing also revealed that Petitioner suffered from other neurocognitive impairments. His visual perceptual, visual spatial skills and spatial reasoning are impaired. Petitioner's ability to remember the spatial material rapidly diminished with delay (below the tenth percentile). In addition, his bilateral fine motor, manual dexterity was impaired.

103. Intelligence testing administered in 1992 by Dr. Froming indicates that Petitioner had a Flynn adjusted Full Scale IQ of 72 and was functioning in the mentally retarded range. Petitioner showed moderately severe deficits in language processing and expression that is strongly exacerbated by his deficits in memory function. This level of functioning placed him in the fifth to ninth percentile. The percentile rank meant that 91 to 94 percent of people performed and scored better than Petitioner. Because Petitioner's ability to articulate a more elaborate response was impaired, an intellectual measure that relied only on the comprehension of what was heard was used. His performance on this task was even more impaired, scoring below the first percentile. Intellectual ability and mental retardation may be expressed numerically representing mental or chronological age. In Petitioner's case, the age equivalent of his ability to

comprehend and explain what was said to him was that of an eleven-year-old child.

104. During testing in 1992, Petitioner demonstrated the numerous behaviors characteristic of his impaired functioning and other mental problems. He exhibited hyper-vigilance, confusion, exaggerated need for approval from others, unquestioning responses, extreme eagerness to try to mask his deficits, perseveration or an impaired ability to switch from one task to another, impaired ability to predict when engaged in unfamiliar tasks, and inappropriate laughing and talking when nervous.

IV. SUMMARY OF INTELLECTUAL FUNCTIONING AND ADAPTIVE BEHAVIOR.

105. Petitioner exhibited a low intellectual capacity, serious learning disabilities, impaired cognitive judgment, and psychological and neurological problems prior to age 18.

106. Petitioner's intellectual impairments thwarted his efforts to function at a level corresponding to his chronological age and school grade level prior to age 18.

107. Petitioner did not have the ability to function at the same level as his peers, or advance cognitively at the same rate as his peers, prior to age 18.

108. Petitioner was below grade level in reading, arithmetic, and writing prior to age 18.

109. Petitioner exhibited low academic potential, and significant academic retardation prior to age 18.

110. Petitioner exhibited difficulty with social skills, emotional maturity, work habits, and classroom behaviors during his schooling prior to age 18.

111. Petitioner's Flynn adjusted WISC Full Scale IQ scores from 1969, 1973, and 1975 are 72, 68, and 62, respectively.

112. The WISC Full Scale IQ scores are the most reliable scores since they are based on all available subtests.

113. Petitioner's WISC scores prior to age 18 are consistent with mental retardation.

114. Petitioner's Verbal IQ score on the PPVT, in 1977 when he was 16 years old, was

66. This score is in the deficient range, and is consistent with mental retardation.

115. Petitioner's highest Reading WRAT score he achieved during prior to age 18 was a 3.0 grade level, in the impaired range.

116. Petitioner's highest Spelling WRAT score prior to age 18 was 3.0 grade level, in the impaired range.

117. Petitioner's highest arithmetic score prior to age 18 was 4.0 grade level, in the borderline range.

118. There is nothing in the records to suggest that Petitioner was capable of functioning higher than 3.0 grade level in reading, 3.0 grade level in spelling, and 4.0 grade level in arithmetic prior to age 18.

119. Petitioner's WRAT scores are consistent with his IQ scores, both showing mental retardation prior to age 18.

120. Through age 12, Petitioner's WISC and WRAT scores are consistent and do not suggest a problem with lack of effort.

121. Through age 12, Petitioner was anxious to do well, which does not suggest a problem with lack of effort.

122. Petitioner was raised in an English-speaking household. His poor performance on WISC, PPVT, WRAT, and CAT assessments was not the result of bilingualism.

123. Petitioner experienced speech difficulties prior to age 18. He did not pronounce simple words correctly. His sentences trailed off into incomprehensible mumbles, and after he mumbled, he would behave as if others understood him. People that knew him had to frequently ask Petitioner to repeat himself.

124. Based on the available evidence, Petitioner, by a preponderance of the evidence, is mentally retarded within the meaning of *Atkins v. Virginia* (2002) 536 U.S. 304, *In re Hawthorne* (2005) 35 Cal. 4th 40, and California Penal Code section 1376.

125. Petitioner has sustained his burden of proof, by a preponderance of the evidence, that he is mentally retarded within the meaning of *Atkins v. Virginia* (2002) 536 U.S. 304, *In re Hawthorne* (2005) 35 Cal. 4th 40, and California Penal Code section 1376.

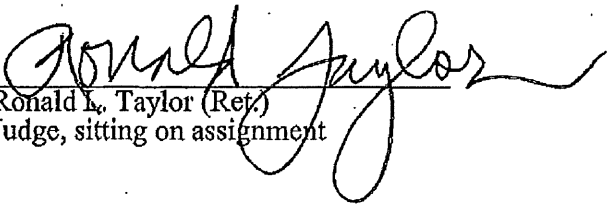
126. The available data, which does not include a current IQ test, reflects that Petitioner is mentally retarded within the meaning of accepted scientific definitions of that condition and within the meaning of *Atkins*, *In re Hawthorne* (2005) 35 Cal. 4th 40, and Penal Code section 1376.

V. COURT DECISION.

In this matter, which is before the Court upon return of the Order to Show Cause issued by the California Supreme Court on March 16, 2005 in California Supreme Court Case No. S116793, the Court makes the following decision:

1. Petitioner has sustained his burden of proof, by a preponderance of the evidence, that he is mentally retarded within the meaning of *Atkins v. Virginia* (2002) 536 U.S. 304, *In re Hawthorne* (2005) 35 Cal. 4th 40, and California Penal Code section 1376;
2. Petitioner's Petition for Writ of Habeas Corpus, California Supreme Court Case No. S116793 is hereby GRANTED;
3. Petitioner's sentence of death is hereby VACATED; and
4. Pursuant to California Penal Code section 1376, Petitioner is SENTENCED to life without the possibility of parole in *People v. David Rey Fierro*, Riverside Superior Court Case No. 440182/CR23644.

Dated: July 21, 2010


Ronald L. Taylor (Ret.)
Judge, sitting on assignment