

No. _____



IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER 2020 TERM



STEVEN LIVADITIS,
PETITIONER

v.

RON DAVIS,
RESPONDENT



APPENDICES TO PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE UNITED STATES



CAPITAL CASE

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Neutral

As of: January 22, 2020 9:58 PM Z

Livaditis v. Davis

United States Court of Appeals for the Ninth Circuit

May 9, 2019, Argued and Submitted, San Francisco, California; August 9, 2019, Filed

No. 14-99011

Reporter

933 F.3d 1036 *; 2019 U.S. App. LEXIS 23797 **; 2019 WL 3756064

assistance of counsel claim

STEVEN LIVADITIS, Petitioner-Appellant, v. RON DAVIS, Warden, Respondent-Appellee.

Case Summary

Subsequent History: Motion granted by [Livaditis v. Davis, 2019 U.S. App. LEXIS 30183 \(9th Cir. Cal., Oct. 7, 2019\)](#)

Rehearing denied by, Rehearing denied by, En banc [Livaditis v. Davis, 2019 U.S. App. LEXIS 32296 \(9th Cir. Cal., Oct. 28, 2019\)](#)

Prior History: **[**1]** Appeal from the United States District Court for the Central District of California. Stephen V. Wilson, District Judge, Presiding. D.C. No. 2:96-cv-02833-SVW.

[People v. Livaditis, 2 Cal. 4th 759, 9 Cal. Rptr. 2d 72, 831 P.2d 297, 1992 Cal. LEXIS 2585 \(June 18, 1992\)](#)

Overview

HOLDINGS: [1]-The court affirmed the district court's denial of a prisoner's habeas corpus petition challenging his capital sentence, only considering the record before the California Supreme Court (including the trial court record), because the California Supreme Court did not unreasonably apply federal law or unreasonably determine facts in denying the prisoner's ineffective assistance of counsel claim based on counsel's failure to investigate and present in mitigation evidence of the mental impairments and abusive conduct of his mother, and the California Supreme Court could have reasonably determined that the prisoner was not prejudiced by counsel's failure to investigate and present in mitigation evidence that he had suffered from mental impairments prior to and through the time of his crimes.

Disposition: AFFIRMED.

Outcome

Judgment affirmed.

Core Terms

mitigation, hostages, interviews, robbery, killed, district court, mental illness, sentence, family member, murders, investigate, habeas petition, penalty phase, state court, declaration, disorder, argues, jewelry, abused, merits, mental health expert, court's decision, present evidence, mental health, circumstances, aggravating, impairments, prejudiced, army, ineffective

LexisNexis® Headnotes

Criminal Law & Procedure > Habeas
Corpus > Review > Antiterrorism & Effective Death
Penalty Act

Criminal Law &
Procedure > ... > Appeals > Standards of
Review > De Novo Review

Criminal Law &
Procedure > ... > Review > Standards of
Review > Contrary & Unreasonable Standard

court's review is limited to the record that was before the
state court that adjudicated the claim on the merits.

Criminal Law &
Procedure > ... > Review > Standards of
Review > Contrary & Unreasonable Standard

Criminal Law &
Procedure > ... > Appeals > Standards of
Review > De Novo Review

[HN1](#) **Review, Antiterrorism & Effective Death Penalty Act**

The court of appeals reviews the district court's denial of habeas relief de novo. For petitions filed after April 24, 1996, the Antiterrorism and Effective Death Penalty Act (AEDPA) governs the court's review of habeas claims. Under AEDPA, the court may grant a writ of habeas corpus only if the state court's adjudication of the merits of the claim: (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. [28 U.S.C.S. § 2254\(d\)](#). This is a high bar, as it was meant to be. A state court's determination that a claim lacks merit precludes federal habeas relief so long as fairminded jurists could disagree on the correctness of the state court's decision.

Criminal Law & Procedure > Habeas
Corpus > Review > Scope of Review

Criminal Law & Procedure > ... > Standards of
Review > Contrary & Unreasonable
Standard > Unreasonable Application

[HN2](#) **Review, Scope of Review**

Where a state court summarily denies a claim, a petitioner can satisfy the "unreasonable application" prong of [28 U.S.C.S. § 2254\(d\)\(1\)](#) only by showing that there was no reasonable basis for the state court's decision. The federal court must determine what arguments or theories could have supported the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of the U.S. Supreme Court. The

[HN3](#) **Standards of Review, Contrary & Unreasonable Standard**

The court of appeals evaluates a habeas claim de novo and considers evidence presented for the first time in federal court only if it finds, considering only the evidence before the state court, that the adjudication of a claim on the merits resulted in a decision contrary to or involving an unreasonable application of clearly established federal law, or that the state court's decision was based on an unreasonable determination of the facts.

Criminal Law & Procedure > Habeas
Corpus > Review > Antiterrorism & Effective Death
Penalty Act

Criminal Law & Procedure > Habeas
Corpus > Review > Scope of Review

[HN4](#) **Review, Antiterrorism & Effective Death Penalty Act**

A federal habeas court conducting review under the Antiterrorism and Effective Death Penalty Act is limited to the record that was before the state court that adjudicated the claim on the merits. This rule applies even when the state court has summarily denied the habeas claims.

Criminal Law & Procedure > Habeas
Corpus > Review > Scope of Review

[HN5](#) **Review, Scope of Review**

When the California Supreme Court issues a summary denial of a habeas claim, it generally assumes the allegations in the petition to be true, but does not accept

wholly conclusory allegations, and will also review the record of the trial to assess the merits of the petitioner's claims.

Criminal Law & Procedure > Habeas
Corpus > Review > Antiterrorism & Effective Death
Penalty Act

Criminal Law & Procedure > ... > Review > Specific
Claims > Ineffective Assistance of Counsel

Criminal Law & Procedure > Counsel > Effective
Assistance of Counsel > Tests for Ineffective
Assistance of Counsel

[HN6](#) **Review, Antiterrorism & Effective Death Penalty Act**

For review under the Antiterrorism and Effective Death Penalty Act of claims of ineffective assistance of counsel, the law clearly established by decisions of the U.S. Supreme Court is *Strickland v. Washington*. Under *Strickland*, the petitioner must satisfy a two-part test: First, the petitioner must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the [Sixth Amendment](#). Second, the petitioner must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the petitioner of a fair trial, a trial whose result is reliable.

Criminal Law & Procedure > Habeas
Corpus > Review > Antiterrorism & Effective Death
Penalty Act

Criminal Law & Procedure > ... > Review > Specific
Claims > Ineffective Assistance of Counsel

Criminal Law &
Procedure > ... > Review > Standards of
Review > Deference

[HN7](#) **Review, Antiterrorism & Effective Death Penalty Act**

Review of counsel's performance must be highly deferential. The court must indulge a strong presumption that counsel's conduct falls within the wide

range of reasonable professional assistance. When reviewing a state court's decision on a *Strickland* claim under the Antiterrorism and Effective Death Penalty Act (AEDPA), the federal court's review must be doubly deferential, because *Strickland* provides courts with a general standard: Because judicial application of a general standard can demand a substantial element of judgment, the more general the rule provided by the U.S. Supreme Court, the more latitude the state courts have in reaching reasonable outcomes in case-by-case determinations. In turn, the state courts' greater leeway in reasonably applying a general rule translates to a narrower range of decisions that are objectively unreasonable under the AEDPA. Accordingly, the federal court reviews a state court's decision applying *Strickland*'s general principles with increased, or double, deference.

Criminal Law &
Procedure > ... > Review > Standards of
Review > Deference

Criminal Law & Procedure > Habeas
Corpus > Review > Scope of Review

Criminal Law & Procedure > ... > Review > Specific
Claims > Ineffective Assistance of Counsel

[HN8](#) **Standards of Review, Deference**

Where the state court does not discuss its reasons for denying a habeas petitioner's claims of ineffective assistance of counsel, the question before the federal court becomes whether there is any reasonable argument that could have supported that decision under the deferential standard that applies in this context.

Criminal Law & Procedure > Counsel > Effective
Assistance of Counsel

[HN9](#) **Counsel, Effective Assistance of Counsel**

Under *Strickland*, strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgment supports the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. Reviewing courts must apply a heavy measure of deference to counsel's

judgments about the decision not to investigate.

Criminal Law & Procedure > Sentencing > Capital Punishment > Mitigating Circumstances

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Sentencing

[HN10](#)  **Capital Punishment, Mitigating Circumstances**

A mercy or family sympathy theme is a valid approach to mitigation in the death penalty context.

Criminal Law & Procedure > Habeas Corpus > Review > Burdens of Proof

Criminal Law & Procedure > Sentencing > Capital Punishment

Criminal Law & Procedure > ... > Exceptions to Default > Cause & Prejudice Standard > Proof of Prejudice

[HN11](#)  **Review, Burdens of Proof**

Establishing prejudice in the death sentence context requires a showing that there is a reasonable probability that, absent the errors, the sentencer would have concluded that the balance of aggravating and mitigating circumstances did not warrant death. The defendant bears the highly demanding and heavy burden of establishing actual prejudice.

Summary:

SUMMARY*

Habeas Corpus / Death Penalty

The panel affirmed the district court's denial of Steven Livaditis's habeas corpus petition challenging his capital sentence.

Applying [Cullen v. Pinholster, 563 U.S. 170, 131 S. Ct. 1388, 179 L. Ed. 2d 557 \(2011\)](#), the panel considered only the record before the California Supreme Court (including the trial court record), and did not consider the evidence presented in the federal court evidentiary hearing. Because the California Supreme Court summarily denied Livaditis's state habeas petition, the panel considered whether there is any reasonable argument that could have supported that decision under the deferential AEDPA standard that applies in this context.

The panel held that the California Supreme Court did not unreasonably apply federal law or unreasonably determine facts in denying Livaditis's ineffective assistance of counsel claim based on counsel's failure to investigate and present in mitigation evidence of the mental impairments and abusive conduct of Livaditis's mother. The panel rejected Livaditis's argument that his counsel's performance was constitutionally **[**2]** deficient for failing to discover and present this evidence, and concluded that the state court could reasonably have concluded that Livaditis was not prejudiced by counsel's failure to do so.

The panel held that the California Supreme Court could have reasonably determined that Livaditis was not prejudiced by counsel's failure to investigate and present in mitigation evidence that Livaditis suffered from mental impairments prior to and through the time of his crimes. As it was unnecessary, the panel did not address counsel's performance with regard to this evidence.

Counsel: Gary D. Sowards (argued), McBreen & Senior, Los Angeles, California; Jan B. Norman, Altadena, California; for Petitioner-Appellant.

Seth P. McCutcheon (argued), Deputy Attorney General; Victoria B. Wilson and James William Bilderback II, Supervising Deputy Attorneys General; Lance E. Winters, Senior Assistant Attorney General; Gerald A. Engler, Chief Assistant Attorney General; Xavier Becerra, Attorney General; Office of the Attorney General, Los Angeles, California; for Respondent-Appellee.

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

Judges: Before: Ronald M. Gould, Richard R. Clifton, and Carlos T. Bea, Circuit Judges. Opinion by Judge Clifton.

Opinion by: Clifton

Opinion

[*1039] CLIFTON, Circuit Judge: **[**3]**

California state prisoner Steven Livaditis appeals the district court's denial of his habeas corpus petition challenging his capital sentence. Livaditis pled guilty to three counts of first degree murder, five counts of robbery, three counts of kidnapping, and one count of second degree burglary in connection with his armed robbery of a jewelry store in Beverly Hills, California. The California Supreme Court, which had previously affirmed his convictions and sentence, denied his habeas petition. The federal district court likewise denied his federal petition under [28 U.S.C. § 2254](#). On appeal from that denial, Livaditis argues that the district court erred in denying two of his ineffective assistance of counsel claims. In particular, he argues that his trial counsel was ineffective for failing to investigate and present two types of mitigation evidence: 1) evidence that Livaditis's mother was mentally ill and abusive during Livaditis's youth, and 2) evidence that Livaditis suffered from mental impairments prior to and through the time of his crimes. Under the deferential standard of review that applies, we hold that the California Supreme Court could have reasonably concluded that both claims lacked **[**4]** merit. We therefore affirm.

I. Background

On June 23, 1986, twenty-two-year-old Steven Livaditis robbed the Van Cleef & Arpels jewelry store in Beverly Hills. Shortly after the store opened, Livaditis **[*1040]** entered carrying a briefcase. A security guard (William Smith) and three sales clerks (Ann Heilperin, Hugh Skinner, and Carol Lambert) were in the main sales area at the time. Livaditis and Heilperin entered the adjoining boutique after Livaditis asked to look at some watches. A few minutes later, Heilperin screamed. Livaditis, displaying a revolver, forced Heilperin back

into the main sales area. Although Smith attempted to draw his weapon, Livaditis disarmed him. A shipping clerk (Robert Taylor) ran into the sales room and was also taken hostage. Everyone else in the building escaped.

The police quickly surrounded the store. Livaditis forced the five hostages into the watch boutique and ordered Taylor and Lambert to bind the other hostages' ankles and hands. He also ordered them to fill the briefcase with watches.

Livaditis then attempted to leave the store but returned when he saw the police. He ordered Lambert to bind Taylor in a sitting position and then dial 911. On the phone, Livaditis **[**5]** demanded that he be put on the news and provided with a television set and that the police leave. He threatened to "execute these people one at a time."

Smith was the first hostage to be killed. Livaditis stabbed Smith in the back with a hunting knife after Smith said that Livaditis thought he was a "big man with that gun." Smith bled to death in front of the other hostages. Livaditis then covered Smith's body, which was still bound and face down on the ground, with a coat. He left the knife in Smith's back. Livaditis subsequently told a reporter that he stabbed Smith because Smith did not follow orders and "kept talking." Livaditis said that he felt no remorse for the stabbing.

Heilperin was next. Livaditis appeared angry at Heilperin because she screamed at the beginning of the robbery. He then ordered her to lie down next to Smith's body. While on the phone with a local media outlet, Livaditis told the reporter to wait and then walked over to Heilperin and shot her. She died instantly. Livaditis told the reporter that his gun had misfired.

Livaditis held the remaining hostages in the store for approximately thirteen hours. Skinner eventually proposed an escape plan. Skinner suggested **[**6]** that the three hostages and Livaditis exit the store under a blanket so that the police would not be able to tell which person was the gunman. They would be tied together at the waist, with Livaditis in the middle. They would then walk to a nearby car and escape. After Livaditis agreed to this plan, Lambert spent a few hours sewing a blanket from cloth used for jewelry displays. While she was sewing, Livaditis put more jewelry into his briefcase. Once Lambert finished, Livaditis and the hostages practiced walking under the blanket for a couple of hours.

At approximately 11:30 pm, Livaditis and the hostages exited the store under the blanket. As they walked, Skinner and Taylor yelled that they were hostages. Livaditis threatened to kill the hostages if the police intervened. When the police threw "flash-bangs" (explosive diversion devices) as the group reached the car, the blast separated Skinner from Livaditis and the other hostages. Skinner pointed to Livaditis and yelled, "Here he is." Unfortunately, a police sharpshooter stationed on a nearby parking structure mistakenly believed that both male hostages were black and that only Livaditis was white. In fact, Skinner was also white. **[**7]** When the sharpshooter saw Skinner, a white man who resembled the general description the police had received of the gunman, he believed that Skinner was the perpetrator. The sharpshooter heard his spotter say **[*1041]** "shiny object" and heard someone else say "gun." He then shot and killed Skinner, believing that Skinner was the gunman and was about to start killing one or more of the remaining hostages.

At that point, the officers arrested Livaditis. Livaditis told the police that he killed Smith because Smith had been "uncooperative and antagonistic" and "to keep control of the situation." He said that he killed Heilperin because "he felt that he had to kill another hostage in order to prove that his demands should be taken seriously." He said that he was sorry and that his plan had only been to rob the store.

Livaditis pled guilty to the first degree murders of Smith, Heilperin, and Skinner; five counts of robbery; three counts of kidnapping; and one count of second degree burglary. He admitted several special circumstance allegations, including murder during the commission of robbery and burglary, multiple murder, and weapons enhancements. After jury selection, the case proceeded to the penalty **[**8]** phase.

A. The Penalty Phase

During the penalty phase, in addition to evidence about the circumstances of the Van Cleef & Arpels robbery and murders, the state presented evidence of prior crimes and bad acts by Livaditis. That included evidence that he robbed a jewelry store in Las Vegas at gunpoint in February 1986, four months before the Beverly Hills crimes. During the Las Vegas robbery, Livaditis forced two store employees to lie bound on the floor, threatened to kill them, and kicked one of them repeatedly. He escaped with jewelry worth over

\$400,000 retail, or \$177,555 wholesale. Livaditis also had one prior felony conviction for burglary and one for possession of stolen property. In addition, the state's evidence described three prior instances in which Livaditis forcibly resisted arrest.

In arguing for a sentence less than death, the defense focused on several mitigation themes, including family sympathy, pleas for mercy, and Livaditis's acceptance of responsibility for his crimes. Seven witnesses testified on Livaditis's behalf.

Sophie Livaditis, Livaditis's mother, explained the circumstances of her arrival to the United States and described her tumultuous marriage to Louis Livaditis, **[**9]** Livaditis's father. She testified that Louis abused her in front of their children and abused their children as well. She explained that due to her recurring illnesses, she had to send Livaditis to St. Basil's Academy, a Greek Orthodox orphanage in upstate New York, for two years during his childhood. According to Sophie, Livaditis was "never happy there" because he was homesick. She also described the severe appendicitis Livaditis suffered as a child and a head injury that he received at St. Basil's. She said that she "had no problems" with her children and was "very close" with Livaditis.

Sophie believed that Livaditis's problems began during his time in the U.S. Army and became worse after he left the service and moved to Las Vegas. She said that the move was "his disaster" because "he enrolled himself with the bad people." She said that she was shocked when she found out about his crimes because the family "never had problems" and Livaditis had "good plans for the future." She said that her son "knows that he did a very bad thing" and that she "was hurt, very ashamed" and was "grieving with the victims' family."

On cross-examination, Sophie testified that her ex-husband hit and spanked **[**10]** each of her children and repeatedly stated that all of her children had the same upbringing and the same advantages and disadvantages. **[*1042]** She reaffirmed that she never had trouble with her children.

Two of Livaditis's aunts and one of his uncles also testified on his behalf. Their statements were generally similar to Sophie's testimony. One aunt, Pauline Poulakos, testified that Louis Livaditis was "like a monster in the house" and that the children were afraid of him. She said that Louis hit Sophie, including while she was pregnant. She described Livaditis's unhappiness at St. Basil's and his desire to return home.

She said that Livaditis was a "normal boy" who tried to help his mother and that he was "very, very sorry" for what he did. She also rooted his problems in his move to Las Vegas.

Voula Boulari, the other aunt, testified about Livaditis's "delicate character" as a child. She said that she would not imagine that he would commit such a crime and that she was "ashamed of what he did." She said that he "has completely regretted what he did" and that he told her that he "went there just to steal and not cause any other trouble and then he was afraid."

Theofanis Thantzas, Livaditis's **[**11]** uncle, testified about Livaditis's time at St. Basil's. He also said that Livaditis "acted natural" when he lived with them in Greece as a teenager. Like Sophie, Theofanis indicated that Livaditis's problems dated back to his time in the army. He recalled that when Livaditis visited Greece on a leave of absence from the army, "he acted kind of wild."

Father Angelo Gavalas, the family's Greek Orthodox priest, testified about Sophie's challenges as a severely ill single parent. He said that Livaditis had an excellent relationship with Sophie. He also discussed Livaditis's time at St. Basil's and said that Livaditis "managed to stay two years under great duress" because he was very unhappy there. Father Gavalas testified that the Livaditis family was "close knit," so that "if something happens to one of them, it really happens to all of them."

Livaditis's brother, George, testified next. He said that he had "sort of blacked out" his younger years but that he remembered that his parents' relationship "wasn't too nice." He said that life after his parents divorced was "kind of tough" because his mother had to take care of four children alone and struggled to make ends meet, to the point that **[**12]** she was forced to sort through garbage cans to find food and clothes. George said that Livaditis "was always the first to try and do something" to help their mother. He also indicated that Livaditis's problems originated in Las Vegas. He believed that when Livaditis moved to Las Vegas, he was "more confused than ever before" and "really didn't know why he was born, basically, his purpose in life." On cross-examination, George testified that Livaditis was Sophie's favorite but said that Livaditis was not treated differently than the other children, with the exception of traveling to Greece with Sophie.

Finally, Livaditis's sister Fanny testified. She said that Livaditis was very close to Sophie and spent more time with her than the other children. Fanny testified that

Livaditis "wasn't very talkative" and "looked very preoccupied and sort of moody and depressed" after he left the military. Livaditis told her that he felt confused and couldn't find any meaning in his life. Fanny said that she forgave Livaditis for what he did and wanted him to live. Livaditis's other sister did not testify.

In closing arguments, the state argued that Livaditis's prior crimes were the beginning of a pattern **[**13]** of criminality that his family either did not see or did not want to see. The state argued that all of the Livaditis children "basically had the same background," but "if anyone had more of an **[*1043]** advantage growing up than anyone else, it would be the defendant" because he was "obviously the favorite of the mother." The state emphasized that Livaditis "had good family" and "a good support network" but engaged in a pattern of refusing to take responsibility for his bad choices. The state then detailed the circumstances of the Van Cleef & Arpels robbery and the murders of the three hostages and placed particular emphasis on the fact that Livaditis made the choice to commit these crimes and bore full responsibility for the consequences.

During the defense's closing argument, Livaditis's attorney, Michael Demby, noted that Livaditis had accepted responsibility for his crimes and admitted his guilt, even though he knew that he would either get life in prison without parole or the death penalty. He urged the jury to be cautious in deciding on the death penalty and asked them to look at Livaditis's background. He said that Livaditis did not have a lifetime record of criminality, unlike many other **[**14]** defendants, and had not been planning to kill the hostages. Demby repeatedly emphasized the effect of Livaditis's crimes and sentence on his family members, who knew a "good" and "kind" side of Livaditis.

The jury began its deliberations on June 16 and returned a verdict of death on June 19, 1987. Livaditis was sentenced to death on July 8, 1987.

B. Procedural History

The California Supreme Court affirmed Livaditis's death sentence, without dissent, in a published opinion filed on June 18, 1992. [*People v. Livaditis*, 2 Cal. 4th 759, 9 Cal. Rptr. 2d 72, 831 P.2d 297 \(Cal. 1992\)](#). The United States Supreme Court denied his petition for a writ of certiorari on March 8, 1993. *Livaditis v. California*, 507 U.S. 975, 113 S. Ct. 1421, 122 L. Ed. 2d 790 (1993) (mem.).

Livaditis successfully applied for a stay of execution and appointment of counsel from the federal district court on April 22, 1996. He filed his first federal habeas petition on April 23, 1997. On August 20, 1997, he simultaneously filed a habeas petition in the California Supreme Court and an amended federal habeas petition in the district court. The California Supreme Court summarily denied his state petition for a writ of habeas corpus on the merits on November 24, 1998.

The district court granted Livaditis leave to file a second amended habeas petition on August 12, 1999. After substantial **[**15]** briefing and other litigation activity, the district court, considering only the record before the California Supreme Court, denied Livaditis's habeas petition in a lengthy written order filed on July 8, 2014.¹

Livaditis appealed. He requested a certificate of appealability on three claims. A motions panel of our court granted a certificate of appealability on part of his claim that he received ineffective assistance of counsel ("Claim 11"), namely, whether "trial counsel was effective at the penalty **[*1044]** phase in failing to present any mitigating evidence concerning: (i) Petitioner's alleged mental health problems; and (ii) Petitioner's allegedly abusive and mentally unstable mother." Livaditis does not present any uncertified claims on appeal.

II. Discussion

HN1^[↑] We review the district court's denial of habeas relief de novo. *Hurles v. Ryan*, 752 F.3d 768, 777 (9th Cir. 2014). Because Livaditis filed his petition after April 24, 1996, the Antiterrorism and Effective Death Penalty Act (AEDPA) governs our review of his habeas claims. Under AEDPA, we may grant a writ of habeas corpus

¹The district court had earlier issued an order granting an evidentiary hearing on various claims in the petition, including the claims that Livaditis raises on appeal. The evidentiary hearing took place over four days in 2010. After the evidentiary hearing, the Supreme Court issued its decision in *Cullen v. Pinholster*, 563 U.S. 170, 131 S. Ct. 1388, 179 L. Ed. 2d 557 (2011). In *Pinholster*, the Court held that a federal habeas court conducting review under AEDPA "is limited to the record that was before the state court that adjudicated the claim on the merits." *Id.* at 181. The parties filed briefs with the district court addressing the impact of the decision on Livaditis's petition. The district court ultimately considered only the record before the California Supreme Court in denying Livaditis's habeas petition.

only if the state court's adjudication of the merits of the claim: "(1) resulted in a decision that was contrary to, or involved an unreasonable application **[**16]** of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." [28 U.S.C. § 2254\(d\)](#).

This is a high bar, as "it was meant to be." *Harrington v. Richter*, 562 U.S. 86, 102, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011). "A state court's determination that a claim lacks merit precludes federal habeas relief so long as fairminded jurists could disagree on the correctness of the state court's decision." *Id.* at 101 (quotation marks omitted).

HN2^[↑] Where, as here, a state court summarily denies a claim, a petitioner "can satisfy the 'unreasonable application' prong of [§ 2254\(d\)\(1\)](#) only by showing that 'there was no reasonable basis' for the [state court's] decision." *Cullen v. Pinholster*, 563 U.S. 170, 188, 131 S. Ct. 1388, 179 L. Ed. 2d 557 (2011) (quoting *Richter*, 562 U.S. at 98). We "must determine what arguments or theories . . . could have support[ed] the state court's decision; and then [we] must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the Supreme Court]." *Id.* at 188 (some alterations in original) (quoting *Richter*, 562 U.S. at 102). Our review is "limited to the record that was before the state court that adjudicated the claim on the merits." *Id.* at 181.

HN3^[↑] We evaluate a **[**17]** habeas claim de novo and consider evidence presented for the first time in federal court only if we find, "considering only the evidence before the state court, that the adjudication of a claim on the merits resulted in a decision contrary to or involving an unreasonable application of clearly established federal law, or that the state court's decision was based on an unreasonable determination of the facts." *Hurles*, 752 F.3d at 778.

A. The Record on Appeal

In *Pinholster*, a habeas case involving another California murder conviction and capital sentence, the Supreme Court held that **HN4**^[↑] a federal habeas court conducting review under AEDPA "is limited to the record that was before the state court that adjudicated the claim on the merits." [563 U.S. at 181](#). This rule applies

even when the state court has summarily denied the habeas claims. See [id. at 181, 188](#).

The district court correctly applied *Pinholster*. It based its decision only on the record before the California Supreme Court (including the trial court record²) [*1045] and did not consider the evidence presented in the federal court evidentiary hearing. We take the same approach.

B. Ineffective Assistance of Counsel Claims

Livaditis raises two ineffective assistance of counsel claims [*18] on appeal. He argues that his trial counsel was deficient for failing to present two categories of mitigating evidence: 1) additional information about Sophie Livaditis's abuse and mental illness; and 2) information about Livaditis's mental illness and brain damage.

[HN6](#) [↑] For our review under AEDPA of claims of ineffective assistance of counsel, the law clearly established by decisions of the U.S. Supreme Court is [Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 \(1984\)](#). See [Ayala v. Chappell, 829 F.3d 1081, 1096 \(9th Cir. 2016\)](#). Under *Strickland*, the petitioner must satisfy a two-part test:

First, the [petitioner] must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the [Sixth Amendment](#). Second, the [petitioner] must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the [petitioner] of a fair trial, a trial whose

result is reliable.

[466 U.S. at 687](#).

[HN7](#) [↑] Our review "of counsel's performance must be highly deferential." [Id. at 689](#). We must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* When reviewing a state court's decision on a *Strickland* claim under [*19] AEDPA, the federal court's review must be "doubly" deferential, [Richter, 562 U.S. at 105](#), because *Strickland* provides courts with a general standard:

Because judicial application of a general standard "can demand a substantial element of judgment," the more general the rule provided by the Supreme Court, the more latitude the state courts have in reaching reasonable outcomes in case-by-case determinations. [Yarborough v. Alvarado, 541 U.S. 652, 664, 124 S. Ct. 2140, 158 L. Ed. 2d 938 \(2004\)](#). In turn, the state courts' greater leeway in reasonably applying a general rule translates to a narrower range of decisions that are objectively unreasonable under AEDPA. Accordingly, we review a state court's decision applying *Strickland*'s general principles with increased, or double, deference.

[Cheney v. Washington, 614 F.3d 987, 995 \(9th Cir. 2010\)](#).

The California Supreme Court denied Livaditis's petition summarily. [HN8](#) [↑] Because it did not discuss its reasons for denying the claims of ineffective assistance of counsel, the question before us becomes "whether there is any reasonable argument" that [*1046] could have supported that decision under the deferential standard that applies in this context. [Richter, 562 U.S. at 105](#).

² In *Pinholster*, the Supreme Court also explained that [HN5](#) [↑] when the California Supreme Court issues a summary denial of a habeas claim, it "generally assumes the allegations in the petition to be true, but does not accept wholly conclusory allegations, and will also 'review the record of the trial to assess the merits of the petitioner's claims.'" [563 U.S. at 188 n.12](#) (alterations and citation omitted) (quoting [In re Clark, 5 Cal. 4th 750, 21 Cal. Rptr. 2d 509, 855 P.2d 729, 742 \(Cal. 1993\)](#)).

The record before the California Supreme Court in this case included both the allegations in Livaditis's habeas petition and the record of the trial. See *id.* The California Supreme Court had previously reviewed the trial record in connection with Livaditis's direct appeal.

After considering the record, we conclude that there were reasonable grounds to support the denial of relief by the California Supreme Court on Livaditis's claims of ineffective [*20] assistance of counsel. Put in terms of the relevant standard under AEDPA, the decision by the California Supreme Court was not based on an unreasonable application of the law or determination of facts.

1. The Defense Strategy

Michael Demby, a deputy public defender, was appointed to represent Livaditis shortly after his arrest. At that point, Demby had more than seventeen years of

experience as a public defender. An investigator assisted Demby on the case.

Demby provided a declaration in Livaditis's state habeas proceedings explaining his strategy for the penalty phase. In this declaration, Demby stated that he "knew early on that a penalty phase investigation was of primary importance in preparing for trial." Demby stated that Livaditis cooperated with preparations for trial and that he interviewed Livaditis about his background multiple times. Demby also interviewed several of Livaditis's family members. According to Demby, these interviews made it "obvious that Mr. Livaditis came from a very dysfunctional family." In particular, he "knew from other members of the family that [Livaditis's mother] suffered from mental and physical illnesses throughout Mr. Livaditis's childhood." According **[**21]** to Demby, Livaditis's mother initially refused to cooperate meaningfully in Livaditis's defense. Demby also knew that Livaditis's sister, Pauline, was mentally ill.

Demby learned that Livaditis "had serious abandonment issues" and that his father had been abusive. Livaditis was placed at St. Basil's when he was eight and stayed there for almost two years, even though he was extremely unhappy. The family only removed him when he began to starve himself and became very ill. Demby learned that Livaditis was then "shuffled to different family members, including an aunt and uncle in Greece who physically and psychologically abused him." He also discovered that Livaditis had other physical problems in his youth, including at least two head injuries, nearly fatal appendicitis, and a serious fall.

Demby stated that did not obtain or review additional records in preparing Livaditis's defense because the trial commenced before he was fully prepared:

The trial prematurely ended my efforts to obtain medical records and other social history documents, and it prevented any attempts to obtain more information about the orphanage where Mr. Livaditis was so unhappy as a child as well as information regarding **[**22]** Mr. Livaditis's training and service in the Army Reserves. Had I been given additional time, I would have done everything I could to obtain additional medical records and related social history documents.³

Demby stated that his initial strategy was to focus on the physical abuse that Livaditis's father and uncle inflicted on him, as well as the detrimental effect of his family's abandonment. Ultimately, however, Demby decided to present testimony from Livaditis's family members instead. **[*1047]** He hoped that "the jury would like these family members and would want to do something for them, even if they did not want to do something for Mr. Livaditis." He based this decision on interviews that he conducted with various members of the family in Greece, including Sophie Livaditis.

To that end, Demby's mitigation strategy focused on the closeness of the family and the fact that Livaditis only began to have problems as a young adult after leaving the army. Demby also elicited testimony that Livaditis's father was abusive, but he did not probe into the abuse in depth.

2. Mental Illness of and Abuse by Livaditis's Mother

Livaditis argues that Demby's assistance was constitutionally deficient because Demby **[**23]** was aware that Livaditis's mother, Sophie, suffered from severe mental illness and had abused her children but failed to investigate further or present any of this evidence in mitigation. The information that Demby was aware of included statements of family members and the family priest describing Sophie as depressed, ill, emotionally and mentally unstable, and in need of special therapy; a statement from a family member that Sophie abused Livaditis; and statements from family members and Livaditis describing his misery at St. Basil's and the rarity of Sophie's visits.

Based on this information, Livaditis now contends that Demby should have pursued further investigation into Sophie's background and abuse. He argues that, had Demby and his investigator performed proper interviews with family members, they would have learned that Sophie and her family experienced hardship in Greece; mental illness was common in Sophie's family; Sophie's parents were mentally ill; Sophie was "essentially sold" to relatives in the United States who did not treat her well; Sophie's marriage to Louis Livaditis was difficult from the beginning; Sophie attempted to self-induce abortions, including while pregnant **[**24]** with Livaditis, because she did not want children; Sophie beat all of her children; relatives described her as suffering from a nervous breakdown and odd behavior after she and Louis were divorced; Sophie prohibited her children from contacting any member of the Livaditis family, including Louis; she was referred for a psychiatric consultation because of "bizarre behavior" during a

³ There is no claim before us that Livaditis's trial counsel did not have adequate time to prepare for the penalty phase of trial, or that the trial court wrongly denied a motion to continue the trial.

hospital stay, resulting in a diagnosis of a "hysterical personality with the possibility of underlying ego pathology," with a possible dissociative disorder; and Sophie enlisted other relatives to discipline and beat her children. Livaditis argues that Demby's performance as his attorney was constitutionally deficient for failing to discover and present any of this evidence in mitigation.

We disagree. [HN9](#)^(↑) Under *Strickland*, "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgment supports the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." [466 U.S. at 690-91](#). Reviewing courts must "apply[] a heavy measure of deference [****25**] to counsel's judgments" about the decision not to investigate. [Id. at 691](#).

The record reflects that Demby did perform an initial investigation of Livaditis's social background, including his mother's abuse and mental illness. Although Demby apparently did not have all of the information that Livaditis describes, he was aware that a focus on Sophie's abuse and mental illness was a possible mitigation strategy. Once he became aware [***1048**] of an alternative strategy, namely, mercy based on pleas from Sophie and other sympathetic family members, he was in a position to make a reasonable decision about how to proceed, and whether to continue to investigate Sophie's background.

The additional evidence of Sophie's mental illness and abuse that Demby failed to discover did not differ meaningfully from the evidence that Demby already had. Rather, it primarily added details about issues of which Demby was already aware. The California Supreme Court could have reasonably concluded that this additional evidence would not have altered Demby's strategy. See [Bobby v. Van Hook, 558 U.S. 4, 11-12, 130 S. Ct. 13, 175 L. Ed. 2d 255 \(2009\)](#) ("[This] is . . . a case, like *Strickland* itself, in which defense counsel's 'decision not to seek more' mitigating evidence from the defendant's background 'than [****26**] was already in hand' fell 'well within the range of professionally reasonable judgments.'" (quoting [Strickland, 466 U.S. at 699](#))).

Likewise, the California Supreme Court could reasonably have concluded that Demby did not select a constitutionally deficient mitigation strategy. The U.S. Supreme Court has recognized that [HN10](#)^(↑) a "mercy"

or "family sympathy" theme is a valid approach to mitigation. See [Pinholster, 563 U.S. at 191](#) (denying petitioner's ineffective assistance of counsel claim, in part because the "family sympathy" mitigation strategy "was known to the defense bar in California [in 1984] and had been used by other attorneys"). And here, pleading for mercy on behalf of Livaditis's family was a legitimate strategy given its closeness, which Demby understood after extensive interviews with the family.

Furthermore, as the district court correctly noted, emphasizing Sophie's abuse of Livaditis would have been inconsistent with portraying her as a sympathetic witness and would therefore have limited the efficacy of a family sympathy approach. Indeed, in light of the challenges that Demby had in convincing Sophie to cooperate with his investigation and testify during the sentencing, portraying Sophie as severely mentally ill could have had [****27**] a detrimental impact on her participation in the trial. In addition, this evidence could have undercut the jury's view of her testimony.

As for the second prong under *Strickland*, the state court could also reasonably have concluded that Livaditis was not prejudiced by Demby's failure to present evidence of Sophie's mental illness and abuse. Demby did elicit some testimony about Livaditis's difficult upbringing during the penalty phase. Although evidence of Sophie's abuse would have added to this testimony, much of the new evidence that Livaditis cites was cumulative. The California Supreme Court could reasonably have concluded that this evidence would not have changed the outcome of Livaditis's sentencing. See [Wong v. Belmontes, 558 U.S. 15, 22-23, 130 S. Ct. 383, 175 L. Ed. 2d 328 \(2009\)](#) (holding that the state court could reasonably have concluded that the petitioner was not prejudiced when the evidence that counsel failed to present was cumulative of the "humanizing" evidence counsel used because the jury was already "'well acquainted' with [the petitioner's] background and potential humanizing features" (quoting [Schriro v. Landrigan, 550 U.S. 465, 481, 127 S. Ct. 1933, 167 L. Ed. 2d 836 \(2007\)](#))).

We conclude that the California Supreme Court did not unreasonably apply federal law or unreasonably determine facts in denying the ineffective assistance [****28**] of counsel claim based on the mental impairments and abusive conduct of Livaditis's mother.

[***1049**] 3. Livaditis's Mental Impairments

Livaditis also argues that Demby was constitutionally deficient because he was aware that Livaditis had signs of possible mental illness but failed to investigate further or present any of this evidence in mitigation.

Livaditis correctly asserts Demby had information suggesting that Livaditis may have been mentally ill. That information included Livaditis's own statements to Demby that he was a little "unstable," had not been "thinking like a normal person," and was "screwed up in the head"; Livaditis's statements to Demby that at the beginning of the robbery, he was "high" and "excited" and felt "like he was President of the United States," but later he felt angry and likened his feelings to a person who was at "a party having a good time and somebody does something to ruin it"; a co-worker's statement that Livaditis was "a hyper person who was given to abrupt mood swings"; a statement from Livaditis to his cousin that he experienced "an inner rage that left him confused"; a copy of the police hostage negotiator's notes that described Livaditis's false assertions [**29] that he was a Vietnam veteran, a college graduate with several degrees, was fluent in four languages, was capable of "maxing" aptitude tests, and was able to move water with telekinesis; a transcript of Livaditis's post-arrest interview indicating that he was chuckling to himself and said that he killed one of the hostages because something "kicked inside" and he heard a voice telling him to kill the hostage; and an interview with the media in which Livaditis described himself as a Robin Hood figure. Demby also received Livaditis's school records, which indicated that Livaditis was a "below average student" who had an "inability to read with comprehension" and was recommended to repeat third grade; and the transcript of a police interview in which Livaditis said that he may not be able to keep up with their interview questions because he did not have a lot of "understanding."

Demby's trial notes indicate that he discussed the issue of mental illness with Livaditis. Those notes reflect that Livaditis told Demby that he was "not crazy," although it had "crossed his mind to act crazy" and he could "do a good job" acting the part. The notes indicate that Livaditis considered feigning mental [**30] illness because he had "heard they could not execute an insane person." Demby also consulted a "mental health expert," although the record is silent regarding the results of that consultation.

Livaditis argues that Demby should have investigated Livaditis's mental impairments further. Had he done so, Livaditis contends that he could have discovered jail

medical records requesting toxicology testing, which a doctor ordered after he observed "Abnormal Behavior," with a handwritten notation of "Drugs/vs/Psychosis"; the results of that toxicology testing that showed no presence of drugs or alcohol; jail records from a few days after Livaditis's arrest indicating that he told staff that he was "hearing voices" and was "willing to see psych"; and a psychiatrist's tentative assessment that he had an "adjustment disorder" with "mixed emotional features" and an antisocial personality disorder.

In the state post-conviction proceedings, Livaditis's new counsel retained three mental health experts to perform an analysis of Livaditis's mental health. Dr. Rosenberg, a psychologist, prepared a report after interviewing Livaditis for 18 1/2 hours, Fanny Livaditis for 5 hours, and George Livaditis for [**31] 5 hours. She also used a detailed social history of Livaditis and related exhibits to prepare her evaluation. She concluded that Livaditis's childhood [**1050] trauma "adversely affected his subsequent psychological development, including his behavioral, social, emotional, and cognitive functioning."

Dr. Watson, a neuropsychologist, performed an evaluation based on 17 hours of interviews and tests. Dr. Watson also reviewed family declarations, Livaditis's hospital records from 1985 and 1986, his educational and army records, other family medical records, his jail medical records, and Dr. Rosenberg's declaration. Dr. Watson concluded that Livaditis had a "mild degree of neuropsychological impairment" and intellectual functioning "below that expected based upon both demographic and performance characteristics."

Dr. Foster, a neuropsychiatrist, provided an expert declaration on the basis of four sets of examinations, interviews, and tests that he conducted over 16 hours. He also reviewed Dr. Rosenberg's social history, the declarations of family members and acquaintances, and Dr. Watson's report. Dr. Foster found that Livaditis suffered from "severe psychiatric disorders, neuropsychological and [**32] medical deficits which significantly compromised his ability accurately to perceive and understand the world around him, his ability to respond adequately to complex situations, and his ability to function normally." According to Dr. Foster, Livaditis's disorders included both post-traumatic stress disorder and a "severe mood disorder with intermittent psychotic features," most likely bipolar disorder, but possibly schizoaffective disorder. Dr. Foster also concluded that Livaditis's symptoms were "consistent with acquired and, perhaps, congenital brain injury."

After reviewing that record, the district court held that the California Supreme Court could have reasonably denied Livaditis's habeas petition under both prongs of *Strickland*. With respect to prejudice, we agree. We conclude that the California Supreme Court could have reasonably determined that Livaditis was not prejudiced at the penalty phase.⁴

[HN11](#)  "Establishing prejudice in the death sentence context requires a showing that there is a reasonable probability that, absent the errors, the sentencer would have concluded that the balance of aggravating and mitigating circumstances did not warrant death. The defendant bears the highly **[**33]** demanding and heavy burden of establishing actual prejudice." [Bible v. Ryan, 571 F.3d 860, 870 \(9th Cir. 2009\)](#) (quotations and punctuation omitted). For three reasons, we conclude that the California Supreme Court could have reasonably determined that Livaditis did not meet that burden.

First, several aggravating circumstances supported the jury's verdict. This was not the first time that Livaditis had demonstrated ruthlessness during the commission of a violent crime. As noted above, the state presented evidence of Livaditis's record of crimes and bad acts. In particular, four months before the Beverly Hills robbery and murders, Livaditis robbed a jewelry store in Las Vegas at gunpoint. During that robbery, he tied up two of the store's employees, verbally abused them, threatened to kill them, and kicked one of the bound employees repeatedly.

Livaditis exhibited similar callousness during the Beverly Hills robbery and murders when he killed Smith and Heilperin. He stabbed Smith because Smith verbally **[*1051]** defied him and let him bleed to death in front of the other hostages. He then killed Heilperin because he wanted to prove that his demands were serious. He chose Heilperin because she had screamed at the start of the robbery. As in the **[**34]** Las Vegas robbery, both victims were helpless. Moreover, during press interviews Livaditis indicated that he believed Smith's stabbing was "appropriate." The cruelty Livaditis displayed over the course of multiple crimes constituted a substantial aggravating factor. See, e.g., [Sully v. Ayers, 725 F.3d 1057, 1069 \(9th Cir. 2013\)](#) ("staggering" aggravating evidence weighed against a conclusion that defendant was prejudiced); [Bible, 571](#)

[F.3d at 870](#) (the "powerful aggravating circumstances surrounding [the] murder" weighed against a conclusion that defendant was prejudiced).

Second, the California Supreme Court could have reasonably decided to accord the declarations submitted by Livaditis's mental health experts little weight. Dr. Rosenberg focused on describing the psychological effects of Livaditis's abusive childhood. Because Demby elicited testimony that demonstrated that Livaditis had been abused as a child and the jury could have inferred negative effects from that treatment, the California Supreme Court could have considered Dr. Rosenberg's testimony cumulative. See [Wong, 558 U.S. at 22-23](#). Moreover, Dr. Rosenberg did not propose a clinical diagnosis. See [Runningeagle v. Ryan, 825 F.3d 970, 987 \(9th Cir. 2016\)](#) (discounting mental health declaration that "gave no affirmative diagnosis").

Dr. Watson indicated only that Livaditis suffered **[**35]** from a "mild degree of neuropsychological impairment." The California Supreme Court could have concluded that mitigating effect of that statement was limited. See [id. at 987-88](#) (giving limited weight to mental health diagnosis that "used qualifying language").

Dr. Foster discussed Livaditis's history of trauma, child abuse, and neglect. Although Dr. Foster proposed several clinical diagnoses, those diagnoses were based on interviews conducted nearly ten years after the murders. See [id. at 988](#) (discounting diagnosis produced more than 20 years after the crimes were committed). Moreover, on the crucial issue of brain damage, Dr. Foster simply opined that Livaditis's symptoms were "consistent with" brain damage. See [Leavitt v. Arave, 646 F.3d 605, 614 \(9th Cir. 2011\)](#) (holding, in pre-AEDPA case, that mental health opinions that "couch results in tentative language" are "simply not enough to show prejudice").

The record also reflected that Livaditis had told Demby that he was "not crazy" but that he had considered acting crazy and could "do a good job" at that. The California court may have decided as a result to treat with skepticism expert statements based on interviews of Livaditis conducted years after he had already been sentenced to death. That skepticism **[**36]** could have been fueled by Demby's own declaration, which indicated that he had consulted his own mental health expert at trial. It would not have been unreasonable for the California Supreme Court to discount the testimony of these mental health experts.

⁴As it is unnecessary, we do not address Demby's performance. See [Pinholster, 563 U.S. at 202](#).

Third, as discussed above, Demby put on extensive mitigation evidence, including testimony from Livaditis's family. One of the key themes of Demby's mitigation strategy was the closeness of the family and the jurors' potential sympathy for Livaditis's mother, Sophie. The mental health experts' declarations discussed the abuse Livaditis suffered at Sophie's hands at length. All three experts relied on that abuse in reaching their conclusions. Any testimony along the lines suggested by the later testimony from those experts would [*1052] almost certainly have touched on Sophie's abuse. That testimony could have rendered Sophie far less sympathetic in the jurors' eyes. Thus, if Demby had called on mental health experts during mitigation, those experts may have undercut the mitigation case that Demby did put on. Cf. [Pinholster, 563 U.S. at 202](#) (no prejudice where, *inter alia*, "some of the new testimony would likely have undercut the mitigating value of the testimony by Pinholster's [**37] mother").

After considering the aggravating evidence adduced, the substantial mitigating evidence that Demby did present, and the mitigation evidence he could have presented, the California Supreme Court could have reasonably concluded that further evidence concerning Livaditis's mental health would not have made a difference. More precisely, in the terms used in *Strickland*, the California Supreme Court could have reasonably concluded that there was not a "reasonable probability that . . . the result of the proceeding would have been different." [Strickland, 466 U.S. at 694](#).

III. Conclusion

We affirm the district court's denial of Livaditis's petition for a writ of habeas corpus. Under *de novo* review, we might reach a different conclusion. Especially under the double deference that applies to our review, however, we cannot say that the inferred conclusions by the California Supreme Court constituted unreasonable applications of federal law or unreasonable determinations of the facts. See [Richter, 562 U.S. at 105](#).

AFFIRMED.

FILED

OCT 28 2019

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

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STEVEN LIVADITIS,

Petitioner-Appellant,

v.

RON DAVIS, Warden,

Respondent-Appellee.

No. 14-99011

D.C. No. 2:96-cv-02833-SVW
Central District of California,
Los Angeles

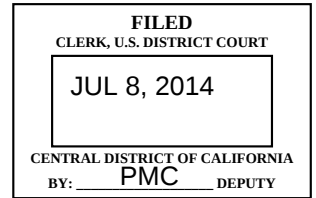
ORDER

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

The panel has unanimously voted to deny the petition for rehearing. Judge Gould and Judge Bea have voted to deny the petition for rehearing en banc, and Judge Clifton so recommends.

The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petitions for rehearing and rehearing en banc (Docket Entry No. 84) are DENIED.



UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

STEVEN LIVADITIS,

Petitioner,

v.

KEVIN CHAPPELL,*
Warden of California
State Prison at San Quentin,

Respondent.

Case No. CV 96-2833 SVW

DEATH PENALTY CASE

ORDER DENYING PETITION
FOR WRIT OF HABEAS
CORPUS

I. Introduction

This case arises from the 1986 robbery of a jewelry store by petitioner Steven Livaditis, which escalated into a lengthy hostage situation resulting in the death of three store employees. In 1987, after jury selection had begun at his trial in the Los Angeles County Superior Court, Livaditis entered guilty pleas to multiple charges arising out of the incident, including three counts of first degree murder, five counts of robbery, and three counts of kidnapping. Livaditis also admitted several special circumstance allegations. The offenses and enhancements

* Kevin Chappell is substituted for his predecessors pursuant to Federal Rule of Civil Procedure 25(d).

1 to which he pleaded guilty made him eligible for the death penalty.

2 Jury selection was completed and the case proceeded immediately to the
3 penalty phase. The jury returned a verdict of death. The California Supreme Court
4 affirmed the conviction and sentence on direct appeal, and subsequently denied
5 Livaditis's petition for writ of habeas corpus. Livaditis now seeks federal habeas
6 corpus relief.

7 **II. Factual Background**

8 **A. The Jewelry Store Robbery and Murders¹**

9 Van Cleef & Arpels, a jewelry store on Rodeo Drive in Beverly Hills,
10 opened for business as usual at 10 a.m. on Monday, June 23, 1986. A short time
11 later, petitioner, wearing a suit and tie and carrying a briefcase, appeared at the
12 inner door of the store entrance and was allowed in. Four employees — security
13 guard William Smith and sales clerks Ann Heilperin, Carol Lambert, and Hugh
14 Skinner — were in the main sales area. Petitioner expressed interest in buying a
15 watch, and Heilperin led him into the adjoining “watch boutique” room.

16 A few minutes later, other employees heard Heilperin scream, and then yell
17 “Please don’t hurt me.” Petitioner escorted Heilperin back into the main sales
18 room at gunpoint and told everybody not to move. Security guard William Smith
19 tried to draw his own firearm, but petitioner forced him to his knees and disarmed
20 him. Robert Taylor, a store shipping clerk, heard Heilperin’s scream and moved
21 toward the sales room from his office in the rear. Petitioner saw Taylor, and
22 ordered him into the sales room. Taylor complied.

23 Other employees in the store’s second floor offices eventually realized that a
24 robbery was in progress and left through the rear of the building. An employee
25 called the police, who soon arrived and began to surround the building.

26
27 ¹ This description of the crimes is derived primarily from the California Supreme
28 Court’s opinion on direct appeal. *See People v. Livaditis*, 2 Cal. 4th 759, 766-770,
831 P.2d 297, 9 Cal. Rptr. 2d 72 (1992).

1 Petitioner, unaware that police were outside, ordered the five employees into
2 the watch boutique. He then ordered them to lie face down on the floor except for
3 Lambert and Taylor. Petitioner ordered those two to bind the other employees'
4 ankles, and their hands behind their backs, using rolls of plastic tape petitioner had
5 brought in his briefcase. After Lambert and Taylor did this, petitioner ordered
6 them to fill his briefcase with watches.

7 Petitioner then took the briefcase full of watches and started toward the store
8 entrance with Taylor, who he needed to let him out the locked front door. When
9 petitioner saw the police outside, however, he became angry and returned with
10 Taylor to the watch boutique. He made Lambert tape Taylor's wrists and ankles
11 like the others, and then had her dial 911 from the store telephone. Thus began the
12 first of several telephone conversations between petitioner and the police.

13 Identifying himself as "John" on the telephone, petitioner began making a
14 series of demands, including that the police pull back from the store, that he be
15 provided with a television set, and that he be put on the television news. He
16 threatened to "execute these people one at a time." He described Smith, the
17 security guard, as an "old, weak, fragile man."

18 At some point after this conversation, petitioner bound Lambert with tape,
19 and turned his attention to Smith. He told Smith that he was too old to be a
20 security guard and that his gun was "outdated." Smith replied, "You think you are
21 a big man with that gun," or words to that effect. Petitioner became angrier, told
22 Smith that he talked too much, and retrieved a hunting knife from his briefcase.
23 He told the others to look away, and then stabbed Smith in the middle of his back.
24 Blood spurted onto Taylor's face. Smith gasped for breath and, still bound and
25 lying face down, bled to death in the presence of the other hostages. Petitioner
26 covered Smith, leaving the knife in him, and his body remained there until the
27 incident was over.

28 Petitioner later spoke with a correspondent for United Press International

1 who telephoned the store upon hearing of the robbery. Petitioner told the reporter
2 that he had only intended to rob the store and leave. He said he stabbed Smith
3 because Smith did not follow orders and “kept talking.” He felt “no remorse” for
4 the stabbing, calling it an “appropriate thing to do at the time.” Petitioner said he
5 would shoot the remaining hostages if the police “storm[ed] the place,” and added
6 that he might soon “have to execute somebody else” if his “demands [were] not
7 met.” He allowed some of the hostages to speak to the UPI correspondent. He
8 ended the conversation by telling the correspondent to “have a nice day.”

9 At some point, petitioner forced Heilperin to lie down next to Smith’s body
10 and face the wall. Petitioner expressed anger toward Heilperin, calling her “Big
11 Mouth Annie” because she had screamed at the outset of the robbery. About half
12 an hour later, petitioner spoke on the telephone with someone from a local
13 television station. During this conversation, petitioner said, “Quiet, just a minute,”
14 then walked over to Heilperin and shot her in the back of the head. Heilperin died
15 instantly. Petitioner then resumed his telephone conversation, telling the caller that
16 his gun had “misfired.”

17 After shooting Heilperin, petitioner appeared to become calmer. He covered
18 Heilperin’s body. About 45 minutes later, he allowed Skinner to tell the police by
19 telephone that Heilperin had been killed. Around this time, petitioner tied Skinner
20 and Taylor together, sitting upright on two chairs near the entrance to the watch
21 boutique, to act as a shield in case the police tried to enter.

22 At some point, Taylor said the hostages’ only chance of surviving the ordeal
23 was to devise a plan for everyone, including petitioner, to leave the building.
24 Knowing that the store had pieces of cloth sometimes used in displays, Skinner
25 suggested that they sew the pieces together into a sort of blanket, which they could
26 then use as a cover as they left the store. By leaving as a group concealed by the
27 blanket, the police would not be able to distinguish petitioner from the hostages
28 and thus would not shoot. They would walk to a nearby car owned by the store (to

1 which Taylor had the keys), get in and drive away. Attempting to make petitioner
2 happy, Skinner also suggested that petitioner take more expensive items of jewelry
3 instead of the comparatively inexpensive watches he had already gathered.

4 Petitioner agreed to the suggestions. Skinner went to another room and
5 collected more expensive jewelry for petitioner, while Lambert used a ball point
6 pen and some string from petitioner's briefcase to stitch the pieces of cloth
7 together. She started the job in the early evening; it took about three or four hours
8 to complete.

9 When the blanket was finished to petitioner's satisfaction, he and the three
10 surviving hostages practiced walking under it. The hostages would be tied together
11 at the waist with petitioner in the middle. Petitioner said that when they got to the
12 car, Lambert would drive, and petitioner would be in the front middle, with
13 Skinner to his right. Taylor was to sit in the middle of the back seat to act as a
14 shield from the rear. The four practiced with the blanket for a couple of hours;
15 petitioner was in no hurry because he wanted to wait until it got dark outside.
16 During this time, petitioner also placed more jewelry into his briefcase.

17 Eventually, the time came to leave. Petitioner tied the hostages together
18 around the hands and waist, and got in the middle. At about 11:30 p.m., they
19 shuffled out of the store in this formation, covered by the improvised blanket.
20 Petitioner carried his briefcase and the gun.

21 Outside, the group made their way to the adjacent parking area where the car
22 was located. Skinner and Taylor called out that they were hostages and pleaded for
23 no one to shoot them. Taylor could hear the "murmuring" of people in the
24 background. Officers heard petitioner shout that he would kill the hostages if the
25 police tried to stop them.

26 By this time, members of the Beverly Hills Police Department and the Los
27 Angeles County Sheriff's Department had secured the area around the store. They
28 decided not to allow the group to drive away. Two deputies were armed with

1 “flash bangs” — diversion devices that explode like large firecrackers — and were
2 instructed to throw them at the group when it reached the car. In the meantime, a
3 sharpshooter and spotter with the Sheriff’s SWAT team had taken up position on
4 an upper level of an adjacent parking structure. Additional sharpshooter teams
5 took up positions at other vantage points.

6 The police were under the mistaken impression that both of the male
7 hostages were African-American. (In fact, only Taylor was.) Thus, the
8 sharpshooter teams believed that the only white male in the group was the gunman.
9 To compound the confusion, Skinner’s appearance generally matched the sketchy
10 description of the gunman that had been provided to the officers.

11 When the blanket-covered group reached the car, the deputies threw the
12 flash-bang grenades as planned. The shock from the blast knocked petitioner,
13 Lambert and Taylor to the ground, still obscured by the blanket. Skinner, however,
14 fell away from the others, out from under the blanket. Skinner started to stand up,
15 pointing to the petitioner and yelling, “Here he is.”

16 The SWAT sharpshooter stationed in the parking structure was watching
17 these events unfold through the scope of his rifle. He saw the blast “spin” one
18 person away from the others and onto his back. When the smoke from the
19 grenades cleared, he observed that the person was a white male, similar in
20 appearance to the description of the gunman. Believing this person to be the
21 gunman, the sharpshooter “locked in” on him, focusing the cross hairs of his rifle
22 scope on the center of the man’s chest. He heard his spotter say something like
23 “shiny object,” and heard someone else yell “gun.” Fearing that the man was
24 armed and a threat to the hostages, the sharpshooter fired a single bullet into the
25 man’s chest, killing him. A moment later, when officers on the ground converged
26 on the group and lifted the blanket, the sharpshooter saw a second white male
27 (petitioner), and said, “Where did he come from?” He soon learned he had shot
28 one of the hostages.

1 The other officers quickly secured the surviving hostages and arrested
2 petitioner, who was lying on the ground after sustaining burn injuries from the
3 flash-bang devices. Petitioner's gun, which was found on the ground nearby, was
4 loaded with six .357 Magnum bullets, cocked, and ready to fire. Found nearby was
5 a switchblade knife and a "speedy loader" (a device designed for quick reloading
6 of the gun). Inside the store, the covered bodies of Heilperin and Smith were
7 found. Inside petitioner's briefcase, in addition to the jewelry, were another
8 speedy loader, two rolls of tape, some white twine, and a pair of gloves.

9 After his arrest, petitioner told the police he stabbed Smith because he was
10 "uncooperative and antagonistic." Petitioner said he had to kill Smith "to keep
11 control of the situation." Petitioner said he shot Ms. Heilperin because "he felt that
12 he had to kill another hostage in order to prove that his demands should be taken
13 seriously." He chose Heilperin because she was uncooperative and had created the
14 hostage situation by screaming at the outset of the robbery.

15 Petitioner also said he was sorry, and that his plan had been only to tie up the
16 employees, take store merchandise, and leave. He expressed regret when he was
17 mistakenly told that Taylor, one of the survivors, had been killed.

18 **B. Evidence of Prior Criminal Conduct**

19 Because Livaditis did not contest his guilt, the trial proceeded immediately
20 to the penalty phase. In addition to the evidence of the crimes described above, the
21 prosecution introduced evidence of aggravating factors in the form of Livaditis's
22 prior criminal conduct:

23 The prosecution presented evidence of three prior
24 instances in 1984 and 1985 in which defendant forcibly resisted
25 arrest in Las Vegas, Nevada. On the first occasion, a police
26 officer was attempting to handcuff defendant in a crowded
27 computer store after defendant had attempted to sell two
28 computers that had been stolen in a recent burglary. Defendant
fled. He pushed his way through two officers, broke through a
sliding glass door, knocked down some store customers, and
escaped after breaking the store's front door off its hinges. On
the second occasion, defendant also resisted when an officer
tried to handcuff him. On the third occasion, defendant was

1 arrested for suspected possession of cocaine. He fled on foot,
2 and then kicked and resisted the officers when he was
eventually captured. It took several officers to subdue him.

3 On February 2, 1986, defendant robbed a jewelry store in
4 Las Vegas at gunpoint. He forced the two employees to lie on
the floor and taped their hands and feet. He threatened to kill
5 the employees, abused them verbally, and kicked one of them
repeatedly. He eventually escaped with jewelry worth over
6 \$400,000 retail, or \$177,555 wholesale. The employees
identified defendant as the gunman, and his palm print was
7 found on a roll of tape recovered from the store.

8 Defendant had two prior felony convictions in Nevada,
one each for burglary and possession of stolen property.

9 *Livaditis*, 2 Cal. 4th at 770-71.

10 **III. Procedural History**

11 Livaditis was charged in the Los Angeles Superior Court by Information
12 filed August 25, 1986. Trial began with jury selection on April 22, 1987. On
13 April 28, 1987, before jury selection was complete, Livaditis pleaded guilty to
14 three counts of murder, five counts of robbery, and three counts of kidnapping, and
15 further admitted almost all of the alleged special circumstances. Jury selection
16 resumed and was completed, and testimony at the penalty trial began on June 4,
17 1987. The jury began its deliberations on June 16, 1987, and returned a verdict of
18 death on June 19, 1987. The trial court entered a judgment of conviction and
19 imposed the sentence of death on July 8, 1987.

20 On June 18, 1992, the California Supreme Court issued a 43-page opinion
21 on the automatic direct appeal, unanimously affirming the judgment of death. The
22 United States Supreme Court denied Livaditis's petition for a writ of certiorari on
23 March 8, 1993.

24 On April 22, 1996, Livaditis applied to this Court for a stay of execution and
25 appointment of counsel, which was granted. He filed his initial federal habeas
26 corpus petition on April 23, 1997. (Dkt. 25.) On August 20, 1997, he filed a
27 habeas corpus petition in the California Supreme Court, and simultaneously filed
28 an amended habeas petition in this Court. (Dkt. 56.)

1 On November 24, 1998, the California Supreme Court denied Livaditis's
2 state habeas petition. *In re Steven Livaditis on Habeas Corpus*, S063733. All of
3 the claims were summarily denied on the merits, and several were alternatively
4 denied on procedural grounds.

5 On January 7, 1999, Livaditis sought leave to file a Second Amended
6 Petition for Writ of Habeas Corpus ("SAP"). The Court granted the request. (Dkt.
7 89.) The SAP is the operative petition at issue here. Respondent filed a motion to
8 dismiss the SAP on the ground that petitioner's claims were procedurally barred
9 from federal habeas review. (Dkt. 94.) The motion was granted in part and denied
10 in part, and Claims 9 and 38 were dismissed. (Dkt. 100.)

11 Respondent then filed a motion for judgment on the pleadings. (Dkt. 111.)
12 The Court directed the parties to file additional briefs addressing whether the Court
13 should hold an evidentiary hearing on certain claims. (Dkt. 125.) After these
14 briefs were filed, the Court issued an order granting an evidentiary hearing on
15 Claim 5 (shackling), portions of Claim 11 (ineffective assistance of counsel
16 ("IAC")), and Claim 12 (incompetence to stand trial). (Dkt. 144.) The Court also
17 dismissed a portion of Claim 11 ("11L") pursuant to 28 U.S.C. §2244(d), and
18 granted judgment on the pleadings in favor of respondent on Claims 6, 18-19, 21-
19 23, 25-28, 31-34, and 39. *Id.*²

20 The evidentiary hearing took place across four separate days in 2010 before
21 the undersigned judge, to whom the case had by then been reassigned. The parties
22 subsequently filed briefs addressing the merits of the remaining claims and the
23 impact of the Supreme Court's decision in *Cullen v. Pinholster*, 131 S. Ct. 1388
24
25
26

27
28 ² The latter claims were all either conceded or withdrawn by petitioner. (See Dkt.
144 at 24.)

(2011).³ (See Pet. Briefs, Dkt. 280, 288, 291, 295; Resp. Briefs, Dkt. 279, 293.)

IV. Legal Standard

Livaditis filed his initial federal habeas petition on April 23, 1997, after the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”). Pub. L. No. 104-132, 110 Stat. 1214 (1996); 28 U.S.C. §2254. Thus, AEDPA applies to this case. *Lindh v. Murphy*, 521 U.S. 320, 336 (1997).

Pursuant to AEDPA, this Court may not grant relief to a habeas petitioner with respect to any claim “adjudicated on the merits” in state court, unless the state court’s adjudication of the claim

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). The Supreme Court has explained that this “is a ‘difficult to meet’ and ‘highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt.’” *Pinholster*, 131 S. Ct. at 1398 (quoting *Harrington v. Richter*, 131 S. Ct. 770, 786 (2011) and *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002)). The petitioner carries the burden of proof. *Id.*

Under § 2254(d)(1), “clearly established Federal law” refers to the holdings, as opposed to dicta, of decisions of the Supreme Court in existence at the time of the relevant state court decision. *Pinholster*, 131 S. Ct. at 1399; *Lockyer v. Andrade*, 538 U.S. 63, 72 (2003) (“[C]learly established law” under § 2254(d)(1) “is the governing legal principle or principles set forth by the Supreme Court at the

³ The evidentiary hearing was held before the Supreme Court’s decision in *Pinholster*, which substantially limited the circumstances under which federal habeas courts should hold evidentiary hearings.

1 time the state court renders its decision.”); *accord Williams v. Taylor*, 529 U.S.
 2 362, 412 (2000). Nevertheless, circuit-level precedent may provide guidance in
 3 determining what constitutes “clearly established” federal law and whether the
 4 state court applied that law unreasonably. *Clark v. Murphy*, 331 F.3d 1062, 1069
 5 (9th Cir. 2003), overruled on other grounds by *Andrade*, 538 U.S. 63.

6 A state court decision is “contrary to” clearly established federal law if the
 7 state court arrives at a conclusion opposite that reached by the Supreme Court on a
 8 question of law, or if the state court decides a case differently from the Supreme
 9 Court on materially indistinguishable facts. *Williams v. Taylor*, 529 U.S. at 412-
 10 13. Similarly, “[t]he addition, deletion, or alteration of a factor in a test established
 11 by the Supreme Court also constitutes a failure to apply controlling Supreme Court
 12 law under the ‘contrary to’ clause of the AEDPA.” *Benn v. Lambert*, 283 F.3d
 13 1040, 1051 n.5 (9th Cir. 2002).

14 A state court decision is based on an “unreasonable application” of clearly
 15 established federal law if the state court identifies the correct governing legal
 16 principle from the Supreme Court’s decisions but applies that principle in an
 17 “objectively unreasonable” manner to the facts of the prisoner’s case. *Williams v.*
 18 *Taylor*, 529 U.S. at 412-13. The Supreme Court need not have applied a specific
 19 legal rule to a nearly identical fact pattern for the state court’s decision to be
 20 considered an unreasonable application of clearly established federal law. *Panetti*
 21 *v. Quarterman*, 551 U.S. 930, 953 (2007). “[E]ven a *general* standard may be
 22 applied in an unreasonable manner.” *Id.* (emphasis added).

23 Under either clause of § 2254(d)(1), the law must be clearly established.
 24 There must be a “Supreme Court decision that ‘squarely addresses the issue’ in the
 25 case before the state court” or one that “establishes an applicable general principle
 26 that ‘clearly extends’ to the case before us.” *Moses v. Payne*, 555 F.3d
 27 742, 760 (9th Cir. 2009) (quoting *Wright v. Van Patten*, 552 U.S. 120, 123, 125
 28 (2008)); *Aguilar v. Woodford*, 725 F.3d 970 (9th Cir. 2013).

1 A state court decision involves an “unreasonable application” of clearly
2 established federal law only if it is objectively unreasonable; an incorrect or
3 inaccurate application is not necessarily unreasonable. *Williams v. Taylor*, 529
4 U.S. at 409-10. A federal court “may not issue the writ simply because the court
5 concludes in its independent judgment that the relevant state-court decision applied
6 clearly established federal law erroneously or incorrectly. Rather, that application
7 must be objectively unreasonable.” *Andrade*, 538 U.S. at 75-76. There is no
8 requirement that the state court cite Supreme Court precedents, or even be aware of
9 them, “so long as neither the reasoning nor the result of the state-court decision
10 contradicts them.” *Early v. Packer*, 537 U.S. 3, 8 (2002).

11 When determining whether the state court’s legal conclusion was contrary to
12 or an unreasonable application of federal law, “review . . . is limited to the record
13 that was before the state court that adjudicated the claim on the merits.” *Pinholster*,
14 131 S. Ct. at 1398. In other words, “review under § 2254(d)(1) focuses on what a
15 state court knew and did.” *Id.* at 1399. Therefore, evidence introduced in federal
16 court, including testimony at a federal court evidentiary hearing, has no bearing on
17 review pursuant to § 2254(d)(1). *Id.* at 1400. “Although state prisoners may
18 sometimes submit new evidence in federal court, AEDPA’s statutory scheme is
19 designed to strongly discourage them from doing so.” *Id.* at 1401.

20 As for claims based on § 2254(d)(2), a petitioner must show the state court’s
21 decision is based on “an unreasonable determination of the *facts* in light of the
22 evidence presented in the State court proceeding.” 28 U.S.C. § 2254(d)(2)
23 (emphasis added). A federal court must presume the state court’s factual findings
24 to be sound unless petitioner rebuts the “presumption of correctness by clear and
25 convincing evidence.” 28 U.S.C. § 2254(e)(1). “The standard is demanding but
26 not insatiable; as we said the last time this case was here, ‘[d]eference does not by
27 definition preclude relief.’” *Miller-El v. Dretke*, 545 U.S. 231, 240 (2005)
28 (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003)).

1 A state court's determination of the facts is "unreasonable" under
2 § 2254(d)(2) only if the federal court is "convinced that an appellate panel,
3 applying the normal standards of appellate review, could not reasonably conclude
4 that the finding is supported by the record [before the state court]." *Taylor v.*
5 *Maddox*, 366 F.3d 992, 1000 (9th Cir. 2004). A determination cannot be found
6 unreasonable simply because it might properly have been reversed on direct
7 appeal. *Id.*

8 Where a state court has determined that a claim lacks merit, federal habeas
9 relief is precluded "so long as 'fairminded jurists could disagree' on the
10 correctness of the state court's decision." *Richter*, 131 S. Ct. at 786 (quoting
11 *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). "[E]ven a strong case for
12 relief does not mean the state court's contrary conclusion was unreasonable." *Id.*
13 Instead, to obtain federal habeas relief, a state prisoner must show that the state
14 court's ruling on a claim was "so lacking in justification that there was an error
15 well understood and comprehended in existing law beyond any possibility for
16 fairminded disagreement." *Id.* at 786-87.

17 A state court has "adjudicated a claim on the merits" within the meaning of
18 § 2254(d) when it decides the petitioner's right to relief based on the merits of the
19 constitutional claim raised, rather than denying the claim solely on procedural
20 grounds. *Lambert v. Blodgett*, 393 F.3d 943, 969 (9th Cir. 2004). A state court
21 need not explain the basis for its decision for it to be considered "on the merits."
22 *Richter*, 131 S. Ct. at 784 ("There is no text in [AEDPA] requiring a statement of
23 reasons. The statute refers only to a 'decision,' which resulted from an
24 'adjudication.'") When a state court provides no explanation for its decision, "the
25 habeas petitioner's burden still must be met by showing there was no reasonable
26 basis for the state court to deny relief." *Id.* In evaluating a summary denial,
27 therefore, a federal court must "determine what arguments or theories . . . *could*
28 *have supported*" the state court's decision, and then ask "whether it is possible

1 fairminded jurists could disagree that those arguments or theories are inconsistent
2 with” Supreme Court precedent. *Id.* at 786 (emphasis added).

3 **V. Claims of Trial Court Errors**

4 **A. Failure to Grant Continuance (Claim 2)**

5 On the day jury selection began, petitioner’s counsel, Michael Demby,
6 advised the judge that he was not ready for trial because he was still seeking
7 certain medical records relating to petitioner. Petitioner asserts the judge denied
8 his continuance request and thus “prematurely ended” counsel’s efforts to obtain
9 important documents relating to petitioner, including not only medical records, but
10 also social history documents, orphanage records, and military service records.
11 SAP ¶¶ 5-7. Petitioner asserts that if trial counsel had been given additional time
12 and had obtained the records, it is reasonably likely that counsel would have taken
13 a different approach in his mitigation presentation, thereby avoiding a death
14 verdict. *Id.* As discussed below, the prosecutor opposed any significant
15 postponement of trial based on her own pregnancy and imminent due date, as well
16 as the serious health issues of one of the hostage-witnesses.

17 Denial of adequate preparation time may be so prejudicial as to constitute a
18 violation of an accused’s Sixth Amendment right to counsel. *See Powell v.*
19 *Alabama*, 287 U.S. 45, 58 (1935) (right violated where counsel was appointed the
20 morning of trial to represent multiple defendants in rape prosecution). Petitioner
21 asserts that such an “arbitrary deprivation” of additional preparation time as
22 occurred in his case “is tantamount to depriving the accused of any attorney at all,
23 and constitutes structural error requiring reversal,” citing *Mickens v. Taylor*, 535
24 U.S. 162, 166-67 (2002). Petitioner argues that the denial of the continuance “had
25 nothing to do with case-related factors” and was instead for the “personal
26 convenience of the prosecutor,” and therefore was “prejudicial per se” under
27 *Mickens*.

28 Respondent counters that trial judges have broad discretion in matters of

1 scheduling, and that a constitutional violation may be found under only the most
2 egregious circumstances, which were not present in this case. Respondent cites
3 *Ungar v. Sarafite*, 376 U.S. 575 (1964), in which the Supreme Court stated:

4 The matter of a continuance is traditionally within the
5 discretion of the trial judge, and it is not every denial of a
6 request for more time that violates due process even if the party
7 fails to offer evidence or is compelled to defend without
8 counsel. Contrariwise, a myopic insistence upon
9 expeditiousness in the face of a justifiable request for delay can
10 render the right to defend with counsel an empty formality.
There are no mechanical tests for deciding when a denial of a
continuance is so arbitrary as to violate due process. The
answer must be found in the circumstances present in every
case, particularly in the reasons presented to the trial judge at
the time the request is denied.

11 *Id.* at 589 (citations omitted). In *Morris v. Slappy*, 461 U.S. 1 (1983), the Court
12 revisited the issue of proper deference to trial judges with regard to scheduling and
13 continuances:

14 Trial judges necessarily require a great deal of latitude in
15 scheduling trials. Not the least of their problems is that of
16 assembling the witnesses, lawyers, and jurors at the same place
17 at the same time, and this burden counsels against continuances
18 except for compelling reasons. Consequently, broad discretion
19 must be granted trial courts on matters of continuances; only an
unreasoning and arbitrary “insistence upon expeditiousness in
the face of a justifiable request for delay” violates the right to
the assistance of counsel.

20 *Id.* at 11-12 (quoting *Ungar*, 376 U.S. at 589).

21 In this case, the colloquy relevant to the continuance issue took place at two
22 separate court appearances. The first, on Monday, April 20, 1987, occurred a week
23 after an appearance at which the prosecutor (Dona Bracke) had indicated to
24 defense counsel and the court that she would be ready for trial on the April 20 date.
25 At the April 20 appearance, however, Mr. Demby asked for more time:

26 MR. DEMBY: I would ask at this point that the case go
27 over until next Monday. There are several pieces of evidence
28 that I have not received that I have been attempting to get, not

1 from the district attorney's office, but from other places, one of
 2 which I want before I announce ready, so I would ask to go
 3 over at this point until next Monday. Hopefully, I can get it by
 4 then.

5 MS. BRACKE: Judge, I don't have a week to wait really at
 6 this point. I have ten weeks before I deliver and the estimate
 7 for the trial is six to seven weeks, with a break, if necessary, for
 8 Fred's case. I am going to run out of time. My suggestion is
 9 that we could at least do the hardship and the *Hovey* voir dire of
 10 the jurors in a week and not waste a week.⁴ I don't know what
 11 the evidence is that Mr. Demby is waiting for.

12 THE COURT: What is the evidence, Mr. Demby?

13 MR. DEMBY: Your Honor, I don't - -

14 THE COURT: Tell me.

15 MR. DEMBY: I can tell the court in chambers.

16 THE COURT: All right.

17 MR. DEMBY: But I could also state to the court if there is
 18 going to be a problem with Ms. Bracke's pregnancy, I have
 19 talked to my client and he will be willing at this point to waive
 20 time until after she comes back, if that becomes a problem.

21 THE COURT: Do you want to proceed or what?

22 MS. BRACKE: Well, I would still rather proceed.

23 I have another problem in that one of the surviving
 24

25 ⁴ "*Hovey* voir dire" refers to a method of jury selection mandated in capital cases
 26 after *Hovey v. Superior Court*, 28 Cal. 3d 1 (1980), in which the California Supreme
 27 Court held that prospective jurors must be questioned individually and privately
 28 regarding their views on the death penalty. *Id.* The requirement of such a procedure
 was abrogated by statute in 1990 (after petitioner's trial) pursuant to California's
 Proposition 115. See Cal. Code Civil Proc. § 223.

1 hostages had a heart attack at the beginning of March and I
 2 don't know [*sic*]. According to his doctor, he is not in great
 3 shape and I don't really feel like waiting until September or
 4 October and seeing what his condition or status is.

5 MR. DEMBY: May we approach the bench?

6 THE COURT: All right. Dona, will you come up, please?

7 (The following proceedings were held at the bench:)

8 THE COURT: There is a question of some records from
 9 New York and I put in a call to somebody, who apparently has
 10 these records, and he wasn't there and I left word for him to call
 11 me back.⁵

12 In the meantime, the defendant was told to get a shave
 13 and to get non-jail clothes and he hasn't done so.

14 I don't know why he didn't. Did you ask him?

15 MR. DEMBY: Yes, I asked him.

16 THE COURT: So we can't proceed today, in any event, not
 17 the way he is dressed.

18 A-1 RT A-15 to A-17. The parties then agreed to return to court two days later.

19 *Id.* When the parties appeared on Wednesday, April 22, the discussion resumed:

20 THE COURT: All right, Steven Livaditis.

21 MR. DEMBY: Yes, your honor, Mr. Livaditis is
 22 present. I am still not ready for trial.

23 To update the court on further
 24 developments, our office has called back to New York
 25 this morning, after yesterday being told that there would

27 ⁵ The transcript indicates the judge made this statement. The record elsewhere
 28 reflects that he was aware of the problem and had indeed "put in a call" in an effort
 to help counsel locate the records.

1 be somebody in the office who would have information
2 for us, and this morning he was not there and had the
3 answering machine on, so at this point, I have no further
4 information from New York.

5 THE COURT: Well, why don't you, for the record,
6 tell us what it is that you are seeking so that we can use
7 that as a basis for my ruling on the motion?

8 MR. DEMBY: Well, I have informed the court what I
9 was seeking in camera. I don't think I have to state in
10 front of the district attorney the information I am seeking.

11 THE COURT: You are seeking some medical
12 records, aren't you?

13 MR. DEMBY: That is correct, your honor.

14 THE COURT: All right. From the hospital which is
15 no longer in existence?

16 MR. DEMBY: The hospital is no longer in existence.
17 The records are, from my understanding, in a warehouse
18 in New York.

19 THE COURT: All right, now I think a few days ago I
20 called myself and asked them to call back.

21 MR. DEMBY: That is correct.

22 THE COURT: I asked them to call back and let me
23 know about that and I haven't gotten a call back.

24 MR. DEMBY: That is correct, your honor.

25 THE COURT: And you called any number of times.

26 MR. DEMBY: We called numerous times. We
27 finally, yesterday, got hold of the person in charge and he
28 stated their system was that the records were not -- there

1 was no index for the records. That in order to find
2 records, they would have to go through boxes until they
3 find some.

4 THE COURT: You don't know whether there are
5 records or not, do you?

6 MR. DEMBY: I know he was treated at a certain time
7 in a certain hospital.

8 THE COURT: Yes. But you don't know whether
9 there are any records at all in existence.

10 MR. DEMBY: Or still exist. My indication is there is
11 a good chance they still exist, since the indication I have
12 that this place has boxes of records from that hospital and
13 he told me yesterday he would take a man off of what he
14 was doing and look through the boxes and try to find the
15 records.

16 THE COURT: And call you today?

17 MR. DEMBY: And we called this morning and at the
18 time we called, the answering machine was on.

19 What I am told is there are several warehouses,
20 and they are in and out of the office.

21 THE COURT: I am sure that you will hear within the
22 next 48 hours. We can proceed in the meantime with our
23 jurors insofar as hardship is concerned and that will give
24 you sufficient time to be able to ascertain from the source
25 whether there are any records which exist. There is no
26 reason why we should continue this case for that purpose.
27 We have many days yet before we actually get to trial
28 and with the *Hovey* hearings, too.

1 MR. DEMBY: Well, as for the hardships, I suspect it
2 doesn't matter that much. But as for *Hovey*, I think
3 knowing what is in this and any follow-up I may have to
4 do, would affect the type of jury I would want and the
5 questions I would ask and who I would be looking for.

6 MS. BRACKE: Well, that may go to the general voir
7 dire but I don't see how that would affect *Hovey*. It is
8 very limited.

9 THE COURT: I don't think it would affect it.

10 MR. DEMBY: It affects the strategy, including the
11 type of jury I want, including *Hovey*. I don't really
12 understand --

13 THE COURT: Mr. Demby, as you know, of course
14 nobody is more competent than you are about these
15 things, but *Hovey* only has to do with whether or not they
16 entertain such an opinion with respect to the death
17 penalty that they can't qualify as a juror.

18 MR. DEMBY: There are tactical decisions I have to
19 make prior to the *Hovey* that I cannot make until I have
20 certain information.

21 I don't really understand what the rush is, since
22 this court --

23 THE COURT: Rush? How long has this case been
24 pending?

25 MS. BRACKE: Eleven months.

26 THE COURT: What is it that you want to do?
27
28

1 MR. DEMBY: I don't think it is quite that long.⁶ But
 2 I believe Ms. Bracke even has death penalty cases that
 3 are far older than this and in this courtroom, there are
 4 cases far older than that.

5 MS. BRACKE: I do, but I don't have any death
 6 penalty cases where a surviving hostage had a heart
 7 attack in March and may not be around later on this year.
 8 He has heart trouble and he had a serious heart attack in
 9 March, so there is another interest, other than having this
 10 case being continued for another three or four months.

11 THE COURT: I will see, Mr. Demby, that we have
 12 sufficient time before we start this case for you to explore
 13 the possibilities of having these records uncovered from
 14 New York.

15 1 RT 1-5. The judge and counsel then went on to discuss other matters relating to
 16 jury selection and trial clothing for petitioner. *Id.*

17 Jury selection began that afternoon (April 22nd), and lasted until June 3,
 18 1987. The presentation of evidence and testimony commenced on June 4, 1987
 19 (*i.e.*, approximately six weeks after the proceedings quoted above). It appears
 20 from the record that defense counsel never again raised the issue after the April 22
 21 colloquy.

22 The foregoing record reflects the existence of legitimate concerns about the
 23 effect of a lengthy continuance apart from the prosecutor's pregnancy, namely the

24
 25 ⁶ While not dispositive of the current claim, defense counsel was correct. Only ten
 26 months had elapsed since petitioner's arrest and the filing of initial Complaint, and
 27 eight months since the Information was filed in the Superior Court. (At the time,
 28 California utilized a two-tiered Municipal and Superior Court system. *See People v.*
Maldonado, 172 Cal.App.4th 89, 94-95 (2009) (describing criminal charging
 procedures prior to court unification in 1998).)

1 serious health issues of an important percipient witness. *Cf. Slappy*, 461 U.S. at
2 11. Moreover, no clear explanation was offered in the trial court (or on habeas) as
3 to how the records would have assisted trial counsel in his approach to the jury
4 selection process. *Cf. Ungar*, 376 U.S. at 589. The jury selection process
5 continued for six weeks, during which time counsel's investigator could have
6 overseen an ongoing search for the records. Thus, counsel still had substantial
7 time and opportunity to obtain the records, and his ability to do so was not
8 "prematurely ended" by the trial court's failure to postpone jury selection. Indeed,
9 the record shows that petitioner's trial counsel did not raise the issue again in the
10 ensuing weeks before beginning his evidentiary presentation.

11 Even assuming the trial court erred in not granting a continuance, petitioner
12 has not demonstrated prejudice. His effort on habeas to broadly characterize the
13 documents counsel sought as including not just medical records, but also social
14 history documents, orphanage records, and military service records, is belied by
15 the record, which makes clear that counsel was seeking only medical records from
16 a single hospital. The record also reflects that petitioner made no showing before
17 the California Supreme Court as to what those records contained, or how they
18 would have affected the result of the trial. For these reasons, the California
19 Supreme Courts' denial of this claim was not unreasonable.

20 **B. Improper Excusal of Qualified Jurors (Claims 3 and 4)**

21 Petitioner alleges two separate claims for relief based on the manner in
22 which certain prospective jurors were excused from serving on his case. In Claim
23 3, petitioner alleges that one juror, a Ms. Peterson, was improperly excused based
24 on answers indicating difficulties she would have in voting for a sentence of
25 death. SAP ¶¶ 8-11. In Claim 4, petitioner more generally alleges that the
26 prosecution improperly exercised 10 out of 19 peremptory challenges against
27 individuals who expressed reservations or concerns regarding the death penalty.
28 SAP ¶¶ 12-16.

1 A prospective juror may not be excused for cause based on her views on
 2 capital punishment unless those views would prevent or substantially impair the
 3 performance of her duties as a juror in accordance with her instructions and oath.
 4 *Wainwright v. Witt*, 469 U.S. 412, 420 (1985). In applying this standard,
 5 reviewing courts must give appropriate deference to the trial court, and may
 6 resolve ambiguous responses in favor of the state:

7 The judgment as to “whether a venireman is biased . . . is
 8 based upon determinations of demeanor and credibility that are
 9 peculiarly within a trial judge’s province. Such determinations
 10 are entitled to deference even on direct review; the respect paid
 11 such findings in a habeas proceeding certainly should be no
 12 less.” And the finding may be upheld even in the absence of
 13 clear statements from the juror that he or she is impaired
 14 because “many veniremen simply cannot be asked enough
 15 questions to reach the point where their bias has been made
 16 ‘unmistakably clear’; these veniremen may not know how they
 17 will react when faced with imposing the death sentence, or
 18 may be unable to articulate, or may wish to hide their true
 19 feelings.” Thus, when there is ambiguity in the prospective
 20 juror’s statements, “the trial court, aided as it undoubtedly is
 21 by its assessment of the venireman’s demeanor, is entitled to
 22 resolve it in favor of the State.”

23 *Uttecht v. Brown*, 551 U.S. 1, 7 (2007) (quoting *Witt*, 469 U.S. at 424-25, 428,
 24 434) (internal citations and brackets omitted).

25 In *Uttecht*, the Court explained that its precedents in this area established
 26 four central principles:

27 First, a criminal defendant has the right to an impartial jury
 28 drawn from a venire that has not been tilted in favor of capital
 punishment by selective prosecutorial challenges for cause.
 Second, the State has a strong interest in having jurors who are
 able to apply capital punishment within the framework state
 law prescribes. Third, to balance these interests, a juror who is
 substantially impaired in his or her ability to impose the death
 penalty under the state-law framework can be excused for
 cause; but if the juror is not substantially impaired, removal for
 cause is impermissible. Fourth, in determining whether the
 removal of a potential juror would vindicate the State’s interest
 without violating the defendant’s right, the trial court makes a
 judgment based in part on the demeanor of the juror, a
 judgment owed deference by reviewing courts.

Uttecht, 551 U.S. at 9 (citing *Witt*, 469 U.S. at 416, 424-34, and *Witherspoon v.*

1 *Illinois*, 391 U.S. 510, 521 (1968)).

2 **1. Claim 3**

3 The voir dire of Ms. Peterson occurred on April 29, 1987, the seventh day
4 of jury selection. It spans fourteen transcript pages. 6 RT 549-562. After some
5 preliminary questions, the following exchange took place:

6 THE COURT: You will hear all of the facts about the
7 case, too. And after the jurors have heard all of that and
8 retired to determine which of these two penalties they
9 feel they will impose [death or life without parole], are
10 you willing to accept that responsibility if you are a
11 juror?

12 MS. PETERSON: I have predisposition [sic] to have
13 already made up my mind.

14 THE COURT: You have made up your mind about
15 what?

16 MS. PETERSON: Even without hearing the case, I feel
17 that I should say that I have strong feelings that would —

18 THE COURT: Would you vote the death penalty? Is
19 that it?

20 MS. PETERSON: No.

21 THE COURT: Would you not vote the death
22 penalty?

23 MS. PETERSON: I would vote for life without
24 possibility of parole.

25 THE COURT: And no matter what the testimony
26 showed — is that right? You are so committed in your
27 views that it would substantially impair the performance
28 of your duties as a juror to listen to all of the evidence

1 and then decide which is the appropriate remedy?

2 MS. PETERSON: No. I can't say that. But I am just
3 stating my feelings at the beginning.

4 I do believe in the death penalty.

5 THE COURT: Do you?

6 MS. PETERSON: Yes. But I think that I believe in it for
7 repeat offenders.

8 THE COURT: How do you mean, repeat offenders?
9 People who have committed separate, different murders
10 and then they commit another murder? Is that right?

11 MS. PETERSON: Yes.

12 THE COURT: All right. So, you would expect then
13 that if a person is on trial for his life, you would be
14 inclined to -- you could impose the ultimate penalty if he
15 committed other murders? Is that right?

16 MS. PETERSON: Yes.

17 6 RT 550-552. The exchange with juror Peterson continued, during which she
18 reiterated her belief that the death penalty should be reserved for "repeat
19 offenders," *i.e.*, someone who had already committed a murder on a prior, separate
20 occasion. *Id.* at 552 *et seq.* She also indicated that petitioner's young age (22
21 years) would be an additional factor preventing her from voting for a death
22 verdict. *Id.* at 554-555. In response to certain questions from defense counsel,
23 Ms. Peterson arguably equivocated:

24 MR. DEMBY: You have to decide after hearing the
25 evidence, what evidence is in mitigation and what weight
26 to give to that and what evidence is in aggravation and
27 what weight to give to that.

28 MS. PETERSON: Yes.

1 MR. DEMBY: Okay. You have to do that before you
2 make up your mind.

3 MS. PETERSON: Weigh the evidence before? Yes.

4 MR. DEMBY: And when you do weigh the evidence,
5 it is an individual decision that you have to make. You
6 have to decide what is the proper decision.

7 MS. PETERSON: Yes. I understand.

8 MR. DEMBY: Will you be able to do that?

9 MS. PETERSON: Yes.

10 *Id.* at 553-554. However, when questioned more specifically about petitioner's
11 case, Ms. Peterson again made clear her belief that she could not impose the death
12 penalty in light of petitioner's age and, in particular, his lack of any prior murder
13 conviction. *Id.* at 555-557. The questioning continued:

14 MS. BRACKE: I could tell you that, because I know
15 what is going to come out in the penalty phase, you are
16 not going to hear there was a prior murder. Based on
17 that, do you think your state of mind right now is, that
18 regardless of what you heard, that because of the
19 defendant's age and the lack of a prior murder, you
20 couldn't vote for the death penalty in this case?

21 MS. PETERSON: Yes, I think so.

22 THE COURT: . . . In response to questions to the
23 district attorney you indicated that because of the age of
24 the defendant and the fact that part of this particular
25 incident he had committed — assuming that he had
26 committed some prior murders, that you would vote for
27 the death penalty. Absent that, you would not vote for
28 the death penalty. Is that what your answer was? I am

1 unclear, uncertain what your attitude was toward the
2 death penalty.

3 MS. PETERSON: Well, my attitude is that I would like
4 to believe if I am in a situation where I am asked to listen
5 to the evidence and weigh the evidence and come up with
6 a verdict based on that evidence, that I would do that.

7 I am also saying that *in this particular case*, the
8 age of the defendant and what little I do or don't know
9 about his previous —

10 THE COURT: Criminal activities?

11 MS. PETERSON: Criminal activities or record, makes
12 me feel as though sitting right here right now, if I had to
13 vote, I would vote for not giving the death penalty. And
14 that is what my feeling is.

15 THE COURT: Anything further?

16 MS. BRACKE: No.

17 MR. DEMBY: No further questions.

18 *Id.* at 561-562 (emphasis added). After hearing arguments from counsel, the
19 judge excused Ms. Peterson, finding that “with [her] mind made up about the age
20 of the defendant and the fact that there is no prior murder,” she could not vote for
21 the death penalty. *Id.* at 562-566.

22 It is true that Ms. Peterson did not express “categorical” opposition to the
23 death penalty; she said she would support it in certain types of cases. However,
24 even viewed in a light most favorable to petitioner, the record shows that Ms.
25 Peterson’s strongly-held beliefs would effectively preclude her from
26 recommending the death penalty in petitioner’s case. The California Supreme
27 Court explained:

28 The fact that the prospective juror may have considered the

1 death penalty in other cases . . . did not prevent her excusal. A
 2 court may properly excuse a prospective juror who would
 3 automatically vote against the death penalty in the case before
 4 him, regardless of his willingness to consider the death penalty
 5 in other cases. That was the situation here. Although the
 prospective juror indicated a willingness to consider the death
 penalty under facts not applicable to the case (a prior murder),
 the trial court properly found that her ability to perform her
 duty was substantially impaired in this case.

6 *Livaditis*, 2 Cal. 4th at 772-73 (citation and internal quotation marks omitted).

7 Petitioner relies on one brief exchange during the lengthy questioning of
 8 Ms. Peterson: When asked “would you automatically vote for life without
 9 possibility of parole, irrespective and regardless of what the testimony is that you
 10 are going to hear,” she responded simply, “no.” 6 RT 553. If the questioning had
 11 stopped here, petitioner might have a better argument. However, Ms. Peterson’s
 12 answer to this standardized voir dire question (which came after a similar
 13 boilerplate query on whether she “would automatically vote for the death
 14 penalty”) stands alone among the rest of her candid statements during the more
 15 informal exchanges with the judge and counsel. Her responses to the remaining
 16 inquiries, viewed as a whole, can reasonably lead to the conclusion that she could
 17 not vote to recommend a death sentence under the specific facts of petitioner’s
 18 case as it was described to her. And at no point did Ms. Peterson clearly indicate
 19 that she could “temporarily set aside [her] own beliefs in deference to the rule of
 20 law.” *Lockhart v. McCree*, 476 U.S. 162, 176 (1986). Under these circumstances,
 21 it was not unreasonable to find that her ability to serve and adhere to the law was
 22 “substantially impaired.” The trial court’s finding on this question must be
 23 accorded substantial deference on federal habeas review.

24 **2. Claim 4**

25 Petitioner identifies ten occasions on which he contends the prosecutor
 26 exercised peremptory challenges to remove prospective jurors who had expressed
 27 reservations or concerns about the death penalty. As a result, petitioner claims,
 28 his jury was unconstitutionally biased in favor of the death penalty. SAP ¶¶ 12-

1 16.

2 The Supreme Court has not decided whether a prosecutor's use of
3 peremptory challenges to strike death-averse jury candidates violates the
4 Constitution. In rejecting this argument on petitioner's direct appeal, the
5 California Supreme Court relied on its prior holding in *People v. Edwards*, 54 Cal.
6 3d 787 (1991), in which it stated:

7
8 Defendant claims the district attorney improperly used his
9 peremptory challenges to excuse prospective jurors who
10 expressed "even the slightest reservation and concern about the
11 death penalty." We have repeatedly rejected the contention.
12 Defendant urges us to follow a federal district court decision,
apparently the only court ever to find merit in his position. We
are not persuaded. Nor was the circuit court that *reversed* that
decision on this very point. We agree with the circuit court,
and with the opinion of Justice O'Connor concurring in the
denial of certiorari in an earlier appeal of the same case. . . .

13 *Edwards*, 54 Cal. 3d at 831 (citations omitted). In the referenced concurrence,
14 Justice O'Connor emphasized "the ordinary rule that a prosecutor may exercise
15 his peremptory strike for any reason at all," and rejected the argument that such
16 decisions should be subject to the type of scrutiny applied to possible race-based
17 peremptories under *Batson v. Kentucky*, 476 U.S. 79 (1986). *Brown v. North*
18 *Carolina*, 479 U.S. 940 (O'Connor, J., concurring).

19 The Supreme Court came close to addressing this issue in *Gray v.*
20 *Mississippi*, 481 U.S. 648 (1987). Petitioner cites *Gray* without discussing its
21 facts or holding as though it supports his claim. But it plainly does not.⁷ While a
22 four-justice plurality implied in dictum that a prosecutor may not use peremptory
23 challenges to exclude individuals who express reservations about capital

24 _____
25 ⁷ *Gray* involved the impropriety of the exclusion of one juror *for cause* under a
26 peculiar set of facts bearing no resemblance to petitioner's case. *See Gray*, 481 U.S.
27 at 651-57. The Court's holding focused on whether to adhere to its prior view that
28 such errors are structural, not susceptible to harmless error analysis. *See id.* at 657-
668. It does not directly address or decide any issues regarding the use of
peremptory challenges.

1 punishment, Justice Powell wrote separately to disavow this view and express his
 2 opinion that prosecutors retain their traditional right “to exclude panel members
 3 who express doubt as to whether they could vote to impose capital punishment.”
 4 *Compare id.* at 667-68 (plurality) *with id.* at 671-72 (Powell, J., concurring in
 5 part). Justice Powell was joined on that point by the four dissenting justices. *See*
 6 *id.* at 679 (Scalia, J., dissenting). The Supreme Court has not since revisited this
 7 issue.⁸ Thus there is no clearly established federal law supporting petitioner’s
 8 argument.

9 For these reasons, the state court’s denial of Claims 3 and 4 was neither
 10 contrary to nor an unreasonable application of clearly established Supreme Court
 11 precedent.

12 C. Shackling (Claim 5)

13 Petitioner was subjected to physical restraints on two occasions during his
 14 trial. The facts were described in the opinion on direct appeal:

15 During jury selection, the deputy district attorney notified the
 16 court that the sheriff’s department had received information from a
 17 confidential informant regarding a possible escape attempt by
 18 defendant with outside help. Because of this information and
 19 defendant’s history of escape attempts, she requested that defendant
 20 be shackled with an “unobtrusive” leg brace to be worn under his
 pants. Defense counsel objected, and claimed that the brace was
 noticeable and uncomfortable. After hearing from defense counsel
 and the deputy sheriff, the court ordered the leg brace worn for the
 rest of the day pending a final decision that evening.

21 At the end of the jury selection proceedings that day, another
 22 hearing was held. Over objection of the district attorney, the court
 23 decided that with increased security the leg brace would not be
 necessary, and ordered it removed. The leg brace was thus worn only
 during one day of jury selection. Nothing in the record suggests that

24
 25
 26 ⁸ Petitioner cites no federal circuit decisions supporting his view. At least two
 27 circuits have explicitly rejected identical arguments. *See Dennis v. Mitchell*, 354
 28 F.3d 511, 526 (6th Cir. 2003); *Gosier v. Welborn*, 175 F.3d 504, 510 (7th Cir.
 1999); *Pitsonbarger v. Gramley*, 141 F.3d 728, 735 (7th Cir. 1998).

1 any prospective juror observed the brace. [⁹]

2 During the evidence portion of trial, the district attorney
3 requested that defendant be restrained in some fashion during the
4 testimony of the two surviving hostages. She said that Carol Lambert
5 told her that “she will not come into court and testify unless he is
6 [restrained]. She is that fearful of him.” Both of the hostages were
7 still “in therapy” because of the crime. The district attorney said that
8 although Robert Taylor had also requested defendant be restrained,
9 she could talk him into testifying without the restraints. Lambert,
10 however, would “absolutely not come into the courtroom unless he is
11 somehow restrained.” The defense objected that there was no
12 necessity for the restraint. The court responded that “a person who
13 has gone through that particular trauma has ideas that don’t occur to
14 an ordinary person. We have to respect that feeling”; and that
15 “obviously there is no necessity because there is security, but we are
16 dealing with a subjective frame of mind of a woman who has gone
17 through a terrible trauma so, therefore, we have got to humor her. It
18 might not be objectively the thing to do but under the circumstances,
19 I think we ought to do that.”

20 The court ordered that during the testimony of Lambert only,
21 not that of Taylor, defendant be handcuffed to his chair in a fashion
22 that would not be visible to the jury. Defendant was not otherwise
23 physically restrained during the trial.

24 *Livaditis*, 2 Cal. 4th at 773-74 (brackets in original).

25 On habeas, petitioner has supplied a declaration from one juror who, while
26 commenting on the courtroom security and publicity associated with the trial,
27 stated:

28 Another indication that security was tight was the fact that
Livaditis was shackled in his chair. The shackles weren’t
that obvious because Livaditis was already in the
courtroom when the jurors arrived, but they were
noticeable.

SAP Ex. 2 at 9 (Juror Dejong). Juror Dejong’s declaration was part of the record
before the California Supreme Court when it denied this claim on habeas.¹⁰

⁹ However, as will be discussed, the *habeas* record indicates otherwise.

¹⁰ Mr. Dejong also provided live testimony at the hearing held before this Court. As
discussed above, the Supreme Court subsequently decided *Pinholster*, which made
clear that review under § 2254(d) is limited to the record before the state court.
Thus, the Court may not rely on Dejong’s testimony. See *Cannedy v. Adams*, 706
F.3d 1148, 1156 (9th Cir. 2013) (testimony from evidentiary hearing conducted by

1 Since 2005, Supreme Court case law has prohibited the use of visible
 2 shackles during the penalty phase of a capital trial in the absence of “special
 3 need” for such restraints. *Deck v. Missouri*, 544 U.S. 622, 626, 630 (2005). In
 4 *Deck*, the Court held that the potential prejudice arising from visible shackling is
 5 significant not only during the guilt phase but during the penalty phase as well,
 6 even though the presumption of innocence no longer applies:

7
 8 Although the jury is no longer deciding between guilt and
 9 innocence, it is deciding between life and death. That decision, given
 the severity and finality of the sanction, is no less important than the
 decision about guilt.

10 Neither is accuracy in making that decision any less critical.
 11 The Court has stressed the “acute need” for reliable decisionmaking
 12 when the death penalty is at issue. The appearance of the offender
 13 during the penalty phase in shackles, however, almost inevitably
 14 implies to a jury, as a matter of common sense, that court authorities
 15 consider the offender a danger to the community — often a statutory
 16 aggravator and nearly always a relevant factor in jury
 17 decisionmaking, even where the State does not specifically argue the
 point. It also almost inevitably affects adversely the jury’s
 perception of the character of the defendant. And it thereby
 inevitably undermines the jury’s ability to weigh accurately all
 relevant considerations — considerations that are often
 unquantifiable and elusive — when it determines whether a
 defendant deserves death. In these ways, the use of shackles can be
 a thumb on death’s side of the scale.

18 *Id.* at 632-633 (citations and internal punctuation omitted). The Court made clear,
 19 however, that it was not imposing an absolute prohibition on shackling during the
 20 penalty phase:

21
 22 [W]e must conclude that courts cannot routinely place defendants in
 23 shackles or other physical restraints visible to the jury during the
 24 penalty phase of a capital proceeding. The constitutional requirement,
 however, is not absolute. It permits a judge, in the exercise of his or
 her discretion, to take account of special circumstances, including

25
 26 district court before *Pinholster* will generally not be considered on § 2254(d)
 27 review), *cert. denied*, 134 S. Ct. 1001 (2014). In any event, Dejong’s live testimony,
 28 in which he asserted a complete lack of recollection, would not affect the ultimate
 resolution of this claim. See Transcript of Proceedings of 4/28/10, Dkt. 268 at 83-
 87.

1 security concerns, that may call for shackling. In so doing, it
 2 accommodates the important need to protect the courtroom and its
 3 occupants. But any such determination must be case specific; that is
 to say, it should reflect particular concerns, say, special security needs
 or escape risks, related to the defendant on trial.

4 *Id.* at 633. The Court noted other special circumstances in which physical
 5 restraints have long been deemed appropriate, such as physical security, escape
 6 prevention, or courtroom decorum. *Id.* at 628. Thus, trial judges may continue to
 7 order physical restraint of the defendant, but only when warranted by “the
 8 circumstances of the particular case.” *Id.* at 632.

9 Finally, the visibility of the restraints is central to the question of prejudice.
 10 Absent any claim that a petitioner was prevented from assisting his counsel or was
 11 subjected to pain, “whether the petitioner was deprived of a fair trial in this case
 12 depends on what the jury saw.” *Rhoden v. Rowland*, 10 F.3d 1457, 1459-60 (9th
 13 Cir. 1993).

14 Evidence was submitted in petitioner’s state habeas case indicating that at
 15 least one juror saw him shackled, presumably during one or both of the two
 16 relatively brief periods when such restraints were used. Conversely, of course,
 17 jurors may have been equally likely to observe that petitioner was *not* shackled —
 18 at least not visibly — throughout the remaining course of the lengthy jury selection
 19 and trial proceedings. However, accepting the evidence before the state court that
 20 at least one juror observed the shackles, the issue is whether there is any reasonable
 21 basis on which the state court could have determined that there was no due process
 22 violation.¹¹

23 Petitioner was not shackled in the manner historically associated with that
 24 _____

25 ¹¹ Petitioner also asserts error based on the trial court’s failure to give, sua sponte, a
 26 cautionary instruction for the jury to disregard the restraints. This argument clearly
 27 fails. Given that trial counsel and the judge were striving to conceal the restraints, it
 28 was not error for the judge to refrain from calling the jury’s attention to them.
 Similarly, counsel was not deficient for failing to request a cautionary instruction.
 See Claim 11R, *infra*.

1 term, like the petitioner in *Deck* who was forced to wear leg irons, handcuffs, and a
2 belly chain throughout his penalty trial with no pretense of concealment. Rather,
3 this case involves the use of devices that were not as conspicuous or restrictive,
4 and were used for two relatively brief portions of the otherwise lengthy
5 proceedings. *Cf. Walker v. Martel*, 709 F.3d 925, 942 & n. 6 (9th Cir. 2013) (“Not
6 all restraints are created equal.”). The sole juror who said he saw the restraints
7 (Mr. Dejong) does not indicate whether other jurors saw or discussed them.
8 Petitioner has submitted declarations from three other jurors which lack any
9 reference to the restraints. *See* Mark, Goldfarb, and Unkrich Declarations, SAP
10 Exs. 3, 144, 145 (State Habeas Exs. 140, 141, 154). And petitioner does not
11 contend the shackles caused him pain, impaired his mental faculties, or impeded
12 his ability to communicate with counsel. *See United States v. Baker*, 10 F.3d 1374,
13 1402 (9th Cir. 1993) (listing factors affecting reasonableness of shackling).

14 As previously discussed, the phrase “clearly established Federal law” in
15 §2254(d) refers to the law as reflected by the decisions of the Supreme Court at the
16 time of the relevant state court ruling. *Pinholster*, 131 S. Ct. at 1399; *Lockyer v.*
17 *Andrade*, 538 U.S. 63, 72 (2003) ([“C]learly established law” under § 2254(d)(1)
18 “is the governing legal principle or principles set forth by the Supreme Court at the
19 time the state court renders its decision.”); *see also Williams v. Taylor*, 529 U.S. at
20 412 (same). The “clearly established law” that most directly applies to petitioner’s
21 shackling claim is set forth in *Deck v. Missouri*, the 2005 decision in which the
22 Court held, for the first time, that the general prohibition against shackling in
23 capital trials applies to the penalty phase, even after the defendant’s guilt has been
24 established. (Of course, due to his guilty plea, petitioner’s trial consisted only of a
25 penalty phase.)

26 However, petitioner’s direct appeal and state habeas petition were decided
27 well before 2005. Petitioner nonetheless contends that prior Supreme Court case
28 law had already clearly established the principles later made explicit in *Deck*.

Petitioner argues that “the fundamental principles informing the decision in *Deck* had been established for over a quarter century by the time of the state court decision in this case.” Pet. Brief, Dkt. 295 at 9. As proof, he cites the Supreme Court’s decision in *Illinois v. Allen*, 397 U.S. 337, 344 (1970), in which the Court noted that shackling detracts from the dignity and decorum of trial proceedings and impedes the defendant’s ability to communicate with counsel. *Id.* *Allen*, however, hardly dictated the result urged by petitioner. The *Allen* Court ultimately approved the use of shackling and even gagging in appropriate cases, throughout trial or any part thereof, notwithstanding an inevitable degree of prejudice to the accused. *Id.* at 344. *Allen* did not even consider the distinction between the guilt and penalty phases that the Court later examined in *Deck*. *Id.* Quite plainly, *Allen* did not “clearly establish” the principles enunciated by the Court in *Deck* some 25 years later.¹²

Respondent argues that petitioner’s shackling claim is barred under the doctrine announced in *Teague v. Lane*, 489 U.S. 288 (1989). There, the Supreme Court declared that a “new rule” of constitutional law cannot be applied retroactively in federal habeas corpus proceedings to invalidate a final state criminal conviction. *Id.* at 299-301, 310. Construing *Teague*, the Court later explained:

Because the leading purpose of federal habeas review is to “ensure that state courts conduct criminal proceedings in accordance with the Constitution as interpreted at the time of those proceedings,” we have held that “the ‘new rule’ principle . . . validates reasonable, good-faith interpretations of existing precedents made by state courts.” This principle adheres even if those good-faith interpretations “are shown to be *contrary to later decisions*.” Thus, unless reasonable jurists hearing petitioner’s claim at the time his conviction became final “would have felt compelled by existing precedent” to

¹² The dissenters in *Deck* pointed to the absence of prior Supreme Court case law indicating disapproval of shackling at the penalty phase. *Deck*, 544 U.S. at 650 (Scalia & Thomas, JJ., dissenting).

1 rule in his favor, we are barred from doing so now.

2 *Graham v. Collins*, 506 U.S. 461, 467 (1993) (internal citations and brackets
3 omitted) (emphasis added).¹³

4 There are two narrow exceptions to the *Teague* rule against retroactive
5 application of “new rules” in federal habeas cases. Those exceptions are well-
6 described in *Marquard v. Secretary for Dept. of Corrections*, 429 F.3d 1278 (11th
7 Cir. 2005), where (as here) a habeas petitioner sought to have *Deck* applied on
8 federal review of a state court decision issued prior to *Deck*. In *Marquard*, the
9 Eleventh Circuit stated that, “until *Deck*, the Supreme Court had not addressed at
10 all the very different issue of shackling during the penalty phase of a capital trial
11 where the defendant has already been convicted” *Id.* at 1311. The Court of
12 Appeals continued:

13 In addition, neither of *Teague*’s two narrow
14 exceptions to the general rule of non-retroactivity applies
15 here. Under *Teague*, “[a] new rule should be applied
16 retroactively only if it (1) ‘places certain kinds of primary
17 private individual conduct beyond the power of the
18 criminal law-making authority to proscribe,’ or (2)
19 ‘requires the observance of those procedures that . . . are
20 implicit in the concept of ordered liberty.’ ”

21 The first exception is inapplicable because *Deck*’s
22 new rule does not “narrow the scope of a criminal statute
23 by interpreting its terms” or “place particular conduct or
24 persons covered by the statute beyond the State’s power to
25 punish,” but rather regulates “only the *manner of*
26 *determining*” the defendant’s sentence. *Deck*’s new rule
27 is clearly one of procedure rather than substance.

28 The second exception is also not met because
Deck’s new rule is not one of those “watershed rules of
criminal procedure implicating the fundamental fairness
and accuracy of criminal proceedings.” “That a new
procedural rule is ‘fundamental’ in some abstract sense is

26 ¹³ After AEDPA’s enactment in 1996, the Supreme Court indicated that “*Teague*
27 analysis” is effectively subsumed by the application of § 2554(d) as amended, to the
28 extent the new statutory phrase “clearly established law” refers to Supreme Court
decisions “as of the time of the relevant state-court decision.” *Williams v. Taylor*,
529 U.S. at 412.

1 not enough; the rule must be one without which the
 2 likelihood of an accurate conviction is *seriously*
 3 diminished.” *Id.* (quotation marks and citation omitted).
 4 Indeed, the Supreme Court has explained that “[t]his class
 of rules is extremely narrow, and it is unlikely that any
 has yet to emerge.” *Id.* (quotation marks, citations, and
 punctuation omitted).

5 *Deck*’s new rule — that routine shackling during
 6 the penalty phase of a capital trial, without a case specific
 finding that security needs require shackling, violates due
 7 process unless the state shows it did not contribute to the
 verdict — is indisputably important for defendants.
 8 However, *Deck*’s new constitutional rule is not absolute,
 and a defendant may be shackled before the jury if the
 9 trial court determines that security needs or other factors
 so dictate. Accordingly, the absence of the *Deck* rule does
 10 not cast serious doubt on the accuracy or fundamental
 fairness of the proceedings, and thus does not fall within
 11 the narrow exception for watershed procedural rules. As a
 result, *Deck*’s new rule for the penalty phase of a capital
 12 trial does not apply retroactively to Marquard’s case.
 Therefore, Marquard has not shown that any assumed
 13 shackling during the penalty phase violated his federal
 due process rights in 1993.

14 *Marquard*, 429 F.3d at 1311-1312 (emphasis and parenthetical references in
 15 original) (quoting *Schriro v. Summerlin*, 542 U.S. 348, 350-351 (2004)); *see also*
 16 *Tyler v. Cain*, 533 U.S. 656, 665-666 (2001) (“The second *Teague* exception is
 17 available only if the new rule alters our understanding of the bedrock procedural
 18 elements essential to the fairness of a proceeding.”).

19 *Marquard*’s reasoning is persuasive. Moreover, because § 2254(d) refers to
 20 “clearly established law” at the time of the state court’s decision, the California
 21 Supreme Court could not have ignored or misapplied a holding of the United
 22 States Supreme Court that did not yet exist. Under either analysis, *Deck* does not
 23 apply in this claim. The California Supreme Court’s denial of this claim therefore
 24 was not unreasonable under the law in effect at the time of its decision. Any
 25 subsequent change in the law resulting from *Deck v. Missouri* is not retroactively
 26 applicable to petitioner’s habeas claim. Accordingly, Claim 5 must be denied.
 27
 28

D. Unanimity Requirement for Other Crimes Evidence (Claim 7)

Under California law, a juror in a capital case may not consider evidence of a prior unadjudicated crime as an aggravating factor unless the juror finds the prior criminal act has been proved beyond a reasonable doubt. *See* Penal Code § 190.3.¹⁴ However, if jurors are presented with evidence of more than one such prior criminal act, California law does not require the jurors to agree on which of the acts has been established beyond a reasonable doubt, so long as each juror relies only on the act (or acts) that she personally finds true beyond a reasonable doubt. *People v. Miranda*, 44 Cal. 3d 57, 99 (1987). In short, there is no unanimity requirement. *Id.* Petitioner asserts that the absence of a unanimity requirement violates the United States Constitution. SAP ¶¶ 25-28.

On direct appeal, the California Supreme Court denied this claim, explaining that a capital sentencing jury need not be instructed that it can consider other crimes evidence “only if it *unanimously* found such crimes had been proved beyond a reasonable doubt.” *Livaditis*, 2 Cal. 4th at 785 (emphasis in original). The court cited *People v. Miranda*, which discussed the same argument at greater length:

[D]efendant urges us to adopt the rule that the jury must be instructed not to consider evidence of “other crimes” unless it *unanimously* agreed that the prosecution met its burden of proof on such crimes. In so asserting, defendant misunderstands the penalty determination process. Section 190.3 provides that a jury may consider a number of factors in determining the appropriate penalty. To impose a penalty of death, each juror must evaluate the evidence and then unanimously determine that the aggravating factors outweigh the mitigating factors. There is no requirement that the jury agree on *which* factors were used to reach the decision. It is therefore unnecessary that the entire jury find the prosecutor met his burden of proof on the “other crimes” evidence before a single juror may consider this evidence.

¹⁴ Unless otherwise stated, all “Code” citations refer to the specified California Code.

[The rule] is statutorily based and serves a foundational purpose. Generally, unanimous agreement is not required on a foundational matter. Instead, jury unanimity is mandated only on a final verdict or special finding. A defendant is, of course, entitled to a unanimous jury verdict in the final determination as to penalty.

Miranda, 44 Cal. 3d at 99 (emphasis in original).

Petitioner cites no case from the United States Supreme Court or any other court that supports a contrary holding. The petition itself simply alleges that “this procedure . . . permits the presumption of innocence to be overcome by something less than unanimity.” SAP ¶ 28.¹⁵ There is no authority for the proposition that the Constitution requires that all jurors agree that a particular aggravating factor has been shown beyond a reasonable doubt before any juror may consider it.¹⁶ In capital cases, the basic requirements of a constitutionally-adequate sentencing procedure are that it (1) “be structured so as to prevent the penalty from being administered in an arbitrary and unpredictable fashion” and (2) allow the jury to consider “any relevant mitigating evidence regarding [the defendant’s] character or record and any circumstances of the offense.” *California v. Brown*, 479 U.S. 538, 541 (1987).

¹⁵ Petitioner does not argue the merits of Claim 7 and several other claims in his post-petition briefs. See Dkt. 280, 288, 291, and 295. In his initial merits brief, petitioner stated that he would submit no additional briefing on Claims 7, 9, 10, 13, 14, 15, 29, and 35-38, but reserved the right to respond to arguments made by respondent regarding these claims. Pet. Brief, Dkt. 280 at 4 n.2. In his subsequent briefs, however, petitioner did not address these claims.

¹⁶ The potential lack of unanimity on particular aggravating factors does not implicate the right to a jury determination on sentencing enhancements under *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Ring v. Arizona*, 536 U.S. 584 (2002). (In *Ring*, the Court applied *Apprendi* to prohibit the determination of the maximum sentence of death by a judge rather than jury.) See *People v. Prieto*, 30 Cal. 4th 226, 263-64 (2003) (potential lack of unanimity on particular aggravating factors does not violate *Ring*); cf. *Murdaugh v. Ryan*, 724 F.3d 1104, 1114-17 (9th Cir. 2013) (discussing *Ring*’s application to Arizona’s capital sentencing scheme).

Petitioner does not explain why a unanimity requirement for prior crimes evidence is necessary to meet the standards of due process referenced in *California v. Brown* and other cases. In the absence of any clearly established federal law governing this claim, it cannot be said that the state court acted unreasonably in denying it. Claim 7 must therefore be denied.¹⁷

E. Admission of Extrinsic Details of Prior Non-Violent Criminal Activities (Claim 8)

Petitioner asserts he was deprived of due process by the trial court's admission of certain evidence regarding the details of prior non-violent criminal activities that were offered as evidence of aggravating factors justifying a sentence of death. Petitioner's argument focuses on the application of California statutory law, namely Penal Code § 190.3, which regulates the nature, scope, and admissibility of such evidence. *See* Penal Code § 190.3. In summary, petitioner claims the trial court erred by permitting the jury to hear extraneous facts that were not necessary to prove the aggravating factors, resulting in a constitutionally unfair trial.

Petitioner describes the objectionable evidence as follows:

[T]he prosecutor introduced the testimony of Charles Nicolas Reese, an owner of a computer store that was burglarized. Aside from testifying that a number of computers, parts and accessories were taken, his testimony included many of the details of the burglary. Mr. Reese's testimony was followed by Robert Dewey Boyett, who also owned a computer store. His testimony set forth how Petitioner attempted to sell to Mr. Boyett one of Mr. Reese's stolen computers. Petitioner eventually pleaded guilty to receiving stolen property. Trial counsel objected to the testimony detailing the facts underlying the commercial burglary and receiving stolen property. The trial court improperly concluded that underlying facts of the aggravating circumstances were admissible.

¹⁷ Petitioner's claim that trial counsel was ineffective for failing to request a unanimity instruction (*see* Claim 11Q, *infra*) also fails because the trial judge would have denied the request under state law. *See Strickland v. Washington*, 466 U.S. 668, 694-95 (1984) (ineffectiveness inquiry assumes judge would have "acted according to law").

1 [T]he prosecutor also introduced testimony of a Nevada
 2 probation/parole officer that Petitioner may have violated the terms
 3 of his probation by possessing cocaine. Whether or not the substance
 4 allegedly found in Petitioner's room was cocaine or some other illicit
 controlled substance,¹⁸ the alleged criminal activity was nonviolent
 and, therefore, inadmissible at the penalty phase.

5 Pet. Brief, Dkt. 280 at 116 (citations to record omitted).

6 Penal Code § 190.3 lists the aggravating and mitigating factors that guide
 7 the jury's capital sentencing decision. The factors relevant here are "(b) The
 8 presence or absence of criminal activity by the defendant which involved the use
 9 or attempted use of force or violence or the express or implied threat to use force
 10 or violence" and "(c) The presence or absence of any prior felony conviction."

11 Penal Code § 190.3.

12 Factor "b" allows consideration of any violent criminal activity by the
 13 defendant whether or not it led to prosecution and conviction, while factor "c"
 14 allows consideration of a prior felony conviction whether or not the underlying act
 15 was violent. 3 Witkin *Cal. Crim. Law* § 559, subp. 7. Evidence relevant under
 16 factor "b" is thus admissible to the extent it describes any criminal activity "which
 17 involved" force or violence. The conduct need not amount to a felony or result in
 18 a conviction. On the other hand, under factor "c," the evidence is admissible only
 19 to the extent it shows the *existence* of the prior felony conviction. As the
 20 California Supreme Court explained on direct appeal, factor "c" does not permit
 21 the introduction of the underlying facts and circumstances that gave rise to the
 22 felony conviction. *Livaditis*, 2 Cal. 4th at 776.¹⁹

24 ¹⁸ It was neither; the substance was determined to be powdered caffeine. 2 CT 364.

26 ¹⁹ The rationale for this rule is that "it effectively bars the prosecution from
 27 relitigating the circumstances of a crime committed years ago and threatening the
 28 defendant with harm akin to double jeopardy and denial of a speedy trial." *People v. Guerrero*, 44 Cal. 3d 343, 355 (1988).

1 The California Supreme Court rejected this claim as follows:

2
3 Over objection, the court admitted evidence of the
4 three instances in which defendant forcibly resisted arrest,
5 including evidence that on one of the occasions defendant
6 had attempted to sell two computers stolen in an earlier
7 burglary, and that on another of the occasions defendant
8 possessed what the arresting officer believed was cocaine.
9 Evidence of the circumstances preceding the arrests was
10 also admitted. The theft and possession of the computers
11 underlay defendant's felony convictions for possession of
12 stolen property and burglary.

13 Defendant contends that the evidence regarding the
14 possession of stolen property and the suspected cocaine,
15 and the circumstances surrounding the arrests, should not
16 have been admitted because it did not show "criminal
17 activity by the defendant which involved the use or
18 attempted use of force or violence or the express or
19 implied threat to use force or violence" under section
20 190.3, factor (b). He further argues that section 190.3,
21 factor (c), which allows evidence of any "prior felony
22 conviction," does not permit evidence of the facts
23 underlying the conviction.

24 Defendant is correct that the evidence regarding the
25 computers was not admissible to show the circumstances
26 surrounding his felony convictions. Any "prior felony
27 conviction," even of a nonviolent felony, is admissible
28 under section 190.3, factor (c). However, under factor (c),
only the fact of the *conviction* is admissible, not the
underlying facts of the crime. Evidence of the *facts* of
criminal activity, whether or not accompanied by a
conviction, is admissible under section 190.3, factor (b),
but only if the activity involves force or violence.
Although the record is not completely clear, it appears the
court did believe the prosecution was entitled to admit
evidence of the underlying facts of felony convictions
under section 190.3, factor (c). Admission of the
evidence solely on this basis would have been error. The
evidence of the possession of the stolen computers and of
the suspected cocaine was, however, admissible under
section 190.3, factor (b).

29 The prosecution was not limited under section
30 190.3, factor (b), to showing only that defendant was
31 arrested for no apparent reason, and that he then violently
32 resisted those arrests. "Section 190.3, factor (b), refers to
33 'criminal activity,' not specific crimes." Therefore,
34 although the activity must involve specific crimes, "all
35 crimes committed during a continuous course of criminal
36 activity which includes force or violence may be
37 considered in aggravation even if some portions thereof,
38 in isolation, may be nonviolent." The resisting of the
arrests and the subsequent batteries certainly involved

1 force or violence. The possessions of the computers and
 2 cocaine did not themselves involve force or violence, but
 3 they were the crimes leading to the arrests which
 4 defendant resisted, and were thus part of the same
 5 “continuous course of criminal activity which includes
 6 force or violence.” The underlying crimes and
 7 surrounding circumstances “were admissible to give
 8 context to defendant’s subsequent violent episode[s]” of
 9 resistance.

10 *Livaditis*, 2 Cal. 4th at 775-77 (case citations and footnotes omitted, emphasis in
 11 original).

12 Petitioner asserts that the California Supreme Court’s reasoning amounts to
 13 little more than a *post hoc* effort to gloss over the trial judge’s obvious mistake,
 14 the results of which were so prejudicial as to deprive petitioner of a fair trial.
 15 Pet.’s Brief, Dkt. 288 at 21-22. Petitioner argues that the so-called “violent
 16 episodes” occurred only when he resisted officers’ attempts to arrest him for the
 17 underlying conduct, and since there was no dispute that the arrests themselves
 18 were lawful, there was no need for detailed testimony about the circumstances
 19 leading up to those arrests. This was the essence of his counsel’s objection at
 20 trial. 15 RT 2206-2208.²⁰

21 “The admissibility of the defendant’s other criminal activity has been at
 22 issue in almost every capital case following the adoption of the 1978 death
 23 penalty.” 3 Witkin, *Cal. Crim. Law* 4th § 559 (2012). Despite the large body of
 24 California case law construing § 190.3, however, the United States Supreme Court
 25 has never confronted the issue presented by this claim, *i.e.*, whether violent
 26 activity during an arrest for a *non-violent offense* permits introduction of the
 27 specifics of the underlying offense. The California Supreme Court has held that

28 ²⁰ In a letter to defense counsel before trial, the prosecutor described the evidence
 she intended to introduce under § 190.3(b) as encompassing only petitioner’s
 resistance to arrest and flight, and *not the underlying criminal activities* leading up to
 those incidents. 2 C.T. 278-279. This letter reflects an understanding that testimony
 regarding the underlying activities would not be admissible. It is unclear why it was
 nonetheless elicited.

1 such evidence is admissible under the same analysis employed here, namely the
2 “continuous course of criminal activity” rationale. *See* 3 Witkin, *supra*, at subpart
3 (9) and cases cited therein.²¹ But neither petitioner nor respondent cites a United
4 States Supreme Court opinion that comes close to addressing this issue, nor do
5 any of the general rules set forth in the Court’s case law on capital sentencing
6 procedure dictate a result here. In the absence of such a rule, it is not this Court’s
7 role to create one on federal habeas review. 28 U.S.C. § 2254(d).

8 Petitioner further argues that the admission of the testimony regarding the
9 non-violent offenses resulted in unfair prejudice, violating his rights to due
10 process and a fair trial. Even if this evidence was improperly admitted in violation
11 of California law, however, this Court cannot find that any resulting prejudice so
12 infected the proceeding as to require a new trial. *See Romano v. Oklahoma*, 512
13 U.S. 1, 12 (1994) (test is “whether the admission of evidence . . . so infected the
14 sentencing proceeding with unfairness as to render the jury’s imposition of the
15 death penalty a denial of due process.”) A review of the allegedly improper
16 testimony regarding the events leading up to the escape attempts and arrests
17 reveals it to be a mundane factual recitation of facts. One computer store owner,
18 Mr. Reese, very briefly described the aftermath of a theft of his store, and then the
19 owner of another store, Mr. Boyett, testified about petitioner’s effort to sell him
20 computers which had been stolen from Reese’s store. 15 RT 2216 *et seq.* (Reese
21 testimony); 15 RT 2221 *et seq.* (Boyett testimony). As for the remaining incident
22 involving the encounter with the probation officers, the testimony regarding the
23 events preceding the arrest was even less dramatic, consisting of just a few lines of
24 testimony describing a routine probation search and the discovery of a bindle
25

26 ²¹ Unless it runs afoul of the federal constitution, a state court’s interpretation of
27 state law is binding on a federal court in a habeas proceeding. *Bradshaw v. Richey*,
28 546 U.S. 74, 76 (2005); *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991). An incorrect
application of state law, standing alone, is not a basis for relief. *Id.*

1 containing a substance that resembled cocaine. *Id.* at 2259-2260. Viewed as a
2 whole, this evidence was not reasonably likely to affect the jury's verdict.

3 For these reasons, the California Supreme Court's denial of this claim was
4 not an unreasonable application of law or facts as defined in § 2254(d). And even
5 assuming the evidence was admitted was error, it caused no substantial prejudice.
6 Claim 8 must therefore be denied.

7 **F. Trial Judge's Questioning of Defense Witness (Claim Ten)**

8 Petitioner alleges that the trial judge improperly inserted himself into the
9 examination of a defense witness. At trial, a number of petitioner's family
10 members testified on his behalf, some of whom expressed their belief that
11 petitioner fell under the influence of some disreputable individuals during the time
12 he resided in Las Vegas and only then started to engage in criminal activities
13 (which included the computer store thefts). After one such witness, petitioner's
14 brother George Livaditis, had testified to that effect, the trial judge began to ask
15 questions of him:

16 THE COURT: Now, these incidents that happened
17 with your brother with the computers, and so on and so
18 forth, he alone was involved in that, wasn't he?

19 THE WITNESS: From what I understand at that time --

20 THE COURT: Is that right?

21 THE WITNESS: -- Yes.

22 THE COURT: It wasn't his friends that were
23 involved with him. He was the one involved by himself,
24 wasn't he?

25 THE WITNESS: That was my understanding.

26 THE COURT: All right. I think you indicated, or
27 some of the witnesses indicated that these friends were
28 responsible for everything that happened to him in Las

1 Vegas; is that true?

2 THE WITNESS: I don't believe so.

3 19 RT 2908. When defense counsel then asked further questions of George
4 Livaditis, following up on what the judge had elicited, the judge interceded again:

5 COUNSEL: Is your brother the type of person that
6 is influenced by other people?

7 A. I think so, very much so.

8 Q. Now, the people he started hanging
9 out with in Las Vegas were people that were, I take it, not
10 friends of yours?

11 A. That's right.

12 Q. They were people that hung around
13 bars, hung around gymnasiums --

14 THE COURT: Do not ask leading questions will you
15 please?

16 COUNSEL: The Court has started asking
17 questions and I am trying --

18 THE COURT: You are suggesting the answer by
19 your questions, the jury understands that. Let him testify.

20 19 RT 2908-2909. Defense counsel continued:

21 COUNSEL: Okay. Do you know what type of
22 people he started hanging around with?

23 A. Yes, I do.

24 Q. Were they people you approved of?

25 A. No, they are not.

26 Q. Were they people that got into trouble?

27 A. Yes, they did.

28 COUNSEL: Thank you.

1 THE COURT: Who were those people? What kind of
2 trouble did they get into? Just name the people that you
3 say that he hung around with that got him into trouble.
4 Who are they?

5 THE WITNESS: I know a fellow named John, which I
6 have not met. He is a Greek fellow there in town that I --

7 THE COURT: In Vegas?

8 THE WITNESS: Vegas.

9 THE COURT: What about John?

10 THE WITNESS: Well, I know they were friends.

11 THE COURT: All right. What does John do?

12 THE WITNESS: I believe that the incident with the
13 jewelry store in Las Vegas -- I believe that somehow, the
14 material taken from there, Steven gave to this friend of
15 his.

16 THE COURT: How do you know that?

17 THE WITNESS: How do I know that?

18 THE COURT: Yes.

19 THE WITNESS: From friends of Steve's other than
20 John, other Greek boys out there. They sort of heard this
21 news. Steve wouldn't tell me anything. So I was asking
22 around friends in Las Vegas.

23 THE COURT: All right. Anything further?

24 MS. BRACKE : No.

25 THE COURT: All right. You may step down.

26 19 RT 2909-2911.

27 Petitioner contends the judge displayed bias not only by questioning the
28 witness, but also by "suggesting the evidence presented by the defense was

1 repetitious.” SAP ¶ 39(g). Petitioner appears to be referring to this statement
 2 contained within one the judge’s questions (quoted above): “I think you indicated,
 3 *or some of the witnesses indicated* that these friends were responsible for
 4 everything that happened to him in Las Vegas; is that true?” 19 RT 2908.

5 The constitutional right to a fair trial includes the right to be tried before a
 6 judge free of actual bias or the appearance of bias. *In re Murchison*, 349 U.S. 133,
 7 136 (1955). The due process clause “requires a fair trial in a fair tribunal before a
 8 judge with no actual bias against the defendant or interest in the outcome of his
 9 particular case.” *Bracy v. Gramley*, 520 U.S. 899, 904-05 (1997) (internal
 10 quotation marks and citations omitted). However, a trial judge is more than
 11 simply a moderator or an umpire. *Duckett v. Godinez*, 67 F.3d at 739; *United*
 12 *States v. Mostella*, 802 F.2d 358, 361 (9th Cir. 1986). “The judge may ...
 13 ‘participate in the examination of witnesses to clarify issues and call the jury’s
 14 attention to important evidence.’” *United States v. Parker*, 241 F.3d 1114, 1119
 15 (9th Cir. 2001) (quoting *United States v. Wilson* 16 F.3d 1027, 1031 (9th Cir.
 16 1994)); *United States v. Laurins*, 857 F.2d 529, 537 (9th Cir. 1988) (it is proper
 17 for the judge to “participate in the examination of witnesses to clarify evidence,
 18 confine counsel to evidentiary rulings, ensure the orderly presentation of evidence,
 19 and prevent undue repetition.”).

20 On habeas corpus review, the issue is whether the trial judge’s behavior
 21 rendered the trial so fundamentally unfair that it violated the petitioner’s federal
 22 constitutional right to due process. *Duckett*, 67 F.3d at 740. There is a “strong
 23 presumption” against judicial bias, and a corresponding need for a habeas
 24 petitioner to show “extreme facts” in order to prevail on such a claim. *See Sivak*
 25 *v. Hardison*, 658 F.3d 898, 923-927 (9th Cir. 2011). “To sustain a claim of this
 26 kind, there must be an ‘extremely high level of interference’ by the trial judge
 27 which creates ‘a pervasive climate of partiality and unfairness.’” *Duckett*, 67 F.3d
 28 at 740 (quoting *United States v. DeLuca*, 692 F.2d 1277, 1282 (9th Cir. 1982)).

1 “A trial court will be reversed for excessive judicial intervention only if the record
2 discloses actual bias on the part of the trial judge or leaves the reviewing court
3 with an abiding impression that the judge’s remarks and questioning of witnesses
4 projected to the jury an appearance of advocacy or partiality.” *Shad v. Dean*
5 *Witter Reynolds, Inc.*, 799 F.2d 525, 531 (9th Cir. 1986) (internal punctuation
6 omitted).

7 Even if a habeas petitioner can show apparent or actual bias on the part of
8 the trial judge, he must also demonstrate prejudice. The test is whether the
9 judge’s attitude and conduct “‘had substantial and injurious effect or influence in
10 determining the jury’s verdict.’” *Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993)
11 (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). The Court in
12 *Brecht* added: “Our holding does not foreclose the possibility that in an unusual
13 case, a deliberate and especially egregious error of the trial type, or one that is
14 combined with a pattern of prosecutorial misconduct, might so infect the integrity
15 of the proceeding as to warrant the grant of habeas relief, even if it did not
16 substantially influence the jury’s verdict.” *Id.* at 638 n.9.

17 While the trial judge’s questions and comments might indicate some degree
18 of impatience or incredulity, they hardly reflect an “extremely high level of
19 interference” or a clear indication of pro-prosecution bias. *Duckett*, 67 F.3d at
20 740. The judge’s questions and the witness’s responses fill about four pages out
21 of the 3,046-page reporter’s transcript of the trial proceedings. The questions
22 reflect an appropriate effort by a trial judge to establish some rudimentary
23 foundational facts regarding the basis of the witness’s knowledge, and to clear up
24 the evident vagueness in his testimony. The record indicates that the judge waited
25 until it appeared both counsel had finished examining the witness before asking
26 his follow-up questions, which then prompted defense counsel’s additional
27 queries. 19 RT 2907-2908. Nor was the judge’s subsequent admonition to avoid
28 leading questions improper. *Cf. People v. Fudge*, 7 Cal. 4th 1075, 1108 (1994)

(judge has obligation to exercise “reasonable control of the trial.”). For similar reasons, trial counsel could reasonably have decided not to object to the judge’s questions, especially since this would have risked making it appear that the defense feared a thorough cross-examination of the witness.

The California Supreme Court could have reasonably denied this claim on the merits, given the scant showing of bias or any appearance thereof, along with the inadequate showing of potential prejudice. Therefore, Claim 10 must be denied.

VI. Ineffective Assistance of Counsel (Claims 11)

A. Overview of Petitioner’s Allegations

Petitioner claims trial counsel was deficient in several respects, including by failing to adequately investigate entire categories of mitigation evidence, including petitioner family background and alleged psychological disorders, failing to present substantive mental-state defenses, and failing to raise the issue of petitioner’s competence to stand trial. Claim 11 is comprised of a number of separate allegations or subclaims. Because these IAC subclaims are naturally interrelated, the Court considers them in their entirety. After winnowing out the clearly meritless claims, the cumulative prejudice of the remaining alleged deficiencies will be addressed last.

Because the California Supreme Court summarily denied petitioner’s IAC claim in its entirety, the question on federal habeas is whether any reasonable jurist could reach such a result. *Richter*, 131 S. Ct. at 786. However, petitioner insists that the state court’s summary denial of this claim on the pleadings — where his allegations are assumed to be true — must be unreasonable under § 2254(d) as long as his pleadings state a *prima facie* claim.²² However, the United States Supreme Court has said that this understanding of California’s

²² See Pet. Briefs, Dkt. 280 at 108; Dkt. 288 at 24 n. 5; Dkt. 291 at 4-5, 19-20, 42; Dkt. 295 at 5-7.

1 habeas review process is inaccurate:

2 The parties agree that the state-court record includes both
3 the allegations of the habeas corpus petition *and any*
4 *matter of record pertaining to the case.* Under California
5 law, the California Supreme Court's summary denial of a
6 habeas petition on the merits reflects that court's
7 determination that the claims made in the petition do not
8 state a prima facie case entitling the petitioner to relief. It
9 appears that *the court generally assumes the allegations in*
10 *the petition to be true, but does not accept wholly*
11 *conclusory allegations, and will also review the record of*
12 *the trial to assess the merits of the petitioner's claims.*

13 *Pinholster*, 131 S. Ct. at 1402 n.12 (emphasis added and internal punctuation
14 omitted) (citing *In re Clark*, 5 Cal. 4th 750, 770 (1993) and *People v. Duvall*, 9
15 Cal. 4th 464, 474 (1995)).

16 The Ninth Circuit recently rejected a similar argument:

17 [Petitioner] argues that § 2254(d) does not apply because
18 the California Supreme Court's decision was not an
19 "adjudication on the merits" within the meaning of the
20 statute. His argument rests on the premise that
21 California's pleading rules improperly deprived him of the
22 opportunity to factually develop his federal claims before
23 the California Supreme Court summarily denied them.
24 His argument fails in light of the fact that both *Pinholster*
25 and *Richter* arose from the very same summary denial
26 procedure. *Pinholster*, 131 S. Ct. at 1396 & n.1; *Richter*,
131 S. Ct. at 783. Indeed, the Supreme Court
demonstrated its awareness of California's pleading rules
when it explained in *Pinholster* that "the California
Supreme Court's summary denial of a habeas petition on
the merits reflects that court's determination that 'the
claims made in th[e] petition do not state a prima facie
case entitling the petitioner to relief.'" 131 S. Ct. at 1402
n. 12 (quoting *In re Clark*, 5 Cal. 4th 750 (Cal.1993)
(alteration in original)). To assess the merits of the
petitioner's claims, the California Supreme Court
"generally assumes the allegations in the petition to be
true" *and also reviews the trial record.* *Id.* (citing *People*
v. Duvall, 9 Cal. 4th 464 (Cal.1995); *Clark*, 21
Cal.Rptr.2d 509.2d at 742). So the court does not fail to
render an "adjudication on the merits" just because it does
not grant an evidentiary hearing.

27 *Sully v. Ayers*, 725 F.3d 1057, 1067 n.4 (9th Cir. 2013) (emphasis added), *cert.*
28 *denied*, No. 13-8821, 2014 WL 713384 (U.S. June 2, 2014).

1 Therefore, the mere fact that a habeas petitioner can successfully *allege* a
2 prima facie claim of ineffective assistance of counsel (or any other claim) and
3 assert he was prejudiced thereby, does not necessarily mean he is entitled to an
4 evidentiary hearing and a reasoned decision in the state court. A state court may
5 reasonably deny such claims based not only on the pleadings but in light of all the
6 evidence properly before it, including that which can be gleaned from the trial
7 record. *See Pizzuto v. Blades*, 729 F.3d 1211, 1218-20 (9th Cir. 2013). A state
8 court's determination of the facts based on its review of the record is entitled to a
9 presumption of correctness, which applies regardless of whether the state court
10 conducted an evidentiary hearing. 28 U.S.C. § 2254(e)(1); *Pizzuto*, 729 F.3d at
11 1218-19. This presumption can be rebutted by a petitioner only upon a showing
12 of clear and convincing evidence to the contrary. 28 U.S.C. § 2254(e)(1).
13 Moreover, in this case, with the possible exception of the psychiatric issues
14 (discussed *infra*), petitioner's claims generally do not involve materially disputed
15 facts. *Cf. Earp v. Ornoski*, 431 F.3d 1158 (9th Cir. 2005) (hearing required on
16 disputed facts concerning prosecutorial misconduct); *Nunes v. Miller*, 350 F.3d
17 1045 (9th Cir. 2003) (hearing required on IAC claim due to factual dispute over
18 communication of plea offer).

19 In conducting federal habeas review, this Court's role is not to examine
20 whether there was an error in the procedure employed by the California Supreme
21 Court when it reviewed the state habeas corpus petition, but to assess whether the
22 ultimate *decision* rendered by the state court denying that petition was objectively
23 unreasonable. *Richter*, 131 S. Ct. at 786; *Franzen v. Brinkman*, 877 F.2d 26, 26
24 (9th Cir. 1989). "Under § 2254(d), a habeas court must determine what arguments
25 or theories supported or, as here, could have supported, the state court's decision;
26 and then it must ask whether it is possible fairminded jurists could disagree that
27 those arguments or theories are inconsistent with the holding in a prior decision of
28 this Court." *Richter*, 131 S. Ct. at 786.

1 **B. Legal Standard**

2 The Sixth Amendment guarantees the right to effective assistance of
3 counsel. *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984). To prevail on
4 a claim of ineffective assistance of counsel, there must be a showing that (1)
5 counsel’s conduct fell below an objective standard of reasonableness (*i.e.*, was
6 “deficient”), and (2) the defendant was prejudiced thereby. *Id.* at 687; *accord*
7 *Richter*, 131 S. Ct. at 770. To establish deficient performance, petitioner must
8 show that “counsel’s representation fell below an objective standard of
9 reasonableness” as viewed “under prevailing professional norms.” *Strickland*,
10 466 U.S. at 688. The test is not simply whether counsel’s representation “deviated
11 from best practices or most common custom.” *Richter*, 131 S. Ct. at 788.

12 A court considering an IAC claim must apply a “strong presumption” that
13 counsel’s representation was within the “wide range” of reasonable professional
14 assistance. *Strickland*, 466 U.S. at 689. The petitioner bears the “heavy burden”
15 of proving that counsel’s assistance was neither reasonable nor the result of
16 “sound trial strategy.” *Id.* “Judicial scrutiny of counsel’s performance must be
17 highly deferential. . . . A fair assessment of attorney performance requires that
18 every effort be made to eliminate the distorting effects of hindsight.” *Id.* On
19 federal habeas review, the court must affirmatively entertain the range of *possible*
20 reasons counsel may have had for proceeding as he did. *Pinholster*, 131 S. Ct. at
21 1407.

22 The second prong of the *Strickland* test — prejudice — requires a showing
23 of a reasonable probability that, but for counsel’s errors, the result of the
24 proceeding would have been different. *Strickland*, 466 U.S. at 694. “It is not
25 enough for the defendant to show that the errors had some conceivable effect on
26 the outcome of the proceeding.” *Id.* at 693. “On the other hand, we believe that a
27 defendant need not show that counsel’s deficient conduct more likely than not
28 altered the outcome in the case.” *Id.*; *cf. Kyles v. Whitley*, 514 U.S. 419, 434

1 (1995) (discussing same prejudice standard in context of *Brady* claims). “A
2 reasonable probability is a probability sufficient to undermine confidence in the
3 outcome.” *Strickland*, 466 U.S. at 694. “The benchmark for judging any claim of
4 ineffectiveness must be whether counsel’s conduct so undermined the proper
5 functioning of the adversarial process that the trial cannot be relied on as having
6 produced a just result.” *Id.* at 686.

7 Where prejudice is not shown, there is no need to determine whether
8 counsel’s performance was deficient. *Id.* at 697. *Strickland* explained that “there
9 is no reason for a court deciding an ineffective assistance claim to approach the
10 inquiry in the same order or even to address both components of the inquiry if the
11 defendant makes an insufficient showing on one.” *Id.* “If it is easier to dispose
12 of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we
13 expect will often be so, that course should be followed.” *Id.*

14 A state inmate pursuing an IAC claim in a post-AEDPA federal habeas
15 proceeding must contend with an even higher level of deference than would apply
16 on direct review. *Richter*, 131 S. Ct. at 785. “A state court must be granted a
17 deference and latitude that are not in operation when the case involves review
18 under the *Strickland* standard itself.” *Id.* The Supreme Court has cautioned
19 federal habeas courts to “guard against the danger of equating unreasonableness
20 under *Strickland* with unreasonableness under § 2254(d). When § 2254(d)
21 applies, the question is not whether counsel’s actions were reasonable. The
22 question is whether there is *any reasonable argument* that counsel satisfied
23 *Strickland*’s deferential standard.” *Id.* at 788 (emphasis added). Thus,
24 establishing an entitlement to relief based on ineffective assistance of counsel
25 under § 2254(d) is even more difficult than establishing relief under *Strickland* on
26 *de novo* review. “The standards created by *Strickland* and § 2254(d) are both
27 highly deferential, and when the two apply in tandem, review is doubly so.”
28 *Richter*, 131 S. Ct. at 788 (citations and internal quotation omitted); *Yarborough v.*

1 *Gentry*, 540 U.S. 1, 6 (2003) (per curiam) (judicial review of *Strickland* claim is
 2 “doubly deferential when it is conducted through the lens of federal habeas.”).
 3 This double deference requires a federal habeas court to ask not whether the state
 4 court’s denial of an IAC claim under *Strickland* was incorrect, “but whether that
 5 determination was unreasonable — a substantially higher threshold.” *Knowles v.*
 6 *Mirzayance*, 556 U.S. 111, 123 (2009). Moreover, “[b]ecause the *Strickland*
 7 standard is a general standard, a state court has even more latitude to reasonably
 8 determine that a defendant has not satisfied that standard. *Id.*; *Yarborough v.*
 9 *Alvarado*, 541 U.S. at 664 (“[E]valuating whether a rule application was
 10 unreasonable requires considering the rule’s specificity. The more general the
 11 rule, the more leeway courts have in reaching outcomes in case-by-case
 12 determinations”); *accord Richter*, 131 S. Ct. at 788 (“The *Strickland* standard is a
 13 general one, so the range of reasonable applications is substantial.”).

14 **C. Defense Presentation at Trial**

15 Petitioner was represented throughout the Superior Court proceedings by a
 16 single member of the Los Angeles County Public Defender’s Office, who was
 17 assisted at times by an investigator from that Office. Counsel’s preparation for the
 18 trial included in-person interviews with several of petitioner’s family members
 19 and acquaintances, some of whom resided in Greece. At the trial, defense counsel
 20 called members of petitioner’s family, along with a Greek Orthodox pastor who
 21 had known the family since the late 1960’s. The opinion on petitioner’s direct
 22 appeal describes their testimony:

23 Defendant’s mother and other family members
 24 testified about defendant’s childhood, some coming from
 25 Greece to do so. The marriage of defendant’s parents,
 26 both natives of Greece, had been arranged, and was never
 27 a success. The father abused the family, including
 28 defendant and his three older siblings. His mother
 divorced his father when defendant was five years old.
 Thereafter, the family generally lived in poverty, often
 relying on welfare. Defendant was a good child, and was
 supportive of his mother and the family. For a while
 defendant lived at a Greek Orthodox Church orphanage,

1 where he was unhappy. Defendant also lived in Greece
 2 for a few years. Later, he was in the United States Army.
 3 Defendant's brother testified that defendant became
 involved with the wrong kind of friends in Las Vegas, and
 thereby got into trouble.

4 The family members testified that the family was
 5 close, that they all loved defendant, and that they wanted
 him to live.

6 *Livaditis*, 2 Cal. 4th at 771. George elaborated on their mother's efforts to keep
 7 the family clothed and fed, which included sorting through garbage containers. 19
 8 RT 2884. In addition, the family members testified that petitioner did not intend
 9 the Van Cleef & Arpels robbery to turn deadly, and was remorseful for the deaths
 10 that occurred. 19 RT 2799, 2831, 2847, and 2854. They also expressed their own
 11 shame and regret for petitioner's actions, and begged the victims' families and the
 12 court for forgiveness. 19 RT 2804, 2848, 2854, and 2917.

13 Petitioner asserts that trial counsel's mitigation presentation was
 14 prejudicially inadequate and misdirected. Trial counsel did not present expert
 15 testimony regarding petitioner's mental or psychological condition, and did not
 16 pursue such issues as a potential guilt-phase defense or as mitigation evidence.
 17 Also, trial counsel chose not to present evidence of the years of abuse inflicted
 18 upon petitioner by his mother (who testified in mitigation). As described below,
 19 petitioner submits a great deal of background information on these issues,
 20 consisting primarily of information about his highly dysfunctional family life and
 21 his apparent mental health problems.

22 **D. Evidence in Support of Claim**

23 **1. Subclaim 11A: Evidence Counsel Possessed Yet Failed to** 24 **Present Regarding Petitioner's Background and Mental** 25 **Health Before the Murders**

26 In Subclaim 11A, petitioner focuses on evidence concerning his
 27 background and mental health that was in trial counsel's possession but was not
 28 used. SAP ¶¶ 44-47. (Subclaim 11B, by contrast, describes background and

1 mental health evidence that was not in counsel's possession but allegedly was
 2 readily obtainable. SAP ¶¶ 48-54.) The petition sets forth the evidence that trial
 3 counsel allegedly possessed but failed to present, which, according to petitioner,
 4 proves that counsel was deficient. SAP ¶¶ 44-47 at pp. 50-72. This evidence may
 5 be summarized as follows:

- 6 • As a Child, Petitioner Witnessed Abuse in the Home

7 Fanny Livaditis, one of petitioner's two sisters, informed trial
 8 counsel that petitioner often saw their father verbally and physically
 9 abuse their mother. Petitioner also witnessed his father tie Fanny to
 10 a table, naked, and beat her with a belt. Petitioner's mother, Sophie,
 11 and petitioner himself confirmed that he witnessed these regular
 12 beatings. SAP ¶ 44(a)(1)-(3).

- 13 • As A Child, Petitioner Himself was Subjected to Abuse

14 Counsel knew that petitioner was beaten by both his parents.
 15 Petitioner recounted an incident in which his mother battered him
 16 and his siblings so forcefully that she seriously injured her back,
 17 became bedridden as a result, and thereafter enlisted petitioner's
 18 uncle to beat the children in her stead. Petitioner's mother would
 19 send him to stay with the uncle and his wife, who were cruel and
 20 beat him. *Id.* ¶ 44(b)(1)-(6).

- 21 • Information about Petitioner's Father

22 Counsel was informed that petitioner's father, Louis Livaditis,
 23 was a "womanizer" and a "barbarian" who was "unable to raise a
 24 family." Louis achieved brief financial success operating restaurants
 25 but squandered the family's assets as a result of alcohol abuse and
 26 gambling. As was noted at trial, he ultimately abandoned the family
 27 when petitioner was young. *Id.* ¶ 44(c).

1 • Information about Petitioner's Mother

2 Counsel was told that Sophie was "always depressed and ill
3 [and] was unable to give the right guidance to her children." She
4 was "emotionally unstable." Pastor Angelo Gavalas (who testified
5 at trial) informed counsel of his belief that petitioner's problems
6 were attributable to Sophie's mental instability. Sibling George
7 Livaditis confirmed to counsel that petitioner's childhood had been
8 difficult and that their mother had abused petitioner. *Id.* ¶ 44(d).

9 • Petitioner's Early and Lengthy Separation from His Family

10 Counsel learned that when petitioner was eight years old, he
11 and his ten year old sister Fanny were placed with Sophie's consent
12 at St. Basil's Academy, an orphanage and school for disadvantaged
13 and "problem" children in upstate New York, run by the Greek
14 Orthodox Church. *Id.* ¶¶ 44(e), 49(zz). (George and petitioner's
15 other sister, Pauline, apparently remained with their mother.) Sophie
16 rarely visited, and petitioner was very unhappy; he would frequently
17 cry and refuse to eat, and he begged to go home. Petitioner was
18 forced to stay at St. Basil's for two years and was not invited to go
19 home for visits, even on holidays; he was allowed to return home
20 only after he had "nearly starved to death." Sophie later sent him to
21 Greece to stay with relatives. *Id.* ¶¶ 44(e)(3)-(5). George told
22 counsel of his belief that petitioner's feelings of abandonment by his
23 mother were the "seeds of [his] criminal actions." *Id.* ¶¶ 44(e)(2).

24 • Petitioner's Desire to Help and Support His Mother

25 Counsel was told of petitioner's strong feelings for his mother.
26 Fanny described how petitioner promised his mother he "would
27 support her within his own future home," and that he "even went as
28 far as to say that he would not marry if his wife did not agree to keep

1 his mother with them.” Fanny said “[m]oney was and perhaps still
 2 is a major issue for mother as she often complained of her children’s
 3 lack of monetary gifts and/or financial support towards her.” Sophie
 4 herself told counsel that she and petitioner would “talk about how
 5 the old people are left alone and the family neglected them,” and that
 6 petitioner told her: “Depend on me. Don’t worry, I’ll take care of
 7 you.” Sophie would ask for financial support from petitioner and his
 8 siblings. A former co-worker told counsel’s investigator that
 9 petitioner constantly expressed worry about his mother. *Id.* ¶ 44(g).

10 • Petitioner’s Physical and Mental Health Prior To and On the
 11 Date of the Murders

12 Counsel learned that petitioner suffered a ruptured appendix at
 13 age two and nearly died. When petitioner was eight, he suffered a
 14 head injury at St. Basil’s that knocked him unconscious and required
 15 ten stitches. After he returned from Army basic training, he
 16 experienced constant headaches. *Id.* ¶ 44(k).²³

17 In a letter to trial counsel, petitioner’s sister Pauline wrote that
 18 petitioner had on occasion threatened suicide and said he did not
 19 know “what he is living for.” According to Pauline, after petitioner
 20 left the Army, he felt “lost and confused” and had to “make a
 21 decision of whether to live or die.” *Id.* ¶ 44(h). Petitioner informed
 22 trial counsel that while in Greece, his “mind was screwed up”; he
 23 felt he was “kicked around” and “not good at anything”; he had
 24 “hostile feelings” and felt “life was unfair.” *Id.* ¶ 44(i). A former
 25 co-worker said petitioner was a “hyper person who was given to
 26

27 ²³ It is unclear whether trial counsel was aware that petitioner also suffered head
 28 injuries in a car accident less than a year before the murders, as mentioned in the
 next subclaim.

1 abrupt mood swings.” A cousin said he was “destructive” and
2 would break or hit objects. According to the cousin, petitioner said
3 he felt “an inner rage” that left him “confused.” *Id.*

4 With respect to the day of the murders, counsel’s notes reflect
5 that petitioner said “he was not crazy but was a little ‘unstable;’” if
6 he had been “thinking like a normal person,” he “would not have
7 gone into the store and acted the way he did”; during the incident, he
8 “was definitely screw up [sic] in the head”; he said “a person has to
9 be really screwed up in the head kill somebody [sic].” Petitioner
10 also said he “wanted to get attention by being on television” and was
11 hoping that he “could make a change by making a statement about
12 hunger in America.” At the beginning of the incident, he was “high”
13 and “excited” and felt “like he was President of the United States.”
14 Later, however, he turned angry, like a person who is at “a party
15 having a good time and somebody does something to ruin it.” *Id.*

16 Among the discovery materials provided to counsel was a
17 police interview in which petitioner stated that he killed hostage
18 Smith because something “kicked inside” of him, and he heard a
19 voice telling him to kill Smith. Even after he had tied up Smith and
20 forced him to lie face down on the floor, petitioner said that Smith
21 was “[t]ryin’ to get at me.” Petitioner said he had demanded news
22 coverage because he wanted to be on television to “tell ‘em
23 somepin’ [sic] important, but I don’t remember exactly what. I
24 wanted somepin’ so all the world can hear.” At times in the police
25 interview, petitioner seemed to be “chuckling to himself.”
26 *Id.* ¶ 44(h)(9).

27 Counsel also received handwritten notes of the police negotiator
28 who spoke with petitioner by telephone during the standoff. The

1 notes indicated that petitioner described himself as a Viet Nam
 2 veteran, a college graduate with several degrees, fluent in four
 3 languages, capable of “maxing” aptitude tests, and able to move
 4 water with telekinesis. *Id.* ¶ 44(i)(7).

5 Counsel also possessed a copy of a jailhouse interview that
 6 petitioner granted to a newspaper reporter after the incident, in
 7 which he stated he killed Smith because something “just clicked.
 8 My fuse went off.” He said he committed the robbery because “I
 9 had a lot anger built inside of me.” He told the reporter that he saw
 10 himself as a Robin Hood figure, and that “it was OK to steal from
 11 the rich” because he “was generous to the poor.” *Id.* ¶ 44(h)(10).

12 • Information on Petitioner’s Low Intelligence and Fearfulness

13 Counsel obtained school records reflecting that, in the third
 14 grade, petitioner was viewed as a “below average student” who had
 15 an “inability to read with comprehension”; he was required to repeat
 16 third grade. After his arrest, petitioner told the police that he did not
 17 have “a lot of under, understanding” and that he might not be able to
 18 “keep up” with their interview questions. *Id.* ¶ 44(l).

19 Counsel possessed information showing that, during the
 20 hostage incident, petitioner expressed a fear of being beaten.
 21 Petitioner told the police negotiator that he was afraid of “the idea of
 22 [the police] beating me up.” Hostage Carol Lambert testified at the
 23 preliminary hearing that petitioner appeared to be more afraid of
 24 being beaten by the police than being shot. Lambert separately told
 25 the prosecutor that petitioner requested media coverage during the
 26 standoff so that “he could give himself up and he wouldn’t be hurt
 27 by the police . . . it would be on tape and the police wouldn’t come
 28 in and, and beat him up and hurt him.” She said he felt that “maybe

1 if he had some sympathy outside, by making this interview, the
 2 police wouldn't hurt him if he did come out." *Id.* ¶ 44(j).

3 This subclaim will be discussed along with other subclaims in assessing
 4 petitioner's overall IAC claim.

5 **2. Subclaim 11B: Evidence of Petitioner's Background and**
 6 **Mental Health Which Counsel Did Not Possess But**
 7 **Allegedly Should Have Found and Presented**

8 Subclaim 11B presents an extensive narrative of evidence and testimony
 9 that trial counsel did *not* possess but allegedly could have found through
 10 reasonable investigation. Petitioner asserts that the failure to seek out and present
 11 this evidence reflects ineffective assistance of counsel. SAP ¶¶ 48-54 at 72-122.
 12 Petitioner faults trial counsel for not interviewing certain people, and improperly
 13 conducting the interviews of others. The claim otherwise sets forth an account of
 14 petitioner's wretched childhood and teen years, which allegedly should have been
 15 obtained by counsel and presented to the jury:

16 • Witnesses Who Counsel Failed to Interview

17 Petitioner alleges that counsel was provided with names of
 18 persons who could have provided helpful leads or testimony, if only
 19 counsel had interviewed them. Petitioner told counsel about a
 20 girlfriend named Ruth Calderon who visited him regularly even after
 21 he was jailed for the murders. Ms. Calderon called counsel several
 22 times, but counsel only spoke to her once, briefly, and did not
 23 interview her. Petitioner also told counsel that he had a friend in the
 24 Los Angeles area named Spiro Banos, with whom petitioner had
 25 lived and seen on a daily basis during the month or so preceding the
 26 murders; another friend named Daniel Robertson ("Tasos") who
 27 could be found at Caesar's Palace in Las Vegas; a friend named
 28 "Jim" who once bailed petitioner out of the Beverly Hill Police

1 Department jail; and two friends in Greece he identified as Anthony
 2 Katsadimos and “Andrew” who could provide information about his
 3 teenage years there. SAP ¶ 48(a).

4 Petitioner alleges if counsel had interviewed these individuals,
 5 he could have obtained and presented information which included:
 6 “If [petitioner] didn’t eat regularly, his mood would change and he
 7 would get irritable and aggravated easily”; he “seemed to have
 8 multiple personalities” and became “fixated and obsessed with
 9 things”; he exhibited mood shifts, quickly becoming agitated and
 10 irritable. SAP ¶ 48(b) (citing Banos Decl., SAP Ex. 48). His mood
 11 swings went from “excited and hyper” to regular periods of
 12 depression where he would “just stare vacantly into space.” *Id.*
 13 (citing Calderon Decl., SAP Ex. 46).²⁴

14 • Counsel Mishandled Interviews of Family Members

15 Two months before trial, counsel and his investigator went to
 16 Greece to interview members of petitioner’s family. Counsel
 17 conducted several group interview sessions with various members of
 18 the extended clan as well as close family friends. Petitioner alleges
 19 that each of interviews was conducted in the presence of his mother
 20 Sophie (who had moved back to Greece) and at least two to six other
 21 relatives or neighbors. SAP ¶ 48(c). Everyone was either family or
 22 close personal friends of Sophie, and all were aware the interviews
 23 were being tape recorded. “Not surprisingly,” alleges petitioner,
 24 “the picture painted in these interviews was that Petitioner was a
 25

26 ²⁴ Petitioner provides declarations only from Calderon and Banos. Nothing in the
 27 record indicates what the remaining four individuals (“Jim,” “Andrew,” Anthony
 28 Katsadimos, or Daniel Robertson aka “Tasos”) might have said, assuming counsel
 could have located them.

1 loving child and that Petitioner's mother was a paragon of love and
 2 strength who suffered enormously from an abusive husband, poor
 3 physical health and dire poverty." *Id.* "Trial counsel was told about
 4 three separate episodes of petitioner saving kittens." *Id.* "During
 5 one of the group interviews, Petitioner's mother became distressed
 6 and began criticizing her daughter [Fanny] when Petitioner's mother
 7 learned for the first time in one of trial counsel's interview sessions
 8 that Petitioner had contemplated suicide in December 1983." *Id.* In
 9 later interviews by habeas counsel, some of the relatives admitted
 10 they had not been willing to disclose "negative" information in front
 11 of Sophie or the others. *Id.* at n. 8.

12 • What Counsel Would Have Learned Through Proper Interviews
 13 and Investigation

14 Petitioner claims that but for counsel's faulty method of
 15 interviewing witnesses, and his overall failure to investigate, he
 16 could have obtained a more "coherent and compelling" picture of
 17 petitioner's family background and his unhappy childhood. *Id.* ¶ 49.
 18 That information included the following:²⁵

19 Petitioner's mother, Sophie, suffered great hardship growing up
 20 in Greece in the 1930's and 1940's. Conditions were especially bad
 21 during World War II and the years that followed, due to the
 22 devastating effect of the war on the area where she and her family
 23 lived. In addition to such hardships, mental illness was common in
 24 Sophie's extended family, and afflicted both of her parents.
 25 *Id.* ¶¶ 49(a)-(c).

26
 27 ²⁵ The Court here summarizes the lengthiest portion of the IAC claim. Many of the
 28 allegations duplicate others elsewhere in the petition; this summary minimizes such
 repetition when possible.

1 Sophie's parents, like many others in the war-torn area, were
2 left financially unable to care for their children. Sophie's father
3 nonetheless gambled away what little they had (which, petitioner
4 says, may explain Sophie's chronic anxiety about money). When
5 Sophie was still in her teens, her parents sent her away to live in the
6 United States with her aunt and uncle, who had "selected" Sophie
7 over her other siblings from pictures sent to them by her parents. As
8 characterized by petitioner, Sophie was essentially sold to her
9 relatives. Sophie's "new parents" did not treat her well, and quickly
10 put her to work as a sales clerk. Sophie did not want to move to
11 America and later confided that she wished she had jumped off the
12 ship that took her there. *Id.* ¶ 49(f).

13 Sophie's adoptive parents arranged for her to marry Louis
14 Livaditis, who had also recently arrived from Greece. Louis had
15 stowed away on a cargo ship to get to the United States and wanted
16 to marry an American citizen to avoid deportation. Sophie knew
17 almost nothing about Louis prior to their marriage in 1957. Their
18 life together was difficult from the start. Louis was violent and
19 made little money. After their first child (Pauline) was born, Sophie
20 did not want any more children. With each of her subsequent
21 pregnancies, she allegedly tried to self-induce abortions (including
22 while pregnant with petitioner), and ultimately showed little interest
23 in her children. *Id.* ¶¶ 49(g)-(i).

24 For several years the family lived in Brooklyn, N.Y., where
25 Louis was rarely at home, working late and staying out gambling.
26 When home, he often beat Sophie and the children. Sophie herself
27 felt overwhelmed and would also physically and verbally abuse the
28 children. *Id.* ¶¶ 49(p)-(s).

1 Unable to pay Louis' mounting gambling debts, the entire
2 family skipped town and fled to Texas in 1967, when petitioner was
3 three. The marital violence and discord grew even worse, and
4 included incidents where Louis brandished a knife at Sophie and
5 threatened to kill her. Both parents abused the children in turn.
6 Sophie's outbursts of rage were unpredictable, and her beatings of
7 the children commonly lasted 10 to 15 minutes. *Id.* ¶¶ 49(t)-(aa).

8 Sophie and Louis were finally divorced in 1970, when
9 petitioner was six. (Thereafter, Louis did not pay the court-ordered
10 child support.) Sophie and the children left Texas and moved back
11 to Brooklyn that same year. Relatives in Brooklyn observed that
12 Sophie was suffering from a "nervous breakdown" during this
13 period, and her behavior grew increasingly odd. She ranged from
14 violent to catatonic, and was increasingly reliant on others for help.
15 She complained of chronic back pain and headaches. Visitors to the
16 home would find her in bed. She applied for and began receiving
17 welfare payments. Louis eventually made his way back to Brooklyn
18 but when he attempted to see the children, Sophie would not permit
19 it. She forbade any contact with their father or anyone on his side of
20 the family, stating that the entire Livaditis family was evil.
21 Petitioner rarely if ever saw his father again; Louis died ten years
22 later. *Id.* ¶¶ 49(cc)-(mm).

23 Petitioner began showing signs of depression between ages six
24 and eight. He would often cry but rarely spoke, keeping everything
25 to himself. He began attending school in the New York Public
26 School system, but was soon experiencing trouble there, both
27 academically and socially. School records indicate he was viewed
28 as "nervous/restless." *Id.* ¶¶ 49(rr)-(tt).

1 In July 1972, Sophie was admitted to a Brooklyn hospital for
2 her back pain. Medical records reflect that, during her hospital stay,
3 a doctor referred her for a psychiatric consultation because of her
4 “bizarre behavior.” Sophie told the hospital psychiatrist that she had
5 frequent migraines that were precipitated by “screaming at her
6 children” and “worrying.” The psychiatrist noted she would smile
7 inappropriately, and “there was a certain inappropriate and
8 demanding manner” about her. She was diagnosed as having “a
9 hysterical personality with the possibility of underlying ego
10 pathology, with a possible dissociative disorder,” and was prescribed
11 Thorazine. As her mental health continued to decline, the children
12 were forced to care for themselves, with oldest sibling Pauline
13 taking the lead at age 14. Members of Sophie’s church eventually
14 intervened, which led to petitioner and Fanny being placed at St.
15 Basil’s Academy (as previously discussed). *Id.* ¶¶ 49(ww)-(zz).

16 St. Basil’s had the reputation of an “old-style orphanage” where
17 children were not nurtured and corporal punishment was condoned.
18 Petitioner was allegedly struck, kicked, and humiliated by school
19 personnel, and hazed and bullied by other children. He had
20 difficulty responding to the teacher’s requests and did poorly in his
21 classes. His mother did not respond to suggestions by the school on
22 how to help improve his academic performance. *Id.* ¶¶ 49(aaa)-(fff).

23 After finally returning home from St. Basil’s for good,
24 petitioner clung to Sophie’s side and tried to please her by doing
25 things around the house, in part to avoid being placed outside the
26 home again. The family’s apartment building, situated in a poor and
27 crime-ridden neighborhood, was badly deteriorating. As Sophie’s
28 health worsened and the children grew older, she enlisted other

1 relatives to discipline the children with physical beatings,
2 particularly for petitioner and his brother George. Sophie referred to
3 her children as animals. She rebuffed any suggestion of family
4 counseling. *Id.* ¶¶ 49(aaa)-(fff).

5 In the summer of 1978, when Petitioner was 14, Sophie took
6 him to Greece and left him with an abusive aunt and uncle.
7 Petitioner disliked living in Greece. He did not speak Greek fluently
8 and had difficulty in school. He did not complete high school there
9 and instead attended a technical school and worked at a gas station.
10 His aunt observed petitioner engage in bizarre behaviors, staring into
11 space and laughing uncontrollably without explanation. He seemed
12 jumpy and uneasy, and appeared to be hearing voices. He believed
13 he was involved in events he read about in the news. He would stop
14 talking in the middle of a sentence, and not respond when asked a
15 question, not seeming to hear. He said he thought people were
16 watching him and talking about him. *Id.* ¶¶ 49(aaa)-(fff).

17 Eighteen months after leaving petitioner in Greece, Sophie
18 returned there to live permanently. Petitioner moved in and spent
19 most of his time with her, and did not have his own friends.
20 Petitioner slept in the same room as Sophie, assisted in the daily
21 chores, attended church with her and chatted with her friends. His
22 sister observed that he had taken on responsibilities that were more
23 appropriate for a husband. Sophie encouraged him to support her
24 financially. Petitioner was torn between feelings of responsibility
25 for his mother and his desire for independence. *Id.* ¶¶ 49(aaaa)-
26 (cccc).

27 Eventually, despite pressure from his mother to stay, petitioner
28 left Greece and returned to Brooklyn. He was 17 years old. He

1 lived briefly with his sister Pauline, worked at an uncle's restaurant,
2 and pursued a GED. He then left for Las Vegas and stayed briefly
3 with George, before returning again to Brooklyn. He went back to
4 work at his uncle's restaurant, but (according to the uncle) he
5 "lacked the necessary skills to cope with the stress of work and to
6 interact socially with other people." *Id.* ¶¶ 49(dddd)-(eeee).

7 In May 1982, shortly after turning 18, petitioner enlisted in the
8 Army Reserves. He was assigned to be a "laundry and bath
9 specialist," one of the lowest possible work designations in the
10 Army. After basic training, he returned to New York and spent the
11 night at his uncle's apartment before traveling back to Las Vegas. In
12 the middle of the night, while apparently still asleep, he jumped out
13 of bed and stood at attention, shouting "Yes sir! Yes sir!" *Id.* ¶¶
14 49(dddd)-(eeee).

15 After basic training, petitioner's behavior became even more
16 peculiar. He seemed distraught and depressed over his lack of
17 education, job skills, and difficulty obtaining anything other than
18 minimum wage employment. In December 1983, petitioner left Las
19 Vegas and flew back to Greece. He was depressed and suicidal. He
20 obtained a rail pass and ended up in Brussels, where he nearly
21 committed suicide by jumping off a building, until he heard "voices"
22 telling him not to jump. He returned to Las Vegas, where he again
23 stayed with his brother and his brother's wife in their small
24 apartment. He was penniless, jobless, depressed, confused, and
25 unsure of his identity. His behavior continued to range from
26 depressed and silent to flamboyant and hyperactive. *Id.* ¶¶ 49(jjjj)-
27 (rrrr).

28 Petitioner attended several Army Reserve assignments in Las

1 Vegas, but in late 1983 and early 1984, he began missing those
2 assignments and was eventually discharged based on his
3 “unsatisfactory participation.” Petitioner and his brother fought, and
4 petitioner was kicked out of the apartment. Without his brother’s
5 support and nowhere to stay, petitioner moved in with an
6 acquaintance who “played on Petitioner’s financial difficulties and
7 led him into committing a burglary of a computer store in Las Vegas
8 in October of 1984.” Petitioner was arrested in October 1984 for
9 possession of stolen property, his first serious brush with the law.
10 Unable to make bail, he remained in jail for nearly three weeks
11 before he was released. *Id.* ¶¶ 49(ssss)-(www).

12 Some weeks later (apparently while the first case was still
13 pending), he was arrested for attempting to sell computers that had
14 been stolen from another Las Vegas computer store. It was during
15 this arrest that petitioner engaged in his first effort to resist capture,
16 knocking down a police officer in the process. When petitioner later
17 showed up at his brother’s apartment, George called the police.
18 During the ensuing arrest, petitioner was clubbed by the police.
19 Petitioner was represented by a local Greek-American attorney, who
20 later observed:

21 There was something not quite right about Mr.
22 Livaditis. He was illogical, irrational, and kind of
23 “hyper.” He said things that didn’t follow. I tried
24 to speak to him in Greek, so we could really get
down to it, but he was the same in Greek, he was
“off” in both languages, he was not all there.

25 *Id.* ¶ 49(zzzz). Petitioner spent over seven months in jail while the
26 charges were pending; on his first day in custody, he allegedly tried
27 to commit suicide by drinking toxic cleansers. *Id.* ¶¶ 49(www)-
28 (yyy).

1 In February 1985, to resolve both cases pending against him,
2 petitioner pleaded guilty to burglary, possession of stolen property
3 and misdemeanor escape. Petitioner underwent a 120 day diagnostic
4 study at Nevada State Prison to evaluate his fitness for probation.
5 The prison reported that he participated in the program and received
6 good work reports from his supervisors, who noted his ability to get
7 along with staff and fellow inmates. The staff noted that he was
8 functioning at an 8th grade level. In July 1985, after nearly seven
9 months in jail, petitioner, then 21, received a ten year suspended
10 sentence, was granted probation and released from custody.

11 *Id.* ¶¶ 49(yyyy)-(aaaaa).

12 Petitioner soon got a job working for a Las Vegas bail bond
13 agency. In July 1985, petitioner was a passenger in a car driven by
14 the agency's owner when they were pulled over by Las Vegas
15 police. After a search of the car revealed drugs and a weapon,
16 petitioner once again resisted arrest. The charges against petitioner
17 were ultimately not pursued. A co-worker at the bail bond agency
18 said there "was something not right" with him, and he would "drift
19 off" during conversations. *Id.* ¶¶ 49(ccccc)-(eeeeee).

20 In November 1985, petitioner was involved in a serious auto
21 accident in Las Vegas. He did not seek medical help until two days
22 later, when he went to a local hospital and reported headaches from
23 the accident. He was diagnosed as having multiple contusions and
24 possible post-traumatic memory loss. *Id.* ¶¶ 49(fffff)-(ggggg).

25 Within a week of the auto accident, petitioner was visited in his
26 motel room by probation officers, accompanied by a police officer.
27 They searched the room and found a bundle containing white
28 powder. Once again, petitioner resisted the officers, fled, and was

1 caught five blocks away. He was jailed on probation violation
2 charges. Later analysis showed that the powder found in his room
3 did not contain a controlled substance. Petitioner nonetheless
4 remained in custody until January 23, 1986.

5 While in jail, petitioner's mother came from Greece to visit
6 him. According to George, "Instead of helping [petitioner], all she
7 did was complain about how much it cost her to fly out there and
8 how inconvenienced she was. She beat up on him verbally. Steve
9 was very upset and angry about this visit." An old friend who saw
10 petitioner after his release from jail stated: "When he got out this
11 time, I could hardly recognize him. He had a long, scraggly beard.
12 He was withdrawn and unemotional. His eyes were red as if he had
13 been on drugs. He was very anxious, hands shaking, and his eyes
14 were scanning around nervously." *Id.* ¶¶ 49(hhhhh)-(dddddd).

15 About a week after his release, petitioner committed the
16 takeover robbery of the Las Vegas jewelry store. Afterwards, he
17 moved to Los Angeles and moved into an apartment in Hollywood.
18 He met and began a dating Ruth Calderon, seeing her nearly every
19 day for several months. Ms. Calderon observed:

20 Steve was a very moody person; at times he was
21 very quiet and depressed about his life, and at
22 other times he was very excited, and bouncing off
23 the walls with energy. [....] When [he] was in an
24 excited and hyper mood, he seemed like he had
25 endless energy and drive. He would jump around
26 and dance, even when no music was playing. He
27 would speak loudly and talk with strangers. [He]
28 also would speak so quickly when he was excited
that he couldn't get the words out fast enough. He
would bounce from topic to topic and talk about
big plans to travel and do things with his life.

Id. ¶ 49(ppppp).

In May or early June 1986, petitioner moved in with a Greek

1 couple, Spiro Banos and his wife, who were living at a motel in
 2 Downey. Mr. Banos noted that petitioner seemed ravenous when he
 3 ate and could not go long without a meal: “If [he] did not eat
 4 regularly, his mood would change and he would get irritable and
 5 aggravated easily.”²⁶ He “seemed to have multiple personalities” and
 6 would become “fixated and obsessed with things.” On June 23,
 7 1986, shortly after moving to the Downey motel, petitioner
 8 committed the Van Cleef & Arpels robbery. *Id.* ¶¶ 49(qqqqq)-50.

9 As with Subclaim 11A, the facts raised in this subclaim will be discussed
 10 along with other remaining subclaims in assessing petitioner’s overall IAC claim.

11 **3. Subclaim 11C: Evidence of Petitioner’s Physical and** 12 **Mental Health Immediately After the Murders**

13 While trial counsel was aware of at least some information relevant to
 14 petitioner’s circumstances immediately after the murders,²⁷ petitioner identifies
 15 additional evidence that he alleges was readily available but not investigated by
 16 counsel. Specifically, petitioner alleges that counsel knew or should have known
 17 that after petitioner’s arrest, he was treated at the Los Angeles County Medical
 18 Center, and continued receiving treatment after he was moved to the Los Angeles
 19 County Jail. SAP ¶¶ 55(a)-(b). Counsel could have learned that petitioner was
 20 put on intravenous medication and underwent treatment for breathing problems
 21 associated with the presence of bronchial (windpipe) wall thickening possibly due
 22 to swelling associated with “inhalational phenomenon,” presumably from the
 23 flash-bang grenades. *Id.* ¶ 55(c)(1). Also, about an hour after petitioner’s arrest,
 24 someone at the County Medical Center filled out a request form for a toxicology
 25

26 ²⁶ As noted elsewhere, his demands for food during the lengthy stand-off were not
 27 met.

28 ²⁷ See discussion of Subclaim 11A, *supra*.

1 test, with a notation stating: “Drugs/vs/Psychosis.” SAP Ex. 101. The test was
 2 ordered based on an observation of “Abnormal Behavior” by petitioner. The test
 3 showed no presence of alcohol or drugs. *Id.* ¶¶ 55(c)(3), 55(f). Counsel
 4 apparently never sought or obtained any of these records. *Id.* ¶ 55(c).

5 A few days later, according to jail records, petitioner told staff he was
 6 “hearing voices” inside his head and was “willing to see psych.” He was placed
 7 on the jail’s “psych line.” A jail psychiatrist noted petitioner was “depressed and
 8 anxious” and was having “suicidal thoughts.” The psychiatrist assessed that
 9 petitioner had an adjustment disorder with mixed emotional features, and noted
 10 that petitioner described himself in a manner that indicated an antisocial
 11 personality disorder. *Id.* ¶ 55(f)(2). Another mental health expert who evaluated
 12 petitioner about two weeks after the incident opined that he was “experiencing
 13 distress in excess of a normal reaction.” Petitioner, however, refused any “psych
 14 meds” because they made him “feel like a zombie.” *Id.* ¶¶ 55(c)(6)-(9). In an
 15 apparent reference to the Van Cleef & Arpels incident, petitioner told a jail
 16 psychiatrist that he had done things in the past which “angered” people, but “this
 17 is weird even for me.” *Id.* ¶ 55(f)(1).

18 This subclaim will also be discussed with the other mental health issues in
 19 connection with the overall claim of IAC.

20 **4. Subclaim 11D: Failure to Present Evidence of Police** 21 **Incompetence During the Stand-Off**

22 Petitioner discusses at length the alleged “misconduct and incompetence” of
 23 the law enforcement agencies that responded to the Van Cleef & Arpels location
 24 on the day of the murders. SAP ¶¶ 56-60, at 144-164. Trial counsel possessed
 25 almost all of the information described in this claim, but did not use it as
 26 mitigation evidence. *Id.* ¶ 56, n. 11. The information included: Police officers
 27 positioned themselves directly in front of the store where petitioner could see
 28 them, in violation of training and policy for such situations; because the police

1 were visible to petitioner, he did not simply leave the store with the stolen items as
2 he had intended but instead stayed and took hostages; during the ensuing
3 negotiations, the police refused essentially all of petitioner's requests, including
4 removal of the visible officers in front of the store; police also did not meet
5 petitioner's demands for food and a television set; officers at the scene were
6 initially given incorrect descriptions of the gunman and hostages; when more
7 accurate descriptions were provided, several officers did not hear them because
8 they had been ordered to turn off their radios to conserve batteries during the
9 lengthy stand-off; the inaccurate descriptions led to the fatal shooting of hostage
10 Hugh Skinner by a police marksman; Lambert suffered burns (which she
11 mentioned at trial) that were caused by the improper use of the flash-bang
12 grenades; and the surviving hostages, along with Mr. Skinner's heirs, sued the
13 police for their alleged mishandling of the entire event. *Id.* ¶¶ 57-58.

14 This subclaim does not merit further discussion because it adds no weight
15 to the overall IAC claim. Clearly, a reasonable attorney could make a strategic
16 decision not to pursue this theory of "mitigation." An attorney might reasonably
17 fear that such an argument would not be well received by some or all jurors, who
18 might view it as an attempt to deflect blame toward the police for the harm
19 petitioner so clearly caused (including Mr. Skinner's death). This risk of a
20 negative reception by jurors constitutes a sufficient tactical reason to forgo such
21 an approach. Indeed, such a presentation would have been inconsistent with
22 defense counsel's arguments that petitioner accepted full responsibility for his
23 actions. *See* 20 RT 2965-2966, 2979. The analysis ends there. *See Strickland*,
24 466 U.S. at 689; *Pinholster*, 131 S. Ct. at 1407. To the extent Subclaim 11D may
25 be viewed as a stand-alone claim, it is hereby denied.

26 **5. Subclaim 11E: Failure to Prepare Defense Witnesses for**
27 **Their Testimony**

28 Petitioner states that trial counsel, "[r]ather than presenting the compelling

1 mitigation evidence provided to and/or readily available to [him], called witnesses
2 for petitioner who testified, in essence, that Petitioner had been a good person who
3 loved his mother very much and who came from a normal, loving family.” SAP ¶
4 61. Petitioner alleges that “[t]hese witnesses were completely unprepared to
5 testify and often severely limited in their understanding of the questions asked as a
6 result of their lack of familiarity with the English language and the American legal
7 system.” *Id.*

8 It is further alleged in Subclaim 11E that due to the lack of witness
9 preparation, petitioner’s mother “committed perjury” when she supposedly
10 testified during cross-examination that petitioner’s siblings “had never been in any
11 trouble.” SAP ¶ 62(a), citing 19 RT 2820. Petitioner claims that Sophie and
12 defense counsel were aware that petitioner’s sister Fanny had once run away to
13 California as a minor, was arrested for burglary, and served time in juvenile
14 custody; hence Sophie’s testimony was perjured. Petitioner also argues that the
15 prosecutor undermined the credibility of Sophie and George’s testimony about
16 petitioner’s law-abiding conduct (prior to his Las Vegas years) when she surprised
17 them with evidence that he had been arrested as a juvenile for possessing a bus
18 pass belonging to someone else. Neither Sophie nor George recalled or was aware
19 of this incident. *Id.* ¶ 62.

20 As for prejudice, petitioner claims that this testimony — allegedly the
21 product of poor witness preparation and a misguided defense strategy — left the
22 jury with the distorted view that petitioner’s family relationships were positive
23 and supportive, that his siblings (in contrast to petitioner) never got into trouble,
24 and that his family was unfamiliar with petitioner’s criminal history. *Id.* ¶ 63.

25 Subclaim 11E appears to raise two entirely separate issues: (a) whether
26 counsel adequately prepared the witnesses, and (b) whether counsel erred by
27 eliciting testimony that the family relationships were supportive and loving. The
28 reasonableness of the latter mitigation theme is one of the overarching questions

1 underlying petitioner's entire IAC claim, and will be addressed more fully after all
2 the IAC subclaims are discussed.

3 To the extent that Subclaim 11E is based on the assertion that counsel was
4 ineffective for failing to prepare witnesses, it fails. The assertion that Sophie
5 "committed perjury" due to lack of preparation is an exaggeration that is belied by
6 the record. Petitioner fails to demonstrate that trial counsel or Sophie (or the
7 prosecutor for that matter) was even aware of Fanny's juvenile offense. Petitioner
8 alleges trial counsel knew of Fanny's juvenile record because she had told him she
9 ran away to California as a teen and became "a ward of the court." Even if
10 counsel was so informed, however, such a status does not require a finding of
11 criminal activity. SAP ¶ 62(a), n.14; see Cal. Welfare & Institutions Code §§ 601
12 and 602. And contrary to petitioner's misquotation of the record, the alleged
13 perjury occurred when Sophie was asked whether petitioner's siblings had "ever
14 been any trouble," or whether she ever "had any trouble" with the child, not
15 whether they had "been in any trouble." In each instance Sophie replied simply,
16 "No trouble." 19 RT 2820. These are the types of nuances and ambiguities of
17 speech that would preclude any finding of perjury.²⁸

18 In any event, while portraying Fanny as a juvenile delinquent might have
19

20 ²⁸ "A fundamentally ambiguous statement cannot, as a matter of law, support a
21 perjury conviction." *United States v. Camper*, 384 F.3d 1073, 1076 (9th Cir. 2004).
22 "A question is fundamentally ambiguous when men of ordinary intelligence cannot
23 arrive at a mutual understanding of its meaning." *Id.* (quoting *United States v.*
24 *Culliton*, 328 F.3d 1074, 1078 (9th Cir. 2003) (per curiam)). In determining whether
25 a question is fundamentally ambiguous, the court must consider the context of the
26 question and the answers, as well as other extrinsic evidence relevant to the witness's
27 understanding of the questions. *Culliton*, 328 F.3d at 1079. In the present case, the
28 context of the testimony indicates the prosecutor's question may have been limited to
a time period that did not coincide with Fanny's California adventure. 19 RT 2810.
Moreover, it is abundantly clear from the transcript that Sophie, who testified
without an interpreter, often struggled in her effort to speak and understand precise
English. *Id.* at 2775 *et seq.*

1 diluted the prosecution theme that “none of the other siblings turned out bad,” it
 2 would hardly have endeared Fanny to the jury or helped to promote the defense
 3 theme of sympathy for the family. And counsel’s alleged “failure to prepare”
 4 Sophie and George for the “bus pass” questioning adds nothing because neither
 5 witness even recalled the incident, so their responses (*i.e.*, expressing lack of
 6 knowledge or recollection) most likely would not have changed. In any case, the
 7 subject had no logical impact on their ultimate testimony expressing remorse and
 8 hope for forgiveness. Petitioner also overlooks the fact that the bus pass incident
 9 was later explained in the testimony of petitioner’s aunt Pauline Poulakos, who
 10 told the jury that petitioner said he merely found the bus pass, and that nothing
 11 ever came of the incident. 19 RT 2841-2843. The prosecutor did not even
 12 cross-examine Ms. Poulakos on that issue. 19 RT 2848. Thus, any prejudice from
 13 the alleged lapses in the defense witnesses’ testimony, whether or not caused by
 14 deficient preparation, was virtually non-existent.

15 Accordingly, the “failure to prepare witnesses” aspect of Subclaim 11E fails
 16 to support the overall IAC claim and is hereby denied.

17 **6. Claim 11F: Failure to Retain Competent Experts**

18 Petitioner alleges that trial counsel should have retained experts and
 19 provided them with evidence including that which is described above, such as
 20 petitioner’s miserable childhood, poor academic performance, bizarre behavior,
 21 and traumatic head injuries. SAP ¶ 65. According to petitioner, a competent
 22 neuropsychologist could have testified “regarding the impact” of such a history.
 23 *Id.* at ¶ 65(a).

24 Petitioner asserts that trial counsel also should have presented an expert on
 25 child abuse, who could have shown the jury just how “severely negatively”
 26 petitioner was impacted in light of the above facts. Among other things, such an
 27 expert could testify that an individual’s development and functioning are the
 28 product of a combination of factors, including the medical and psychiatric history

1 of the individual and his family; abuse, neglect and psychological maltreatment;
 2 stressful life events; coping deficits; education; and family and community social
 3 support. *Id.* at ¶ 65(b). Applying those factors, the expert could have opined that
 4 petitioner was a vulnerable child born into a family with an extensive history of
 5 emotional and psychiatric disorders. *Id.* He suffered life-threatening physical
 6 trauma as a child. He was terribly abused and mistreated beginning in infancy and
 7 extending over critical developmental stages of his life. *Id.* The perpetrators of
 8 the abuse were his parents, relatives, and teachers, *i.e.*, persons a child would
 9 normally trust, which only exacerbated its negative impact; such abuse may
 10 destroy a child's ability to trust, feel secure, and safely interact with the world.
 11 The child abuse expert could synthesize all these factors for a jury and describe
 12 how they contributed to multiple impairments in petitioner's development and his
 13 subsequent behavioral, cognitive, social, and emotional functioning. *Id.*

14 Petitioner alleges that there was no reasonable tactical justification for trial
 15 counsel's failure to present such evidence and, had counsel done so, "it is
 16 reasonably likely that a jury would have used this evidence as a mitigating factor
 17 weighing against the death sentence." *Id.* at ¶ 66.

18 The resolution of Subclaim 11F rests largely on the reasonableness of trial
 19 counsel's ultimate approach to the mitigation presentation at petitioner's trial.
 20 This is addressed below.

21 **7. Subclaim 11G: Failure to Seek Appointment of Second** 22 **Counsel**

23 In Subclaim 11G, petitioner notes that trial counsel did not seek to have
 24 another attorney appointed to assist in the investigation and presentation of the
 25 case. Petitioner asserts that "[a]s early as the 1980's, counsel and courts both
 26 recognized the need for second counsel to assume responsibility *for the penalty*
 27 *phase* of a capital case." SAP ¶ 67 (emphasis added). Petitioner asserts that
 28 second counsel could have "fully investigate[d] the family background and other

1 mitigating evidence that could have been presented on Petitioner’s behalf.” *Id.*
2 Petitioner says the need for second counsel in his case is evident “[g]iven the
3 extremely wide discrepancy between the evidence presented and the full truth of
4 Petitioner’s life.” *Id.*

5 Petitioner cites *Keenan v. Superior Court*, 31 Cal. 3d 424 (1982), in which
6 the California Supreme Court held that a trial court abused its discretion by
7 summarily denying a request for second counsel despite a showing of need based
8 on the factual and legal complexity of the case. *Id.* The *Keenan* Court
9 acknowledged “the inherent problem present in any capital case of simultaneous
10 preparation for a guilt phase and a penalty phase of the trial,” which involve
11 “substantially different” issues and evidence. *Id.*²⁹

12 However, there is no clearly established federal law requiring the
13 appointment of two defense attorneys in capital cases, nor is there any basis for
14 finding that such a rule can be derived from existing Supreme Court authority.
15 Even the California Supreme Court in *Keenan* recognized that appointment of
16 second counsel in a capital case “is not an absolute right” and remains within the
17 trial court’s discretion based on the showing of legal and factual complexity in a
18 particular case. *Id.* at 493. Indeed, the state high court later upheld refusals of
19 second counsel in capital cases based on inadequate showings of need. *See, e.g.,*
20 *People v. Gonzales*, 52 Cal. 4th 254, 285 (2011); *People v. Staten*, 24 Cal. 4th
21 434, 446 (2000).

22
23
24 ²⁹ Not long after petitioner’s trial, the American Bar Association also strongly urged
25 the appointment of second counsel in capital cases. *See* ABA Guidelines on the
26 Appointment and Performance of Counsel in Death Penalty Cases (1989), Guideline
27 2.1 (“In cases where the death penalty is sought, two qualified trial attorneys should
28 be assigned to represent the defendant.”). A primary reason cited by the ABA
justifying appointment of two attorneys is the obligation to immediately begin
preparing both the guilt and penalty phase defenses upon counsels’ assignment to the
case. *See, e.g.,* Guideline 11.4.1.

1 While a California statute dating back to 1872 states that in capital cases
 2 “two counsel on each side may argue the cause” (Penal Code §1095), the courts
 3 have held that the statute does not require the *appointment* of two attorneys, nor
 4 does it give rise to a state-created liberty interest that may be enforced on federal
 5 habeas corpus. *Bonin v. Calderon*, 59 F.3d 815, 841 (9th Cir. 1995) (on federal
 6 habeas, no enforceable liberty interest under § 1095); *People v. Jackson*, 28 Cal.
 7 3d 264, 286 (1980) (no right to appointment of two attorneys), *overruled on other*
 8 *grounds*, *People v. Cromer* 24 Cal. 4th 889 (2001). A much more recent
 9 provision, which became effective in 2000 (after petitioner’s trial), codifies the
 10 procedure for requesting second counsel in capital cases, and again leaves the
 11 decision to the judge’s discretion based on a showing of need. *See* Penal Code
 12 § 987(d). Neither statute, however, provides any enforceable *right* to second
 13 counsel or any basis for asserting a federal constitutional violation.

14 Finally, as noted above, and as petitioner’s own allegations make clear, a
 15 primary rationale for appointing two attorneys in a capital case is so that one of
 16 them may focus primarily on the penalty phase presentation, which may otherwise
 17 be neglected by a single attorney who feels compelled to prioritize the guilt phase.
 18 *See Keenan* and ABA Guidelines, *supra*. Here, however, petitioner told trial
 19 counsel at their very first meeting that he wished to plead guilty. While counsel
 20 “initially” dissuaded petitioner from doing so in order to first investigate the case
 21 and explore options, counsel later concurred in the decision to plead. SAP Ex. 1 ¶
 22 2. It therefore appears that, after a reasonable period of resistance by counsel, it
 23 became apparent to him that the penalty phase would be the only phase that would
 24 be tried. At that point, the traditional legal justification for obtaining a second
 25 attorney ceased to exist.

26 In light of the above, there is insufficient support for the claim that trial
 27
 28

counsel was ineffective for failing to request a second attorney.³⁰ Thus, Subclaim 11G does not support petitioners overall IAC claim and is denied to the extent it might be viewed as a stand-alone claim.

8. Subclaim 11H: Failure to Raise Petitioner's Alleged Incompetence

In Subclaim 11H, petitioner argues that trial counsel failed to investigate or otherwise discover that petitioner was mentally incompetent during trial preparation and trial, as well as during his post-arrest statements to law enforcement personnel. In connection with this subclaim, petitioner points out that he (1) pleaded guilty to murder and various enhancements and admitted special circumstances that made him eligible for the death penalty; (2) was interviewed by police on three separate occasions after his arrest and made statements “indicative of a wanton disregard for human life in the killing of the security guard and a lack of remorse for [his] actions”; and (3) allegedly “suffered from neurological deficits and learning and developmental deficits” which left him unable to “comprehend the nature and substance of oral communications and discussion, including that which occurred during questioning and interrogation by law enforcement personnel,” and similarly unable to comprehend “the severity and nature of the charges against him as well as the nature and consequences of waiving any constitutional rights including his right to trial and the rights relating thereto.” SAP ¶ 70.

Petitioner asserts that the evidence of his “medical, educational and social history” (as alleged in Subclaims 11A and 11B, summarized above) should have

³⁰ As a practical matter, it also appears that any effort to have a second attorney assigned from within the Los Angeles County Public Defender’s Office would have been futile. The record reflects that it was that Office’s policy in 1987 to assign only one attorney in capital cases; even eight years later in 1995, petitioner’s counsel indicated that the Office’s then-current practice was to provide a capital trial attorney with a full-time paralegal (but no second lawyer). SAP Ex. 1 ¶ 8.

1 put counsel on notice that petitioner was legally incompetent to give admissible
 2 statements to police, or to validly waive his right to a guilt phase trial and enter
 3 pleas of guilty. Petitioner alleges he was thereby prejudiced: “Had trial counsel
 4 recognized and presented Petitioner’s incompetency, instead of permitting
 5 Petitioner to plead guilty to virtually all of the counts, it is reasonably likely
 6 Petitioner would not have entered a guilty plea and would not have been
 7 convicted.” SAP ¶ 72.

8 Subclaim 11H assumes, of course, that petitioner was indeed incompetent
 9 during the relevant time period — or at least that there was some probability he
 10 would have been found incompetent if his counsel has pursued the issue. The
 11 specifics of petitioner’s substantive claim of legal incompetency will be addressed
 12 in the determination of Claim 12, in which petitioner asserts a stand-alone claim
 13 of lack of competency throughout the time of his arrest, interrogation, and trial.
 14 To the extent petitioner claims counsel was ineffective for failing to raise
 15 incompetency at trial, that issue will be discussed below in connection with the
 16 overall claim of IAC.

17 **9. Subclaim 11I: Failure to Raise Defense of “Diminished** 18 **Actuality”**

19 Subclaim 11I is based on trial counsel’s failure to raise a “diminished
 20 actuality” defense. At the time of the murders (1986), California law required that
 21 a jury find the defendant had a “specific intent to kill” the victim(s) in order to
 22 find true the special circumstance of murder “in the commission of a felony” (*i.e.*,
 23 the felony-murder special circumstance). *Carlos v. Superior Court*, 35 Cal. 3d
 24 1104 (1983). *Carlos* was overruled in 1987 by *People v. Anderson*, 63 Cal. 4th
 25 1104 (1987), but the “diminished actuality” defense remained viable for
 26 defendants (such as petitioner) whose crimes were committed prior to *Anderson*.
 27 See *People v. Duncan*, 53 Cal. 3d 955, 973 n.4 (*Anderson* is not applicable to
 28 crimes committed during the “*Carlos* window,” when specific intent to kill was

1 required). The “diminished actuality” defense focuses on whether the defendant,
 2 due to intoxication or mental condition, could not form the requisite mental state
 3 to commit the offense. *People v. Steele*, 27 Cal. 4th 1230, 1253 (2002).

4 Petitioner could not assert intoxication (as mentioned, his blood tests were
 5 negative), so the “diminished actuality” defense would have required a showing
 6 that, on the day of the murders, he suffered from a mental condition that prevented
 7 him from forming the specific intent to kill. For evidence of his mental condition,
 8 petitioner again refers to the previously-described information regarding his
 9 troubled past and his alleged mental disorders at the time of the offenses. The
 10 essence of Subclaim 11I, therefore, is that trial counsel was deficient for failing to
 11 recognize petitioner’s disorders and asserting substantive guilt-phase defenses
 12 based thereon. Because it involves essentially the same or similar issues, this
 13 subclaim will be resolved with the other subclaims that are based on the evidence
 14 of petitioner’s mental problems.

15 **10. Subclaim 11J: Failure to Move for Change of Venue**

16 Subclaim 11J alleges that trial counsel was deficient for failing to move for
 17 a change of venue based on the pretrial publicity surrounding his case. Petitioner
 18 alleges: “The intense publicity continued in large part due to the horrific nature of
 19 the crime and the strong emotions that were aroused. As a result, a substantial
 20 number of persons in the Los Angeles area were well-acquainted with the reported
 21 facts and circumstances of this case.” SAP ¶ 76. Petitioner states that the news
 22 coverage included the following:

- 23 • A news article in the Santa Monica Evening Outlook
 24 entitled “Hostages Relive Terror” described Robert Taylor’s
 25 preliminary hearing appearance, including his testimony
 26 that, during the standoff, petitioner said “I don’t like
 27 niggers.”
- 28 • As mentioned, while in pretrial custody, petitioner granted

1 an interview with a reporter from the Los Angeles Herald
2 Examiner. Petitioner's counsel was not present.³¹

3 According to the article, petitioner stated: "I'm guilty . . . I'd
4 rather they just executed me and get it over"; "I'll accept
5 any punishment they give me. If it's the death penalty, so
6 be it. I feel I deserve the death penalty." These statements
7 were reported in both of the Los Angeles Herald Examiner
8 and Los Angeles Times. The Herald Examiner included a
9 comment by the Beverly Hills police chief describing
10 petitioner as a "ruthless mad dog" who "killed without
11 compunction."

- 12 • Articles in other local periodicals focused on the suffering
13 experienced by the hostages and their families and friends,
14 with headlines such as "Flowers Mourn the Victims at
15 Scene of Siege," "Reliving a Day of Terror and Tragedy,"
16 and "Shock, Grief in Aftermath of Tragedy."
- 17 • Two articles in the Los Angeles Times referred to petitioner
18 as a "drifter," "risk taker," and a "failure at jobs."

19 SAP ¶ 77. Petitioner alleges that in light of the extensive media coverage of his
20 case, counsel's failure to move for a change of venue was deficient and
21 prejudicial. *Id.* ¶ 78-79. Respondent asserts that trial counsel could have
22 reasonably chosen not to pursue a change of venue because the jury selection
23 process revealed that most prospective jurors had only a faint recollection of the
24 news reports, and all said they would not be swayed by the publicity.

25 In his pleadings and post-petition briefs, petitioner offers no case authority
26 or other legal citation in support of his venue argument. Nor does he point to

27
28 ³¹ Trial counsel states that he had just been appointed to the case and did not learn of
the jail interview until after it occurred. SAP Ex. 1 ¶ 14.

1 anything in the record of the voir dire or deliberations that might reflect that any
2 juror was significantly influenced by media coverage. While the numerous
3 newspaper articles cited by petitioner might have provided at least a colorable
4 basis for a change of venue, trial counsel would have been required to show much
5 more in order to prevail.

6 In reviewing a habeas claim that a change of venue was necessary due to
7 juror taint, the primary question is “whether there was such a degree of prejudice
8 against the petitioner that a fair trial was impossible.” *Harris v. Pulley*, 885 F.2d
9 1354, 1360 (9th Cir. 1988). Among the factors that must be considered are: (1)
10 the pervasiveness of prejudicial media coverage in the community from which
11 jurors are drawn; (2) the size of that community; (3) whether the news reports
12 were largely factual; (4) the passage of time between media coverage and trial;
13 and (5) the jurors’ statements regarding publicity during voir dire. *Id.* at 1360-
14 1364.

15 In his submission on state habeas as well as here, petitioner does not
16 analyze these factors beyond simply cataloguing the newspaper articles. To the
17 extent the Court can assess the factors, almost all tend to weigh against the
18 granting of a venue motion. The relevant “community” was (and still is) the
19 second largest in the country. See U.S. Bureau of the Census, *Population of the*
20 *100 Largest Urban Places*, (1980, 1990), <http://www.census.gov/population>. The
21 news reports peaked shortly after the murders and well before trial. All of the
22 articles cited by petitioner were published in July or August 1986; jury selection
23 began in late April 1987. SAP, p. 21 and ¶ 76. While the articles discussed the
24 events using terms such as “shock,” “grief,” and “tragedy,” and described
25 petitioner as a “drifter” and “failure at jobs,” those descriptions were factual.
26 Apart from the single quotation from the Beverly Hills Police Chief calling
27 petitioner a “ruthless mad dog,” the habeas exhibits do not reflect that the media
28 coverage was unduly inflammatory or prejudicial.

1 In voir dire, the individuals who later served on petitioner's jury expressed
 2 at most only a simple awareness of the news coverage or some basic recollection
 3 of the incident, and all stated they would not be swayed by it and were not
 4 otherwise predisposed. See, e.g., 4 RT at 221-222, 226-227; 9 RT 1185-1187,
 5 1254, 1268-1269; 10 RT 1457. "The relevant question is not whether the
 6 community remembered the case, but whether the jurors . . . had such fixed
 7 opinions that they could not judge impartially the guilt of the defendant." *Patton*
 8 *v. Yount*, 467 U.S. 1025, 1035 (1984). The record here reflects no such evidence
 9 of "fixed opinions" that would have put trial counsel on notice that a change of
 10 venue was needed. And while petitioner has submitted declarations from four
 11 jurors in support of *other* habeas claims, none mentions media coverage or pretrial
 12 publicity. See SAP Exs. 2, 3, 144, 145.

13 Petitioner's failure to address the venue factors makes it difficult to
 14 conclude that the state court's denial of this subclaim was unreasonable. The
 15 Court's independent analysis and review of the record indicates that a venue
 16 motion would probably have failed. A reasonably competent trial attorney could
 17 have chosen not to pursue such a motion, in light of the apparently minor impact
 18 of the publicity and the seeming indifference of the prospective jurors who did
 19 recall anything about the incident. Thus, since petitioner has failed to overcome
 20 the "strong presumption that counsel's conduct falls within the wide range of
 21 reasonable professional assistance," this subclaim must be denied. *Strickland*, 466
 22 U.S. at 689.

23 **11. Subclaim 11K: Failure to Move to Suppress Petitioner's**
 24 **Statements to Police**

25 Petitioner claims he was denied effective assistance of counsel based on
 26 counsel's failure to move to suppress statements petitioner made during police
 27 interviews on June 24 and June 27, 1986 (shortly after the murders). SAP ¶ 80.
 28 Some of the statements were admitted at trial and were indeed "prejudicial" in the

1 broadest sense, albeit not inadmissible: Petitioner indicated he stabbed Smith
 2 because Smith made disparaging remarks about him, and he felt he needed to
 3 “keep control of the situation”; when he stabbed Smith, the “knife went in like
 4 butter”; and after he stabbed Smith, petitioner stepped on his back because Smith
 5 was trying to get up. *Id.* ¶ 81(c). Petitioner also allegedly said he killed Ann
 6 Heilperin in order to prove that his demands should be taken seriously; he chose
 7 Heilperin because she had initially resisted and was uncooperative, and he felt she
 8 was responsible for creating the hostage situation. *Id.*

9 Petitioner contends there were grounds for suppressing these statements.
 10 The June 24 interview occurred at 2:20 a.m., just a few hours after petitioner’s
 11 arrest, while he was still being treated for his injuries; petitioner was advised of
 12 and waived his *Miranda* rights, but he asked for time to rest; the officers left but
 13 returned just twenty minutes later, whereupon petitioner waived his rights once
 14 more and was interviewed. The June 27 interview, which was tape recorded
 15 (unlike the June 24 interview), allegedly reflects that petitioner was confused and
 16 having difficulty comprehending the officer’s questions, including his general
 17 comment at the beginning that he did not have “a lot of under, understanding.”
 18 SAP ¶¶ 81(c)-(e).³²

19 According to petitioner, trial counsel knew or should have known that
 20 petitioner, at the time of the interviews, was in pain and under medication for his
 21 physical injuries, and was exhibiting behavior indicative of drug intoxication or
 22 psychosis. SAP ¶¶ 81(f)-(h). Petitioner says he was prejudiced by the
 23 introduction of these statements at trial, especially when the prosecutor used them
 24 in closing argument as proof of his lack of remorse. SAP ¶ 81(i).

25 This claim involves the same evidence presented on habeas regarding
 26 petitioner’s mental state before, during, and after the murders, including at the

27
 28 ³² Subclaim 11K is based on the same factual allegations as Subclaim 11C, which
 focuses on evidence of petitioner’s mental health following the murders.

1 time of his post-arrest statements to police. Accordingly, this subclaim will be
 2 addressed in the discussion of petitioner's mental state issues and their impact on
 3 the overall IAC claim.

4 **12. Subclaim 11M: Failure to Object to Testimony of Non-**
 5 **Victim Employees**

6 Petitioner alleges that irrelevant and prejudicial testimony of certain non-
 7 hostage employees of Van Cleef & Arpels was improperly introduced at trial, and
 8 that trial counsel was prejudicially deficient in not objecting to its admission.
 9 Petitioner identifies four non-hostage employees who testified: Larry French (16
 10 RT 2355 *et seq.*), Licitte Bolduc (16 RT 2404 *et seq.*), Sergio Driotez (17 RT
 11 2420 *et seq.*), and Julie Stipkovich (17 RT 2531 *et seq.*). Petitioner asserts that
 12 their testimony, as a whole, was "irrelevant and redundant," but makes no effort to
 13 identify which portions were objectionable. SAP ¶ 89(c). Petitioner further
 14 asserts he was prejudiced by the testimony, but does not specify how. SAP ¶ 90.

15 The Court's review of this testimony reveals that the witnesses provided
 16 appropriate background evidence that gave the jury a more comprehensive
 17 understanding of the events. The testimony was largely contextual or
 18 foundational, *e.g.*, describing the layout of the store; the time and manner in which
 19 petitioner entered; how the remaining employees became aware of the robbery,
 20 alerted police, and left via the rear entrance; and identification of the jewelry and
 21 watches which petitioner took when he left the store. The testimony appears to
 22 have been very matter-of-fact, almost entirely devoid of anything that might
 23 reasonably be described as inflammatory or unduly prejudicial. (*See* RT Vols. 16
 24 and 17, portions cited *supra*.)

25 Not all the testimony was so bland, however. The prosecutor asked Mr.
 26 French, the store manager, whether he saw blood in the store when he returned the
 27 day after the murders (he did), and whether he ever saw the slain employees alive
 28 after the killings (he did not). 16 RT 2381, 2834. Defense counsel did not object.

1 It is difficult to discern the need for the first question as police witnesses had fully
2 covered the subject, and the latter question was clearly unnecessary.
3 Nevertheless, the state court could reasonably have viewed any prejudice from
4 these two isolated exchanges as de minimis. Subclaim 11M provides little support
5 for petitioner's cumulative IAC claim. To the extent that it is a stand-alone claim,
6 it is denied.

7 **13. Subclaim 11N: Failure to Exclude Evidence of Non-Violent**
8 **Resistance of Prior Arrests**

9 Petitioner alleges trial counsel was ineffective because he did not move to
10 exclude evidence of petitioner's prior acts of resisting arrest, based on the
11 argument that the episodes did not involve "violent" conduct. Alternatively,
12 petitioner argues, counsel should have requested a jury instruction stating that if
13 these prior incidents were found to be only non-violent escape attempts, the jury
14 could not consider them as factors in aggravation. As mentioned in the discussion
15 of Claim 8, however, trial counsel did object to the admission of the evidence at
16 issue, as the California Supreme Court recognized. *See Livaditis*, 2 Cal. 4th at 775
17 n.3. But the objection was not sustained. Counsel is not required to repeat an
18 objection that has been denied. *See Douglas v. Alabama*, 380 U.S. 415, 422
19 (1965). In any event, the record reflects that each of the prior episodes of resisting
20 arrest occurred in the immediate presence of arresting officers and involved direct
21 physical resistance, including knocking down officers and innocent bystanders.
22 15 RT 2231-2232; 2237-2239; 2261-2266. Petitioner did not merely flee or hide
23 — he forcibly resisted in every instance. A reasonable attorney could have
24 concluded that the proposed jury instruction was not supported by the evidence,
25 and would only have served to highlight the most dangerous aspects of
26 petitioner's seemingly chronic "fight or flight" response. Because this subclaim
27 adds nothing to the IAC calculus, it is denied.
28

**14. Subclaim 11O: Failure to Object to Evidence of the Bus
Pass Arrest**

This subclaim revisits the evidence of petitioner's juvenile arrest for possessing someone else's bus pass, as discussed above in connection with subclaim 11E. Petitioner asserts that counsel's failure to move to exclude the evidence or at least request a limiting instruction was deficient. More specifically, it is alleged that if the prosecutor introduced the juvenile arrest as evidence of petitioner's propensity to commit a crime, trial counsel should have interposed an objection that such evidence is improper; on the other hand, if it was introduced to impeach Sophie's testimony that petitioner had never been in trouble as a youth, trial counsel should have objected that a mere arrest is irrelevant for purposes of impeachment. SAP ¶ 95.

Petitioner further asserts that, at a minimum, trial counsel should have requested a limiting instruction that the juvenile arrest was being offered solely for the purpose of impeaching Sophie's credibility and not to show that petitioner has a propensity to commit crimes. SAP ¶ 96. Petitioner also appears to allege that the jury should have been further instructed that the juvenile arrest should not be considered an aggravating factor. SAP ¶ 97.

It is unclear from the record whether trial counsel had notice of the bus pass incident, and whether he should have been aware of the prosecution's intent to raise it for impeachment purposes. In any case, trial counsel might reasonably have decided not to seek a limiting instruction because it would only draw further attention to the evidence. Also, as noted above, trial counsel substantially deflated any potential prejudice arising from the evidence through his subsequent examination of petitioner's aunt, who knew the most about the incident. And the record provides no support for the notion that jurors were somehow led to believe the bus pass incident was a potential "aggravating factor" in deciding the sentence. Finally, in light of the other evidence of petitioner's far more significant

1 prior criminal conduct, it would be reasonable to conclude that the bus pass
 2 evidence did not play a significant role in the jury's deliberations. Subclaim 11O
 3 is therefore denied.

4 **15. Subclaim 11P: Failure to Effectively Cross-Examine Police**
 5 **Negotiator**

6 Petitioner claims trial counsel failed to effectively cross-examine the
 7 primary hostage negotiator in order to "properly combat the highly prejudicial
 8 recorded statements made by Petitioner during the hostage situation." SAP ¶ 98.
 9 The prosecution called the negotiator, Beverly Hills Police Lieutenant Robert
 10 Curtis, as a witness to authenticate a forty minute portion of the tape recording of
 11 his initial conversation with petitioner on the morning of the hostage stand-off,
 12 during which the allegedly prejudicial statements were made.³³ *Id.* ¶¶ 98-99.
 13 According to petitioner, trial counsel made a brief attempt to counter these
 14 prejudicial statements by cross-examining Lt. Curtis as follows:

15 COUNSEL: Mr. Curtis, during the time you were on the
 16 lines, did Mr. Livaditis' attitude change during different parts of
 17 the time?

18
 19 ³³ Petitioner does not identify any of the statements, but presumably they include
 20 statements like these: "I will execute these people one at a time." "Because of your
 21 stupidity, I will execute one — one person right now, you understand?" "I could
 22 snuff these people's lives out so fast that your men won't even be able to walk across
 23 the street." "I see your men across the street, and one guy looks like a fucking
 24 dickhead.... If I don't see them leave in five minutes, I'm going to kill one of these
 25 people, okay? I'm just going to shoot them in the head and there're going to be four
 26 left, okay? I think one of the ladies is going to go first." "Just listen. Listen to me,
 27 asshole. You're a fucking asshole." "I told these people not to move ... and one of
 28 them is touching the other one like she's a lesbian or something. Ah, she's touching
 her fingers. Now she better listen to me, or she'll be the first to go. One of them is
 so fucking dumb. I told her to get on the floor, and she started screaming." "Well I
 want to kill one of these people. I want to kill one of them because this one security
 guard, he really pissed me off. Okay?" "Cut the bullshit. Who do you think
 you're talking to? I'm not no fucking nigger robber." 18 RT 2693-2731.

1 THE WITNESS: Yes, sir.

2 COUNSEL: Sometimes would he get very agitated and
3 very angry?

4 THE WITNESS: Yes, he would.

5 COUNSEL: And other times he was calmer?

6 THE WITNESS: Yes.

7 COUNSEL: Did you notice whether he was calmer in the
8 afternoon or the evening or in the morning?

9 THE WITNESS: I think initially, he was very excited. At
10 first as you heard on the tape, he was very excited.

11 In general, in the afternoon he was more calm than agitated.

12 However, there were certain points where he would get
13 frustrated or get angry that certain things hadn't been done to
14 his satisfaction. But in total, I would say he was more agitated
15 in the morning than he was in the afternoon.

16 SAP ¶ 99(d), quoting 18 RT 2744.

17 Petitioner claims trial counsel's cross-examination did not go far enough,
18 and that he could have elicited more helpful information from Lt. Curtis. That
19 information allegedly would have shown that petitioner's demeanor changed
20 dramatically during the course of the thirteen hour hostage situation, and that
21 at 12:35 p.m. petitioner expressed concern for the hostages, at 4:40 p.m he talked
22 about the possibility of surrendering if the police would provide press coverage,
23 and at 7:00 p.m. he said he might release the hostages. SAP ¶ 99(e). Petitioner
24 alleges that eliciting this mitigating evidence was essential to combat the highly
25 prejudicial impact of the statements by petitioner that were played to the jury. *Id.*
26 ¶ 100.

27 Although not cited by petitioner, the jury did hear Lt. Curtis testify that
28 during the stand-off, petitioner talked about releasing a hostage and was congenial

1 at times; that a female hostage was heard urging him not to surrender; and that
2 hostage Skinner “defended” petitioner while Skinner was on the phone with Lt.
3 Curtis. 18 RT 2739, 2743, and 2746-2747. The jury also heard from other
4 witnesses that petitioner attempted to get food for all the hostages, permitted them
5 to have water, cleaned blood off Mr. Taylor’s face, and even took a vote with the
6 then-surviving hostages on the suggested escape plan. 15 RT 2469-2470; 2511;
7 2525.

8 The taped statements made by petitioner to the police negotiator were
9 indeed prejudicial, but no argument is made that they were inadmissible. As
10 shown above, the jury heard other testimony mentioned that touched on the same
11 “mitigating” points that petitioner now claims should have been elicited by trial
12 counsel. The fact that trial counsel might have asked a few more questions or
13 elicited a few additional items of helpful testimony is not the stuff of a successful
14 IAC claim. Failure to ask certain questions on cross-examination is a matter of
15 case presentation and decisionmaking that is within counsel’s professional
16 judgment, to which a reviewing court must give great deference. *See Strickland*,
17 466 U.S. at 688-89.

18 Moreover, a reasonable defense attorney could choose to forgo the
19 questions suggested by petitioner because they would have opened the door to
20 devastating follow-up examination and argument emphasizing that petitioner
21 ultimately did *not* show genuine “concern for the hostages” (using them as a
22 human shield, for example), did *not* surrender, and did *not* release even a single
23 hostage. Indeed, it seems likely that the questioning suggested by petitioner could
24 have ended up being used as evidence of counsel’s ineffectiveness. *Cf. Gerlaugh*
25 *v. Stewart*, 129 F.3d 1027, 1035-1036 (9th Cir. 1997) (particular trial tactic urged
26 on habeas would have opened “a basket of cobras,” creating additional grounds
27 for an IAC claim). For the same reason, petitioner cannot show that failure to ask
28 his proposed questions resulted in prejudice.

1 Subclaim 11P adds nothing to the overall IAC claim and clearly fails as a
2 stand-alone claim. Accordingly, it is denied.

3 **16. Subclaim 11Q: “Other Errors” by Trial Counsel**

4 Subclaim 11Q is a catch-all claim covering several purported omissions by
5 trial counsel that are related to non-IAC claims pled elsewhere in the petition.
6 SAP ¶ 104. Petitioner alleges counsel was deficient in the following eight
7 respects:

- 8 • Failure to object to the judge’s questioning of a defense
9 witness (Claim 10);
- 10 • Failure to object to evidence of prior unadjudicated
11 criminal activity (Claim 6);
- 12 • Failure to object to the procedure for use of other crimes
13 evidence (Claim 7);
- 14 • Failure to request a written statement by the jury of
15 grounds and reasoning in imposing death penalty (Claim
16 27);
- 17 • Failure to request that the trial court make a
18 proportionality determination (Claims 31-32);
- 19 • Failure to challenge the constitutionality California’s
20 1978 death penalty statute (Claim 28);
- 21 • Failure to object to the judge’s consideration of the
22 probation report in ruling on the sentence modification
23 motion (Claim 30); and
- 24 • Failure to assert petitioner’s incompetence to waive his
25 pre-trial and trial rights (Claim 12).

26 *Id.* ¶ 104(a)-(h).

27 As discussed elsewhere in this order in connection with the referenced
28 underlying claims, the California Supreme Court could reasonably have concluded

1 that counsel's failure to raise the objections related to Claims 7, 10, 12, and 30 did
 2 not constitute deficient performance under *Strickland*. The remaining claims
 3 (Claims 6, 27, 28, 31, and 32) were denied as a result of petitioner's failure to
 4 contest respondent's motion for judgment on the pleadings as to those claims. See
 5 Dkt. 144 at 24. As for the allegations of ineffective assistance of counsel related to
 6 those claims, the California Supreme Court could reasonably have concluded that
 7 trial counsel's failure to object to evidence of prior unadjudicated criminal activity,
 8 failure to request a written statement from the jury, failure to request a
 9 proportionality determination, and failure to challenge the constitutionality the
 10 state's death penalty statute "did not fall below an 'objective standard of
 11 reasonableness'" since these requests and objections would have been overruled on
 12 the basis of then-extant state and federal law. *Juan H. v. Allen*, 408 F.3d 1262,
 13 1273-74 (9th Cir. 2005) (counsel not deficient for failing to raise meritless
 14 objection). Therefore, Subclaim 11Q is denied.

15 **17. Subclaim 11R: Errors In Relation to Jury Instructions**

16 Subclaim 11R incorporates several stand-alone claims of alleged
 17 instructional error as further instances of trial counsel's ineffectiveness. SAP
 18 ¶ 105. Petitioner lists the following jury instructions, warnings, and cautions that
 19 counsel failed to request or object to:

- 20 • Failure to request a cautionary instruction regarding
- 21 petitioner's shackling (Claim 5);
- 22 • Failure to request an instruction that the jury had the
- 23 absolute discretion to grant mercy (Claim 13);
- 24 • Failure to request an instruction that evidence of
- 25 petitioner's oral admissions should be viewed with caution
- 26 (Claim 15);
- 27 • Failure to object to the trial court's instructions on the
- 28 penalty phase deliberative process (Claim 17);

- 1 • Failure to request an instruction that death could be
- 2 imposed only if the jury was convinced beyond a
- 3 reasonable doubt of the existence of any aggravating factor
- 4 used; and only if each juror was convinced beyond a
- 5 reasonable doubt that the aggravating circumstances were
- 6 so substantial in comparison to mitigating circumstances
- 7 that death was warranted; and that death could be imposed
- 8 only if they were convinced beyond a reasonable doubt
- 9 that death was the only appropriate penalty (Claim 18);
- 10 • Failure to request an instruction that the aggravating
- 11 factors of prior criminal activity or prior felony convictions
- 12 do not include the crimes for which petitioner was on trial
- 13 (Claim 19);
- 14 • Failure to request an instruction defining aggravating
- 15 factors and mitigating circumstances. (Claim 20);
- 16 • Failure to request the deletion of non-pertinent mitigating
- 17 factors from the penalty phase instructions (Claim 21);
- 18 • Failure to request that the jury be instructed that petitioner
- 19 would never be eligible for parole (Claim 22);
- 20 • Failure to object that the instructions did not give sufficient
- 21 guidance to the jury (Claim 23);
- 22 • Failure to request an instruction on the duties of the jury
- 23 during the penalty proceedings (Claim 24); and
- 24 • Failure to request an instruction that the multiple factors in
- 25 aggravation should be treated as a single aggravating factor
- 26 (Claim 25).

27 SAP ¶ 105(a)-(1).

28 As discussed in connection with Claims 5, 15, and 20, the California

1 Supreme Court could reasonably have concluded that counsel did not provide
2 substandard legal representation by failing to request a cautionary instruction on
3 shackling, an instruction about viewing oral admissions with caution, and an
4 instruction defining the terms “aggravating” and “mitigating.” And as discussed
5 in connection with Claims 13, 17, and 24, the state court could have reasonably
6 rejected the associated ineffective assistance of counsel allegations on the ground
7 that petitioner suffered no prejudice from those allegedly inadequate instructions,
8 in view of the other instructions given to the jurors. The remaining portions of
9 this claim relate to Claims 18, 19, 21, 22, 23, and 25, all of which were denied on
10 respondent’s motion for judgment on the pleadings. See Dkt. 144 at 24. The
11 California Supreme Court could reasonably have concluded based on the trial
12 record that petitioner was not prejudiced by counsel’s failure to request the
13 various modifications in the penalty phase instructions that are identified in those
14 claims. Therefore, Subclaim 11R is denied.

15 **E. Discussion of Remaining IAC Subclaims**

16 As reflected in the foregoing review of the multiple parts of petitioner’s
17 IAC claim, most of the grounds alleged lack merit and add nothing to the overall
18 IAC calculus. However, two aspects of the claim require further analysis: (1)
19 trial counsel’s failure to more fully investigate and present mitigation evidence
20 about petitioner’s dysfunctional family history and the abuse he suffered; and (2)
21 trial counsel’s related failure to more fully investigate and present evidence of
22 petitioner’s mental health issues.

23 **1. Failure to Present More Evidence of Abuse and Hardship**

24 Petitioner argues that trial counsel provided deficient representation
25 because he failed to investigate and present additional mitigation evidence about
26 petitioner’s troubled background, which the petition catalogues in detail. To be
27 sure, it probably would have been “within the wide range of reasonable
28 professional assistance” for a capital defense attorney to choose to more fully

1 investigate and present such facts to the jury as part of the overall mitigation case.
 2 *Strickland*, 466 U.S. at 689. Nevertheless, “[t]here are countless ways to provide
 3 effective assistance in any given case.” *Id.* Here, trial counsel pursued a different
 4 approach:

5 My initial strategy was to focus on the physical
 6 maltreatment which Mr. Livaditis suffered at the hands of his
 7 father and uncle as well as the repeated abandonment of his
 8 father and mother during his formative years. Family members
 9 reported, among other things, that at age two, sister Fanny had
 10 been beaten by her father as she was tied to a table because she
 11 had soiled her underwear. The brother, George, freely
 12 admitted that he had completely blanked out his early
 childhood in order to avoid the bad things that had happened.
 However, when I went to Greece and met with various family
 members, I saw that there were members of the family who
 would make good impressions with the jury. I hoped that the
 jury would like these family members and would want to do
 something for them, even if they did not want to do something
 for Mr. Livaditis.

13 SAP Ex. 1 ¶ 7 (Declaration of Michael Demby).

14 In many respects, the dilemma faced by petitioner’s counsel was similar to
 15 that described in *Pinholster*. In that case, Pinholster’s trial counsel had banked on
 16 a procedural “lack of notice” argument which, if successful, would have required
 17 the trial court to exclude all of the prosecutor’s evidence in aggravation.
 18 *Pinholster*, 131 S. Ct. at 1404. Counsel’s strategy did not succeed. On habeas,
 19 Pinholster contended that trial counsel “should have pursued and presented
 20 additional evidence about: his family members and their criminal, mental, and
 21 substance abuse problems; his schooling; and his medical and mental health
 22 history, including his epileptic disorder.” *Id.* The Supreme Court responded:

23 We begin with the premise that “under the circumstances, the
 24 challenged action[s] might be considered sound trial strategy.”
 25 *Strickland*, 466 U.S. at 689. The Court of Appeals dissent
 described one possible strategy:

26 “[Pinholster’s attorneys] were fully aware that
 27 they would have to deal with mitigation sometime
 28 during the course of the trial, did spend
 considerable time and effort investigating avenues
 for mitigation[,] and made a reasoned professional
 judgment that the best way to serve their client

1 would be to rely on the fact that they never got
 2 [the required § 190.3] notice and hope the judge
 3 would bar the state from putting on their
 aggravation witnesses.” 590 F.3d, at 701-702
 (opinion of Kozinski, C.J.).

4 Further, if their motion was denied, counsel were prepared to
 5 present only Pinholster’s mother in the penalty phase to create
 6 sympathy not for Pinholster, but for his mother. After all, the
 “family sympathy” mitigation defense was known to the
 7 defense bar in California at the time and had been used by
 other attorneys. *Id.*, at 707. Rather than displaying neglect, we
 8 presume that [trial counsel’s] arguments were part of this trial
 strategy. See [*Yarborough v.*] *Gentry*, [540 U.S. 1] at 8
 (“[T]here is a strong presumption that [counsel took certain
 9 actions] for tactical reasons rather than through sheer neglect”
 (citing *Strickland*, 466 U.S. at 690).

10 *Pinholster*, 131 S. Ct. at 1404.

11 In short, the Court found that, notwithstanding available evidence regarding
 12 Pinholster’s dysfunctional family, his academic difficulties, and his mental health
 13 problems, it was reasonable for trial counsel to decline a more thorough
 14 presentation of such evidence and instead rely on a somewhat risky procedural
 15 argument, back-stopped by one family witness (Pinholster’s mother) with whom
 16 the jury might sympathize. *Id.* at 1405, 1409. Thus, despite counsel’s failure to
 17 present all the other evidence of his client’s hardships and ailments, the Supreme
 18 Court held that the state court’s rejection of Pinholster’s IAC claim was not
 19 unreasonable. *Id.* at 1403-1404.

20 In the course of addressing points raised in the dissent, the *Pinholster*
 21 majority made observations that are particularly relevant here:

22 At bottom, [the dissent’s] view is grounded in little more
 23 than ... what appears to be [the] belief that the only reasonable
 24 mitigation strategy in capital cases is to “help” the jury
 “understand” the defendant. According to [the dissent], that
 25 Pinholster was an unsympathetic client “compounded, rather
 26 than excused, counsel’s deficiency” in pursuing further
 evidence “that could explain why Pinholster was the way he
 27 was.” But it certainly can be reasonable for attorneys to
 conclude that creating sympathy for the defendant’s *family* is a
 28 better idea because the defendant himself is simply
 unsympathetic.

[The dissent's] approach is flatly inconsistent with *Strickland*'s recognition that "there are countless ways to provide effective assistance in any given case." 466 U.S., at 689. There comes a point where a defense attorney will reasonably decide that another strategy is in order, thus "making particular investigations unnecessary." *Id.*, at 691; cf. 590 F.3d, at 692 (Kozinski, C.J., dissenting) ("The current infatuation with 'humanizing' the defendant as the be-all and end-all of mitigation disregards the possibility that this may be the wrong tactic in some cases because experienced lawyers conclude that the jury simply won't buy it"). Those decisions are due "a heavy measure of deference." *Strickland, supra*, at 691. The California Supreme Court could have reasonably concluded that Pinholster's counsel made such a reasoned decision in this case.

Pinholster, 131 S. Ct. at 1407-1408 (emphasis in original).

Much the same may be said of the current case. At bottom, petitioner's argument is based on the premise that the most sensible approach requires counsel to present any and all evidence tending to "humanize" the defendant, no matter whether such a presentation is consistent with other potential mitigation themes.³⁴ Moreover, petitioner seems to suggest that trial counsel was virtually duty-bound to present every available fact about petitioner's dysfunctional background, from his father's gambling, to his mother's parsimony, to his sibling's various difficulties, along with the virtually endless list of betrayals, abandonments, crises, and failures suffered by and upon petitioner himself. To be sure, assuming the truth of petitioner's life story (as is assumed for the purposes of this order), any reasonable observer would agree that no individual, especially not a child or adolescent, should be subjected to the abuse that was apparently heaped on petitioner. But the mere existence of such facts, no matter how voluminous or compelling, does not end the analysis as to whether a trial lawyer can reasonably choose to forgo or at least limit such a presentation, and to make tactical decisions

³⁴ Petitioner claims that the approach he advocates would not have been inconsistent with any of the other themes presented by trial counsel. *See, e.g.*, Pet. Briefs, Dkt. 291 at 34, Dkt. 295 at 21-23. However, as discussed below, it was inconsistent enough that a reasonable attorney could choose to avoid it.

1 that render it superfluous to scour the globe for even more such evidence. *See*
2 *Rompilla v. Beard*, 545 U.S. 374, 382-83 (2005) (“[T]he duty to investigate does
3 not force defense lawyers to scour the globe on the off chance something will turn
4 up.”).

5 The evidence before the state court in petitioner’s habeas proceedings
6 reflects that counsel made a tactical choice, and did so with at least a general
7 awareness of the type of evidence that petitioner now says should have been
8 presented. Rather than presenting a more fully-detailed account of petitioner’s
9 miserable past, including the evidence of his mother’s role as the primary abuser,
10 counsel instead concluded that Sophie, along with petitioner’s siblings and other
11 relatives, would appeal to a jury. SAP Ex. 1, ¶ 7. A reasonably competent
12 defense attorney might conclude that sympathetic family testimony would be at
13 least as effective, and perhaps more effective, than a theme in which petitioner’s
14 mother and other adult caretakers would be vilified and shown to be unworthy of
15 any sympathy.

16 As indicated, counsel was indeed aware of facts regarding petitioner’s
17 “physical maltreatment,” “repeated abandonment,” and many other facets of his
18 extraordinary personal history. *Id.* ¶¶ 6-7. Counsel also knew, even before the
19 entry of petitioner’s guilty plea, that the mitigation presentation would be of
20 primary importance. *Id.* ¶ 3. Counsel therefore spoke to all of petitioner’s
21 siblings and subsequently travelled to Greece to interview his mother, relatives,
22 and family friends. *Id.* at ¶¶ 3, 5-7. Petitioner’s mother was resistant and initially
23 unwilling to get involved; it was only after trial counsel pressed the matter and
24 met with her in Greece that she was persuaded to cooperate and travel to Los
25 Angeles to testify. *Id.* at ¶¶ 5, 7. Counsel also met with and interviewed
26 petitioner multiple times prior to trial, and found him to be cooperative. *Id.* at ¶ 3.
27 Thus, counsel’s decisionmaking regarding mitigation themes was not uninformed.
28 As the Supreme Court stated in *Strickland*:

1 [S]trategic choices made after thorough investigation of
2 law and facts relevant to plausible options are virtually
3 unchallengeable; and strategic choices made after less than
4 complete investigation are reasonable precisely to the extent
5 that reasonable professional judgments support the limitations
6 on investigation. In other words, counsel has a duty to make
7 reasonable investigations or to make a reasonable decision that
8 makes particular investigations unnecessary. In any
9 ineffectiveness case, a particular decision not to investigate
10 must be directly assessed for reasonableness in all the
11 circumstances, applying a heavy measure of deference to
12 counsel's judgments.

13 *Strickland*, 466 U.S. at 690-91.

14 It is also significant that counsel's mitigation presentation touched on many
15 of the same types of evidence that petitioner claims were prejudicially omitted.
16 The jury heard substantial testimony about how petitioner experienced poverty
17 and abandonment, suffered serious physical injuries, was victimized by a
18 physically and emotionally abusive parent (his father), and got into trouble only
19 after he encountered bad influences in Las Vegas. 19 RT 2815; *Livaditis*, 2 Cal.
20 4th at 771. More specifically, the jury was told that petitioner's father battered
21 his mother, oftentimes in front of petitioner and his siblings. 19 RT 2775-2777.
22 Sophie testified that Louis spent much of his time drinking and gambling with his
23 friends, and when he lost at gambling he would return home and pick on the
24 family, which included physical abuse. 19 RT 2776. She testified that sometimes
25 the family had nothing to eat because Louis did not work and gambled away what
26 little money they had. 19 RT 2775. One of petitioner's aunts testified that the
27 relationship Louis had with Sophie and the children was "very, very bad." The
28 aunt testified that Louis was like a "monster" and that the children were afraid of
him. 19 RT at 2836. The aunt saw Louis punch Sophie when Sophie was seven
months pregnant with Fanny. *Id.* Sophie testified that after their divorce, Louis
did not visit the children or provide financial support. She testified that from 1969
until his death in 1980, Louis never saw the children. 19 RT 2809-2810.

The jury also heard that the family lived on welfare, and that when

1 petitioner and his siblings were growing up, they would see Sophie sorting
2 through garbage cans in their Brooklyn neighborhood looking for food and
3 clothing. 19 RT at 2778-2780, 2784, 2884. Other witnesses told the jury how
4 petitioner was sent away to the orphanage for two years because Sophie could not
5 care for him. They testified that he was very homesick at the orphanage and lost a
6 significant amount of weight while he was there. 19 RT 2779-2783, 2836-2837,
7 2839, 2875-2876, 2914. Witnesses also testified about how petitioner suffered
8 serious illness and injury as a child. 19 RT 2780-2781 (ruptured appendix at age
9 two), 2783 (head injury at orphanage).

10 “Cumulative evidence of [mitigation], duplicating what was presented, does
11 not create a reasonable probability that the sentence would have been different.”
12 *Bible v. Ryan*, 571 F.3d 860, 871 (9th Cir. 2009); *Babbitt v. Calderon*, 151 F.3d
13 1170, 1176 (9th Cir. 1998). Here, while the additional evidence identified on
14 habeas is not entirely cumulative — some aspects of it are indeed different,
15 particularly the evidence of abuse inflicted by his mother (and not just his father),
16 as well as the evidence of his psychological issues — most of the remaining
17 evidence is simply further elaboration on themes that were already communicated
18 to the jury. Thus, petitioner’s insistence that more such evidence should have
19 been presented is unconvincing. *Cf. Schurz v. Ryan*, 730 F.3d 812, 815 (9th Cir.
20 2013) (“We fail to see what the evidence Schurz discusses in his briefs would
21 have added to this already bleak picture.”); *Henry v. Ryan*, 720 F.3d 1073, 1084
22 n.16 (9th Cir. 2013), *cert. denied*, No. 13-9512, 2014 WL 1324640 (U.S. June 9,
23 2014); *Wood v. Ryan*, 693 F.3d 1104, 1119 (9th Cir. 2012), *cert. denied*, 134 S.
24 Ct. 239 (2013).

25 It is also important to consider the totality of the penalty phase presentation
26 and arguments made by trial counsel. As respondent demonstrates, the defense
27 presentation was not insubstantial. *See* Resp. Briefs, Dkt. 279 at 69-72, Dkt. 293
28 at 12-15. Counsel presented and argued more than just the above-referenced

1 evidence of petitioner's background of poverty, abuse, illness and abandonment.
2 In addition, counsel presented and argued the evidence showing how petitioner's
3 life took a turn for the worse when he moved to Las Vegas, before which he had
4 no significant criminal history. 19 RT 2794-2796, 2802-2803, 2823; 20 RT 2976-
5 2978. Counsel thoroughly presented the embarrassment, remorse, and apologies
6 of petitioner's family members. 19 RT 2804, 2848, 2854, 2917; 20 RT 2979. He
7 presented evidence of petitioner's own remorse and his acceptance of
8 responsibility for the murders, and argued it forcefully to the jury. 19 RT 2799,
9 2831, 2847, 2854; 20 RT 2966, 2979. He also effectively conveyed the harshness
10 of a sentence of life without possibility of parole. 20 RT 2966, 2979-2980, 2983.

11 The omission of the evidence of Sophie's chronic abuse of her children,
12 even though it far outlasted the father's abuse, could reasonably be viewed as
13 preferable to the alternative. As a practical matter, counsel would have to forfeit
14 any chance of presenting Sophie as a sympathetic individual, assuming he could
15 get her to testify in the first place. (Indeed, a mitigation case focused on the
16 mistreatment doled out by Sophie and the relatives from Greece would likely have
17 shortened the witness list considerably.) Moreover, placing too much emphasis
18 on petitioner's difficult childhood and adolescence might have undercut the the
19 acceptance of responsibility theme, which may have been counsel's best
20 argument. Faced with a jury that had just seen and heard graphic evidence of the
21 murders, an experienced defense attorney might reasonably choose not to oversell
22 a theme that could appear to be an effort to deflect responsibility.³⁵ An attorney
23 might fear that jurors would be put off by a convicted killer's attack on the
24 character of his own mother. The jury was already provided with compelling
25 evidence that petitioner had an extremely difficult childhood; it was not
26 unreasonable to forgo yet another layer of such evidence (*i.e.*, Sophie's abuse) in

27
28 ³⁵ Petitioner acknowledges "the horrific nature of the crime and the strong emotions
that were aroused." SAP ¶ 76 (Subclaim 11J, *re venue*).

1 return for her cooperation in filling the role of sympathetic mother. *Cf. Williams*
 2 *v. Woodford*, 384 F.3d 567, 616 (9th Cir. 2004) (“The relevant inquiry under
 3 *Strickland* is not what defense counsel could have pursued, but rather whether the
 4 choices made by defense counsel were reasonable”).

5 Trial counsel’s choice was not made in ignorance; the record reflects he was
 6 aware of the most pertinent aspects of petitioner’s background and their potential
 7 mitigation value. *Cf. Sears v. Upton*, 561 U.S. 945, 130 S. Ct. 3259, 3264 (2010)
 8 (due to inadequate investigation, trial counsel was ignorant of the potential
 9 mitigation evidence). Indeed, trial counsel initially considered a presentation
 10 more similar to the one now advocated by petitioner, but later made a tactical
 11 decision to pursue a different approach. SAP Ex. 1 at ¶ 3. Thus, this claim “does
 12 not involve potentially favorable evidence about which counsel was oblivious.”
 13 *Gerlaugh v. Stewart*, 129 F.3d 1027, 1033 (9th Cir. 1997). Rather, counsel “knew
 14 about the evidence and looked into it, but chose as a tactical matter not to use it.”
 15 *Id.* “A reasonable, tactical choice based on an adequate inquiry is immune from
 16 attack under *Strickland*.” *Id.*; *cf. Sears*, 130 S. Ct. at 3265 (“A ‘tactical decision’
 17 is a precursor to concluding that counsel has developed a ‘reasonable’ mitigation
 18 theory in a particular case.”).

19 In his dissent to the subsequently overturned Ninth Circuit decision in
 20 *Pinholster*, Judge Kozinski commented on a similar dilemma:

21 I suppose counsel *could* have presented this evidence [of
 22 abuse], but one thing is clear: It would not have been possible
 23 to present the mother’s testimony, which painted a relatively
 24 rosy picture of the family, and particularly her role in it, and
 25 also the testimony of the brother, sister, aunt and uncle, which
 26 painted their family life as terrible and the mother as neglectful
 27 and selfish. Assuming that counsel had all this evidence
 28 available to present at the penalty phase, they would have had
 to make a choice: They could go with the mother and try to
 develop sympathy for her and the family, or they could paint
 Pinholster’s parents as villains and try to work up sympathy
 for him personally. They absolutely could not do both without
 having the sides collapse on the middle; the two approaches
 are not “consistent theories of mitigation.”

1 *Pinholster v. Ayers*, 590 F.3d 651, 716-17 (2009) (en banc) (Kozinski, J.,
 2 dissenting) (quoting *Porter v. McCollum*, 558 U.S. 30, 44 (2009)), *rev'd*, 131 S.
 3 Ct. 1388 (2011). In the present case, petitioner's trial counsel made a similar
 4 choice. Whether it was the best possible decision that counsel could have made is
 5 not the relevant inquiry under *Strickland*. All that matters under 28 U.S.C.
 6 § 2254(d) is that the California Supreme Court could reasonably have concluded,
 7 based on the evidence contained in petitioner's state habeas corpus petition and
 8 the trial record, that petitioner failed to rebut the strong presumption that counsel's
 9 mitigation strategy fell "within the wide range of reasonable professional
 10 assistance." *Strickland*, 466 U.S. at 689.

11 **2. Failure to Investigate and Utilize Evidence of Petitioner's** 12 **Mental Health Problems**

13 All of the other subclaims in Claim 11 that survive preliminary review
 14 implicate petitioner's mental health issues to some degree: Counsel's failure to
 15 investigate and present evidence of petitioner's mental health as mitigation
 16 evidence (Subclaims 11A and 11B); failure to investigate his mental health
 17 immediately following the murders and (relatedly) move to suppress his post-arrest
 18 statements (Subclaims 11C and 11K); failure to retain experts (Subclaim 11F);
 19 and failure to raise the issues of incompetence and "diminished actuality"
 20 (Subclaims 11H and 11I).

21 In claims of ineffective assistance of counsel for failing to pursue mental
 22 health-related issues, a primary consideration is whether trial counsel was on
 23 notice (*i.e.*, whether counsel knew or should have known) that petitioner might
 24 have been mentally disordered. *See, e.g., Rompilla*, 545 U.S. at 379 (trial counsel
 25 failed to investigate "pretty obvious signs" that his client suffered from mental
 26 illness).

27 The trial record reflects that there were no substantive references or discussions
 28 in court concerning petitioner's mental health, with the possible exception of the

entry of his guilty plea, which included standard inquiries intended to establish the knowing, intelligent, and voluntary nature of the plea. (See plea colloquy at 5 RT 299-326, discussed below.) While the declaration of trial counsel submitted in the state habeas proceeding discusses petitioner's childhood difficulties, and the mental health of his parents and sister Pauline, it does not indicate that petitioner exhibited any symptoms of mental illness during counsel's dealings with him before or during trial. SAP Ex. 1. However, counsel's declaration does contain a passing reference to "my mental health expert" who might have been consulted before trial, but it does not mention any evaluations or conclusions rendered by an expert. *Id.* at ¶ 9 (discussed below). There is no declaration from petitioner himself.

a. Evidence of Mental Illness Offered on State Habeas

As previously described, much of the evidence proffered on state habeas by petitioner related to his abuse at the hands of his parents, as well as the apparent mental instability of his mother and certain other family members. However, petitioner also presented evidence that was indicative of his mental health issues before, during, and after the murders, for example:

- As petitioner grew into adolescence, he began exhibiting depression and feelings of hopelessness. *See, e.g.*, SAP ¶ 44(h). He was "hyper" and had "abrupt mood swings." He was "destructive" and would break or hit objects. He said he felt "an inner rage" that left him "confused." *Id.*
- As a young teen, he engaged in bizarre behaviors, staring into space and laughing uncontrollably without explanation. He was jumpy and uneasy, and appeared to be hearing voices. He would stop talking in the middle of a sentence, and not respond when asked a question, not seeming to hear. He believed he was involved in events he read about in the news, and thought people were

1 watching him and talking about him. *Id.* ¶¶ 49(aaa)-(fff).

- 2 • Two years before the murders, he contemplated suicide by
3 jumping off a building until he heard voices telling him not to jump.
4 His behavior continued to range from depressed and silent to
5 flamboyant and hyperactive. *Id.* ¶¶ 49(jjjj)-(rrrr). When he was
6 arrested and jailed in Las Vegas, he tried to commit suicide by
7 drinking toxic cleansers. *Id.* ¶¶ 49(www)-(yyyy). His attorney
8 stated he was irrational and “not all there.” *Id.* ¶ 49(zzzz). After
9 his release, he appeared disheveled, red-eyed, and anxious. *Id.* ¶¶
10 49(hhhhh)-(ddddd).
- 11 • In November 1985, he was involved in a car accident. He did
12 not seek medical help until two days later; he suffered headaches,
13 and possible post traumatic memory loss. *Id.* ¶¶ 49(fffff)-(ggggg).
- 14 • Regarding the day of the murders, he told counsel he “was not
15 crazy but was a little unstable”; if he had been “thinking like a
16 normal person,” he “would not have gone into the store and acted
17 the way he did”; during the incident, he “was definitely screw[ed]
18 up in the head.” He said a person “has to be really screwed up in
19 the head [to] kill somebody.” He also said he “wanted to get
20 attention by being on television” and was hoping that he “could
21 make a change by making a statement about hunger in America.”
22 At first, he felt “high” and “excited,” “like he was President of the
23 United States,” but when the robbery did not go as planned, he
24 became angry, feeling like someone at “a party having a good time
25 and somebody does something to ruin it.” *Id.*
- 26 • During the stand-off, he told police he was a Viet Nam veteran,
27 a college graduate with several degrees, fluent in four languages,
28 capable of “maxing” aptitude tests, and able to move water with

1 telekinesis. *Id.* ¶ 44(i)(7).

- 2 • Petitioner received medical treatment after his arrest. SAP ¶¶
3 55(a)-(b). A form requesting toxicology testing contained a
4 handwritten notation “Drugs/vs/Psychosis.” The test was ordered
5 after a doctor observed “Abnormal Behavior” by petitioner. The
6 test results showed no presence of alcohol or drugs. *Id.* ¶¶ 55(c)(3),
7 55(f).
- 8 • He said he killed Smith because something “kicked inside” of
9 him, and he “heard a voice” telling him to do so. *Id.* ¶ 44(h)(9).
- 10 • A few days after his arrest, petitioner told jail staff he was
11 “hearing voices” and was “willing to see psych.” A jail psychiatrist
12 noted petitioner was “depressed and anxious” and having “suicidal
13 thoughts.” The psychiatrist assessed that he had an “adjustment
14 disorder” with “mixed emotional features,” and noted that petitioner
15 described symptoms consistent with an antisocial personality
16 disorder. *Id.* ¶ 55(f)(2). Another mental health expert evaluated
17 petitioner about two weeks after the incident, and opined that he
18 was “experiencing distress in excess of a normal reaction.” *Id.* He
19 was “worried about the future, question[ed] value of life if has to be
20 incarcerated.” *Id.* ¶ 55(c)(7).
- 21 • Regarding the murders, petitioner told a jail psychiatrist that he
22 had done things in the past which “angered” people, but that “this is
23 weird even for me.” *Id.* ¶ 55(f)(1).
- 24 • He later told a reporter he committed the robbery because he
25 “had a lot anger built inside,” and saw himself as a Robin Hood
26 figure, stealing from the rich and giving to the poor. *Id.* ¶
27 44(h)(10).

28 Additionally, petitioner submitted declarations in the state habeas

1 proceedings from three mental health experts who were retained after the trial:
2 Mindy Rosenberg, Ph.D., Dr. David Foster, and Dale Watson, Ph.D. *See* SAP
3 Exs. 137-139. According to petitioner, their testimony would have shown the
4 following:

5 Testimony by Dr. Rosenberg, an expert in child
6 psychology, would have provided the jurors with a full
7 and accurate picture of the horrendous childhood and
8 adolescence experienced by Petitioner as well as the
9 factors of his socio-medical history that contributed to his
10 adult behavior. She could have explained, as she does in
11 her declaration, how Petitioner's history of traumatic
12 abuse, terrorizing, abandonment and neglect impaired his
13 mental functioning for life, and contributed to his
14 subsequent adult acts. Her testimony would have given
15 the jurors an understanding of Petitioner's actions that
16 would have caused to the jurors to be sympathetic to
17 Petitioner and would have provided them mitigation
18 necessary to vote for LWOP.

19 Testimony from Dr. Watson, a neuropsychologist,
20 would have further explained Petitioner's actions in the
21 context of his documented brain impairments. The
22 neuropsychological testing performed by Dr. Watson
23 indicates that Petitioner suffers from neurological
24 impairment, which negatively impacts his ability to
25 reason, perceive events and persons accurately and
26 interact with them. Petitioner's intelligence quotient tests
27 revealed a large discrepancy between his verbal IQ of 100
28 (average) and his performance IQ of 84 (borderline). This

1 difference is reflective of damage to the right hemisphere
2 of Petitioner's brain.

3 Finally, very compelling testimony from Dr. Foster
4 [a neuropsychiatrist] would have explained to the jury that
5 Petitioner suffers from severe psychiatric disorders,
6 [neuro]psychiatric and medical deficits which
7 significantly compromise his ability to perceive and
8 understand the world around him, his ability to respond
9 adequately to complex situations, and his ability to
10 function normally. Petitioner suffers from Post Traumatic
11 Stress Disorder with dissociative symptoms and
12 symptoms of Panic Disorder. Petitioner also suffers from
13 Bipolar Disorder with intermittent psychotic features and
14 has evidence of acquired and perhaps congenital brain
15 damage. These deficits and impairments are compounded
16 by the physiological and psychological effects of thyroid
17 dysfunction. Petitioner's severe psychiatric,
18 neuropsychiatric and physical deficits have been long-
19 standing. They have affected his mental functioning since
20 childhood. As a result, Petitioner has been unable to
21 understand the nature and consequences of the
22 proceedings against him, to knowingly, intelligently and
23 voluntarily waive his constitutional rights, and he was not
24 in conscious control of his acts at the time of the Van
25 Cleef & Arpels crimes and allegations, nor during the
26 pretrial and trial proceedings.

27 This testimony from these experts would have
28 demonstrated to the jury not only that compelling

1 mitigating circumstances existed to vote for life rather
2 than death, but these expert opinions should have formed
3 the basis for attacking Petitioner's competency to stand
4 trial, to waive his constitutional rights, to provide rational
5 aid and assistance to counsel in his defense and form the
6 specific intent required to have committed the crimes as
7 alleged.

8 Petitioner's Informal Reply (Lodged Doc. No. 41) at 81-83; SAP ¶¶ 65(c), 66, &
9 Exs. 137-139. These declarations constituted all of the expert psychiatric witness
10 evidence before the California Supreme Court when it considered and denied
11 petitioner's habeas claims. While the State had previously filed an Informal
12 Response to the petition, it submitted no expert declarations or other new
13 evidence.³⁶

14
15
16 ³⁶ The information before the California Supreme Court — and hence the record
17 which dictates the analysis of “reasonableness” under § 2254(d) — was substantially
18 more limited in comparison to the record presented in federal court. Here, the parties
19 submitted several additional expert declarations and exhibits, and subjected their
20 dueling experts to thorough examination during an evidentiary hearing that spanned
21 several days. As the Supreme Court subsequently held in *Pinholster*, however, the
22 determination of the reasonableness of the state court's denial of petitioner's IAC
23 claim under 28 U.S.C. § 2254(d) is limited to the evidence that was before the state
24 court. As a result, this Court must ignore the evidence and testimony that was
25 presented *solely* in federal court, unless petitioner first demonstrates that the
26 California Supreme Court's denial of the claim was an unreasonable application of
27 *Strickland*. See *Cannedy*, 706 F.3d at 1156 (testimony from evidentiary hearing
28 conducted by district court before *Pinholster* will generally not be considered on
Ninth Circuit review); cf. *Hurles v. Ryan*, No. 08-99032, 2014 WL 1979307, at *5
(9th Cir. May 16, 2014) (If court finds unreasonableness based on state record alone,
then “we evaluate the claim de novo, and we may consider evidence properly
presented for the first time in federal court.”).

1 **b. Countervailing Evidence and Circumstances**

2 Notwithstanding petitioner's detailed allegations and his expert witness
3 declarations, the California Supreme Court denied all of his mental health-based
4 IAC claims for failure to state a prima facie case. In reaching that conclusion, "it
5 appears that the court generally assumes the allegations in the petition to be true,
6 but does not accept wholly conclusory allegations, and will also review the record
7 of the trial to assess the merits of the petitioner's claims." *Pinholster*, 131 S. Ct.
8 at 1402 n.12 (explaining California Supreme Court habeas practice). The issue
9 here is whether the California Supreme Court could reasonably have denied these
10 claims based on its review of petitioner's allegations and supporting declarations
11 in tandem with the trial record. In making this determination, this Court "must
12 determine what arguments or theories supported or, as here, could have supported,
13 the state court's decision; and then it must ask whether it is possible fairminded
14 jurists could disagree that those arguments or theories are inconsistent with the
15 holding in a prior decision of [the United States Supreme Court]." *Richter*, 131 S.
16 Ct. at 786.

17 Petitioner's allegations and supporting declarations, standing alone, might
18 appear to have merit. But the California Supreme Court was not restricted to
19 petitioner's own carefully-drafted allegations and expert declarations when it
20 considered and denied the claims relating to his mental health. A closer
21 examination of much of the evidence offered by petitioner, along with a review of
22 other facts readily apparent from the trial court record, raises substantial questions
23 about whether petitioner could meet his burden of proving that counsel was
24 ineffective in his approach to the mental health issues. And "[i]t bears repeating
25 that even a strong case for relief does not mean the state court's contrary
26 conclusion was unreasonable." *Richter*, 131 S. Ct. at 786.

27 The California Supreme Court presumably was guided by the long-standing
28 rule that retrospective determinations of mental illness and incompetency are

1 viewed with caution. *See, e.g., Deere v. Cullen*, 718 F.3d 1124, 1141, 1146-1147
2 (9th Cir. 2013); *cf. People v. Lightsey*, 54 Cal. 4th 668, 707-11 (2012) (discussing
3 case-specific factors relevant to feasibility of conducting retrospective
4 competency hearing). “Belated opinions of mental health experts are of dubious
5 probative value and therefore disfavored.” *Deere*, 718 F.3d at 1141. The
6 Supreme Court and Ninth Circuit have often found retrospective competency
7 determinations to be “lacking or impossible.” *McMurtrey v. Ryan*, 539 F.3d 1112,
8 1131-32 (9th Cir. 2008) (citing *Drope v. Missouri*, 420 U.S. 162, 183 (1975);
9 *Dusky v. United States*, 362 U.S. 402, 403 (1960); *Tillery v. Eyman*, 492 F.2d
10 1056, 1059 (9th Cir. 1974); *Moore v. United States*, 464 F.2d 663, 666-67 (9th
11 Cir. 1972).) In *Drope*, the Supreme Court recognized the “inherent difficulties of
12 such a *nunc pro tunc* determination [even] under the most favorable
13 circumstances.” *Id.* at 183. On federal habeas, it must be presumed that the
14 California Supreme Court could have applied this principle as at least one ground
15 for denying the claims involving petitioner’s mental health. *See Richter*, 131 S.
16 Ct. at 786.

17 Retrospective determinations of a defendant’s mental condition are not
18 irrelevant, however, and may be persuasive to the extent they incorporate evidence
19 of contemporaneous observations by health professionals (such as those by
20 petitioner’s caretakers in the hours and days following his arrest). *See, e.g.,*
21 *Lightsey*, 54 Cal. 4th at 707-11; *People v. Ary*, 118 Cal. App. 4th 1016, 1026
22 (2004); *Odle v. Woodford*, 238 F.3d 1084, 1089 (9th Cir. 2001) (retrospective
23 competency determinations may be valid when the record contains sufficient
24 information upon which to base reasonable psychiatric judgments); *cf. Williams*,
25 384 F.3d at 609 (“We . . . accord little weight to the competency assessments of
26 Williams’s habeas corpus experts because they are based not upon medical reports
27 contemporaneous to the time of the preliminary hearings or trial . . .”). While
28 such evidence might lend strength to petitioner’s subsequent assertions of prior

1 mental health problems, it does not foreclose the question of whether the
2 California Supreme Court could nonetheless have reasonably rejected petitioner's
3 claims. For example, the California Supreme Court could have reasonably
4 concluded that the contemporaneous records in this case, which consisted almost
5 entirely of terse notations and unverified preliminary observations, were simply an
6 inadequate basis for the sweeping conclusions formulated by petitioner's experts
7 more than a decade after his trial.

8 Furthermore, a significant amount of the historical evidence presented by
9 petitioner does little to support a claim of serious mental illness, nor is it
10 particularly mitigating. Such evidence includes the fact that petitioner had
11 "hostile feelings" and felt "life was unfair"; that he was "destructive" and would
12 break or hit objects; that he was "moody"; that when the robbery went awry, he
13 became angry and felt like someone at "a party having a good time and somebody
14 does something to ruin it"; that he killed Smith because something "just clicked,
15 [m]y fuse went off"; that he committed the robbery because he "had a lot anger
16 built inside," and saw himself as a Robin Hood figure; that he was "depressed and
17 anxious" when he was jailed after the murders; that he described symptoms
18 consistent with an antisocial personality disorder; that he was balanced enough to
19 recognize that a person "has to be really screwed up in the head [to] kill
20 somebody"; or that he possessed such self-awareness that he told a jail psychiatrist
21 that while he had done things in the past that "angered" people, the murders were
22 "weird even for [him]." When he explained the cause of his depression, anxiety,
23 and concerns for his future, he said, "I know I will spend my life in prison." SAP
24 Exs. 101, 103. The habeas record also includes trial counsel's notes of a
25 conversation with petitioner before trial: "States not crazy — crossed his mind to
26 act crazy — could do a good job. Heard they could not execute an insane person."
27 State Petition, Ex. 8; SAP Ex. 10 at 67. In short, much of the evidence does not
28 necessarily reflect serious mental illness; indeed, much of it arguably reflects the

1 *absence* of mental illness. All of this evidence was in the record before the
2 California Supreme Court when it denied petitioner's habeas claims.

3 Further, it appears from the habeas record before the state court that
4 members of the psychiatric and medical staff who treated petitioner at the County
5 Jail saw no evidence that he suffered from a severe mental disorder. According to
6 a jail psychiatrist who met with him, albeit briefly, petitioner exhibited an
7 "adjustment disorder" with "mixed emotional features," and petitioner himself
8 described symptoms of an antisocial personality disorder. *Id.* ¶ 55(f)(2). The
9 same psychiatrist said this diagnosis "ruled out psychosis." SAP Ex. 104, ¶ 13.
10 Diagnoses of non-psychotic disorders and possible antisocial personality disorder
11 do not constitute solid grounds for asserting a guilt-phase mental defense or a
12 claim of legal incompetence, nor are they necessarily even "mitigating" factors.
13 *Cf. Parker v. Matthews*, 132 S. Ct. 2148, 2153 (2012) (evidence of defendant's
14 adjustment disorders, tension, and anxiety could reasonably be found insufficient
15 to establish "extreme emotional disturbance" to reduce murder to manslaughter);
16 *Panetti*, 551 U.S. at 960 (distinguishing significance of psychotic disorder in
17 comparison to personality defects); *Boyde v. Brown*, 404 F.3d 1159, 1167 (9th
18 Cir. 2005) (evidence of "various personality disorders and mental deficiencies"
19 did not "raise a real and substantial doubt about [defendant's] competence");
20 *Harris v. Pulley*, 885 F.2d 1354, 1383 (9th Cir. 1988) (distinguishing mitigating
21 power of evidence of mental illness from evidence of antisocial personality
22 disorder). Other notes by County Jail psychiatric and medical staff indicate
23 petitioner was "fully alert" and "oriented," and apparently suffered "no
24 hallucinations." SAP Ex. 103.

25 It has long been recognized that one of the most dependable sources of
26 information regarding a defendant's mental health is his own trial counsel. In
27 *Williams v. Woodford*, in discussing a claim of incompetency to stand trial, the
28 Ninth Circuit observed:

Williams's defense counsel at no point raised the issue of Williams's competence to stand trial. We have previously noted that "defense counsel [is] in the best position to evaluate [a defendant's] competence and ability to render assistance." *Torres [v. Prunty]*, 223 F.3d [1103] at 1109 (citing *Medina [v. California]*, 505 U.S. [437] at 450); *see also Hernandez v. Ylst*, 930 F.2d 714, 718 (9th Cir. 1991) ("We deem significant the fact that the trial judge, government counsel, and [the defendant's] own attorney did not perceive a reasonable cause to believe [the defendant] was incompetent.").

Williams, 384 F.3d at 606; *see also Richter*, 131 S. Ct. at 788 ("Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client . . .").

Petitioner might argue that due to counsel's failure to investigate, he was simply blind to the evidence that his client was mentally ill. However, the trial record and trial counsel's own declaration reflect that he was a highly experienced criminal defense attorney who was familiar with the practice of retaining mental health experts. SAP Ex. 1. It is reasonable to presume that trial counsel had developed at least some proficiency in recognizing a client's mental health issues, and indeed had an incentive to look closely for such evidence. *Cf. Boyde*, 404 F.3d at 1167 ("[P]erhaps the most telling evidence that [petitioner] was competent at trial is that neither defense counsel — who would have had every incentive to point out that his client was incapable of assisting with his defense — nor the trial court even hinted that [petitioner] was incompetent."). The California Supreme Court could have reasonably relied on this type of evidence when it considered petitioner's mental health-related claims.

Similarly, petitioner's post-arrest statements to the police could also reasonably be regarded as voluntary and intelligent, and not the product of police coercion of a heavily medicated or mentally disturbed individual. Petitioner was repeatedly given *Miranda* warnings and repeatedly waived those rights, and he appears to have answered the officers' questions in a largely clear and cogent fashion. *See* 18 RT 2751-2764; SAP Ex. 38. There is no evidence of coercion,

1 nor does petitioner identify statements or conduct during the interviews that
2 clearly demonstrate mental impairment. Even assuming he made a showing of
3 mental impairment, it would not necessarily render the statements inadmissible.
4 *See Colorado v. Connelly*, 479 U.S. 157, 164 (1986) (defendant's mental
5 condition, by itself and apart from its relation to official coercion, is not
6 dispositive on the issue of constitutional voluntariness); *United States v.*
7 *Chischilly*, 30 F.3d 1144, 1151 (9th Cir. 1994) ("Where the record lacks evidence
8 of either physical or psychological coercion by law enforcement officials, the
9 defendant's mental capacity is irrelevant to the due process inquiry into the
10 voluntariness of the confession."); *cf. Mincey v. Arizona*, 437 U.S. 385 (1978)
11 (hospital confession involuntary where defendant had just been shot and seriously
12 wounded, pain was "unbearable," he was confused and incoherent, lapsed in and
13 out of consciousness, and resisted questioning). Given the lack of evidence of
14 mental impairment and the absence of coercion, a motion to suppress petitioner's
15 statements most likely would have failed. The California Supreme Court could
16 reasonably have concluded, therefore, that trial counsel was not deficient for
17 failing to bring such a motion. *See James v. Borg*, 24 F.3d 20, 27 (9th Cir. 1994)
18 ("Counsel's failure to make a futile motion does not constitute ineffective
19 assistance of counsel."). Again, the California Supreme Court had all of this
20 evidence before it on habeas.

21 It also appears that nothing in petitioner's courtroom behavior even
22 remotely suggested that he suffered from mental health issues. As respondent
23 points out, the trial transcripts tend to confirm that petitioner behaved rationally
24 and appropriately throughout the proceedings. For example, the transcript of the
25 hearing where petitioner entered his guilty plea shows that he was fully engaged,
26 highly alert, and seemingly aware of the intricacies and significance of the plea
27 process. At the beginning, Mr. Livaditis himself clarified the record as to which
28 special circumstances he was admitting. 5 RT 301. When the prosecutor asked

1 him whether he understood that the two possible sentences were life without
 2 parole or death, but that the State would be seeking the death penalty, petitioner
 3 stated: “That is the jury’s choices.” (*Id.* at 305-06); when the prosecutor indicated
 4 that she was about to begin reciting the lengthy allegations regarding the factual
 5 bases for each count, petitioner responded: “Is that necessary?” (*Id.* at 309); when
 6 the count regarding Hugh Skinner was recited, including the phrase “you
 7 willfully, unlawfully and with malice aforethought murdered Hugh Skinner,”
 8 petitioner clarified: “I didn’t kill him.” (*Id.* at 315)³⁷; when asked how he pleaded
 9 to the robbery of surviving victim Carol Lambert, he said, “I didn’t rob her,” but
 10 when it was then explained that robbery can include the taking of property from
 11 the “immediate presence” of a person, he responded: “All right, immediate
 12 presence, yes.” (*Id.* at 318-319); when the prosecutor was reciting a kidnapping
 13 charge and asked petitioner if he had moved Lambert “into another country, state,
 14 county, or another part of Los Angeles County,” petitioner replied: “I didn’t move
 15 her to any other state, county, or ...”; then, after the prosecutor clarified “we are
 16 not alleging that you took her outside of Los Angeles County, but within the
 17 county, you moved her against her will; do you understand that?,” he responded,
 18 “Right. Yes.” (*Id.* at 322-323); and when he did not understand a question, he
 19 asked the prosecutor to repeat it (*Id.* at 322).³⁸ Respondent identifies additional
 20 instances at trial where petitioner manifested similar levels of intelligence and

21
 22 ³⁷ Mr. Skinner was the victim who was fatally shot by a police sniper.

23 ³⁸ Petitioner cites *Miles v. Stainer*, 108 F.3d 1109, 1112 (9th Cir. 1997), in which the
 24 Court of Appeals stated that a routine plea colloquy, involving little more than “yes”
 25 or “no” questions, did not prove that the petitioner was competent. However, *Miles*
 26 (a pre-AEDPA case) involved simply whether the evidence before the trial judge
 27 raised doubts about the defendant’s competency (thus requiring a competency
 28 hearing) where there had been *prior* findings of incompetency by three separate
 experts, along with strong evidence that the defendant’s competency “fluctuated”
 and that he had stopped taking his antipsychotic medications. *Id.* at 1111-12.

1 awareness. See Resp. Brief, Dkt. 279 at 117-119.

2 In view of the foregoing evidence, the California Supreme Court could
3 reasonably have concluded based on the record before it that trial counsel
4 observed petitioner's behavior both in and out of court, discussed relatively
5 complex matters with him, and saw no indication that petitioner had significant
6 mental health issues that would qualify either as a legal defense or as persuasive
7 mitigation evidence. The state court therefore could reasonably have found that
8 counsel was not deficient when he declined to pursue further investigation of
9 petitioner's mental health and chose not to raise any defenses or mitigation
10 theories based thereon. Subclaims 11A, 11B, 11C, 11F, 11I and 11K must
11 therefore be denied.³⁹

12 Apart from the inadequate showing of deficient performance, the California
13 Supreme Court could also have concluded that petitioner could not prevail on the
14 prejudice prong of the *Strickland* test, even assuming the truth of all his
15 allegations. In light of the weakness of the evidence of mental incompetence as
16 well as the strong evidence in the record to the contrary, the state court could
17 reasonably have concluded that there was no reasonable probability of a different
18 verdict even if trial counsel had introduced all the psychiatric evidence presented
19 on habeas. Stated another way, a fairminded jurist could reasonably find that it is
20 not reasonably probable that a jury, upon weighing the extensive evidence in
21 aggravation against all the mitigating evidence — including the evidence
22 presented on habeas — would have reached a different penalty decision.
23 Accordingly, even assuming that counsel's performance was deficient under

24 _____
25 ³⁹ With specific regard to Subclaim 11I, based on counsel's failure to assert
26 "diminished actuality," it is similarly reasonable to conclude that petitioner would
27 not have prevailed under such a theory, which would have required the jury to
28 entertain the unlikely premise that he was so mentally ill that he was incapable of
forming the intent to kill. See discussion of Subclaim 11K, *supra*; cf. *Parker*, 132 S.
Ct. at 2153. Thus, counsel was not deficient for declining to pursue such a defense.

1 *Strickland*, petitioner has failed to establish that the California Supreme Court's
2 denial of his ineffective assistance of counsel claim was an unreasonable
3 application of clearly established federal law. Claim 11 must therefore be denied.

4 **VII. Competence (Claim 12)**

5 Petitioner claims he was legally incompetent at all relevant times, including
6 when he was interrogated by the police, when he entered his guilty plea, and
7 throughout his penalty phase trial. SAP ¶¶ 108-112. He alleges that "he suffered
8 from neurological deficits and learning and developmental deficits and other
9 mental deficits which rendered him unable to accurately comprehend the nature
10 and substance of oral communications and discussion, including that which
11 occurred during questioning and interrogation by law enforcement personnel." *Id.*
12 ¶ 110(c). In support of these allegations, petitioner points to the evidence of his
13 medical, educational, and social history described above in connection with Claim
14 11, particularly Dr. Foster's and Dr. Watson's declarations.

15 Petitioner relies primarily on Dr. Foster's findings, which state that
16 petitioner suffers from "Post Traumatic Stress Disorder with dissociative
17 symptoms and symptoms of Panic Disorder," "Bipolar Disorder with intermittent
18 psychotic features," and "has evidence of acquired and perhaps congenital brain
19 damage." Dr. Foster also concluded that petitioner suffered from thyroid
20 dysfunction, which affects mental processes. SAP ¶¶ 65(c); 111. Dr. Foster
21 further opined that petitioner "possibly" suffered from seizure disorder, as shown
22 by the fact that he exhibited symptoms consistent with seizure disorder and, in
23 particular, temporal lobe epilepsy and orbital frontal dysfunction. *Id.* Dr. Foster
24 also concluded that petitioner's multiple mental deficits rendered him particularly
25 "susceptible to coercion" and "incapable" of knowingly waiving his rights. *Id.*
26 Dr. Foster opined that petitioner's mental problems existed at the time of his
27 previous offenses and convictions, as well as during the Van Cleef & Arpels
28 incident and all the subsequent legal proceedings arising from it; in short,

1 according to Dr. Foster, petitioner's mental disorders rendered him legally
 2 incompetent for *all* of those criminal acts and *all* of the legal proceedings that
 3 resulted from them. *Id.* (Subsequent neuropsychological testing by the other
 4 expert, Dr. Watson, ostensibly confirmed that, at least as of 1998, petitioner
 5 continued to suffer from brain dysfunction and impairment. *Id.*)⁴⁰

6 “It has long been accepted that a person whose mental condition is such that
 7 he lacks the capacity to understand the nature and object of the proceedings
 8 against him, to consult with counsel, and to assist in preparing his defense may not
 9 be subjected to a trial.” *Drope*, 420 U.S. at 171; *Pate v. Robinson*, 383 U.S. 375
 10 (1966). The test for competence to stand trial is whether the defendant “has
 11 sufficient present ability to consult with his lawyer with a reasonable degree of
 12 rational understanding — and whether he has a rational as well as factual
 13 understanding of the proceedings against him.” *Dusky v. United States*, 362 U.S.
 14 402 (1960) (per curiam) (internal quotation marks omitted). The test for
 15 competence to plead guilty and competence to stand trial is the same. *Godinez v.*
 16 *Moran*, 509 U.S. 389, 398-99 (1993). “Competence ‘has a modest aim: It seeks to
 17 ensure that [the defendant] has the capacity to understand the proceedings and to
 18 assist counsel.’” *Deere*, 718 F.3d at 1144 (quoting *Godinez*, 509 U.S. at 402).

19 There is a difference between a procedural competency challenge and a
 20 substantive competency challenge. *Boyde*, 404 F.3d at 1165 n.6. A procedural
 21 claim asserts that the trial court erred by failing to conduct a competency hearing,
 22 because there was sufficient evidence at trial to give rise to substantial doubt
 23

24 ⁴⁰ Petitioner also asserts in passing that his brain dysfunction has “rendered [him]
 25 incompetent for all legal proceedings ... *to and including execution.*” SAP ¶ 111
 26 (emphasis added). Apart from this fleeting and conclusory allegation of perpetual
 27 incompetence, petitioner does not otherwise plead a distinct claim of incompetence
 28 to be executed. *See generally Ford v. Wainwright*, 477 U.S. 399 (1986). Such a
 claim is not yet ripe and the Court does not address it. *See Panetti*, 551 U.S. at 934;
Stewart v. Martinez-Villareal, 523 U.S. 637 (1998).

1 regarding the petitioner's competence. *See Pate v. Robinson*, 383 U.S. 375
2 (1966). In contrast, a substantive incompetence claim asserts that petitioner's due
3 process rights were violated because he was actually tried while incompetent,
4 regardless of whether there was sufficient evidence before the trial court to require
5 a *Pate* hearing. *See Boyde*, 404 F.3d at 1165-66. Here, petitioner raises only a
6 substantive competence claim. The California Supreme Court could reasonably
7 have rejected this claim for the same reasons discussed above, including the
8 inherently dubious nature of broad-brush psychiatric assessments carried out more
9 than a decade after trial, the inadequate foundation in the contemporaneous
10 records for those subsequent determinations, petitioner's generally lucid responses
11 in post-arrest police interviews, the absence of any indication of incompetence
12 during the courtroom proceedings, and the lack of any perception by experienced
13 trial counsel that petitioner was incompetent. *Cf. Williams v. Woodford*, 384 F.3d
14 at 608 ("[W]e disfavor retrospective determinations of incompetence, and give
15 considerable weight to the lack of contemporaneous evidence of a petitioner's
16 incompetence to stand trial.").

17 In addition to the evidence discussed above, additional evidence was in the
18 record before the California Supreme Court that undermined petitioner's claim of
19 incompetence. For example, as petitioner's own allegations reflect, just one year
20 before the murders, he underwent a four-month-long "diagnostic" at Nevada State
21 Prison for "an evaluation of his fitness for probation" at the conclusion of which
22 "[t]he prison reported that Petitioner participated in the Street Readiness Program
23 and received good work reports from his supervisors, who noted his ability to get
24 along with staff and fellow inmates." SAP ¶ 49(bbbbb). In February 1986, just
25 months before the murders, petitioner successfully perpetrated the Zales Jewelry
26 store robbery, where he methodically and efficiently made off with jewelry valued
27 well in excess of \$100,000. 16 RT 2274-2332. Petitioner had visited the Zales
28 store on a prior date and then returned later dressed neatly in a suit to carry out the

1 robbery, utilizing the same modus operandi as the Van Cleef & Arpels robbery.⁴¹

2 Also, as noted previously, medical and psychiatric staff members at the
3 L.A. County Jail ultimately found petitioner to be alert and oriented, and suffering
4 from, at worst, personality disorders. See SAP Ex. 103; *cf. Panetti*, 551 U.S. at
5 960 (“The beginning of doubt about competence in a case like petitioner’s is not a
6 misanthropic personality or an amoral character. It is a psychotic disorder.”).

7 In view of the foregoing evidence, the California Supreme Court’s rejection
8 of Claim 12 was not unreasonable. Based on the record evidence and the
9 weaknesses in petitioner’s retrospective mental health allegations, the state court
10 could also have reasonably concluded that counsel was not deficient for failing to
11 raise the issue of competence at trial. (See Claim 11Q, *supra*.) Accordingly,
12 while the Court cannot resolve any potential issues relating to petitioner’s current
13 or future competence, Claim 12 is denied insofar as it alleges that petitioner was
14 incompetent before or during trial.

15 **VIII. Jury Instruction Claims**

16 Seven claims challenging the constitutionality of the jury instructions
17 survived the motion for judgment on the pleadings: Claims 13-17, 20, and 24.

18 **A. Failure to Instruct Jury it has Absolute Discretion to Grant** 19 **Mercy and Spare Petitioner’s Life (Claim 13)**

20 Petitioner claims the trial judge had an obligation to instruct the jurors, sua
21 sponte, “that they had the absolute discretion to exercise mercy and impose a life
22 sentence, even in the face of a finding on their part that death was appropriate.”
23 SAP ¶ 115.

24 Petitioner effectively concedes that the jury was properly instructed on the
25 statutory aggravating and mitigating factors contained in Penal Code § 190.3,
26

27 ⁴¹ Petitioner was subjected to a traffic stop just outside Van Cleef & Arpels one
28 month before the robbery, apparently while scouting the location. 16 RT 2351-2354.

1 including “any sympathetic or other aspect of the defendant’s character or record
 2 that the defendant offers as a basis for a sentence less than death, whether or not
 3 related to the offense for which he is on trial; [as well as his] background,
 4 character, history, any devotion and affection from his family and they for him,
 5 and anything favorable to him during his life or any other mitigating
 6 circumstance.” 20 RT 3002-3003; *see* Penal Code §§ 190.3(k) and (l).

7 Nevertheless, petitioner apparently contends that the trial court’s instructions were
 8 constitutionally inadequate because they did not sufficiently convey that the jury
 9 retained discretion to impose a life sentence even if the weight of the aggravating
 10 factors *permitted* a sentence of death.

11 In denying this claim, the California Supreme Court explained:

12
 13 Defendant contends the court had a sua sponte duty to
 14 instruct the jury that it “had the absolute discretion to exercise
 15 mercy and impose a life sentence, even in the face of a finding
 16 on [its] part that death was appropriate.” We have, however,
 17 repeatedly held that the court is not required to instruct on
 mercy. (*People v. Nicolaus* (1991) 54 Cal. 3d 551, 588-589;
People v. Benson (1990) 52 Cal. 3d 754, 808-809; *People v.*
Andrews (1989) 49 Cal. 3d 200, 227-228; *People v. Caro*
 (1988) 46 Cal. 3d 1035, 1067.)

18 The court here instructed the jury to consider “any other
 19 circumstance which extenuates the gravity of the crime, even
 20 though it is not a legal excuse for the crime and any
 21 sympathetic or other aspect of the defendant’s character or
 22 record that the defendant offers as a basis for a sentence less
 23 than death, whether or not related to the offense for which he is
 24 on trial”; and “defendant’s background, character, history and
 25 any devotion and affection for his family and they for him
 26 and anything favorable to him during his life or any other
 27 mitigating circumstance.” This instruction is even more
 28 expansive than the “catch-all” mitigation instruction suggested
 in *People v. Easley* (1983) 34 Cal. 3d 858, 878, footnote 10; it
 certainly suffices to advise the jury of the full range of
 mitigating evidence it could consider. Nothing more is
 required. (*People v. Sully* (1991) 53 Cal. 3d 1195, 1245-1246.)

26 *Livaditis*, 2 Cal. 4th at 781-82 (brackets in original).

27 The cases cited by the state court generally hold that the import of a “mercy
 28 instruction” is adequately covered by the standard instructions on mitigation and

1 aggravation as set forth in Penal Code § 190.3, on which petitioner's jury was
 2 instructed. Some of the cases relied upon by the California Supreme Court make
 3 reference to *California v. Brown*, 479 U.S. 538 (1987), which addressed the
 4 propriety of an instruction previously given in California courts prohibiting jurors
 5 from being "swayed by mere sympathy." *Id.* at 541. While no such instruction
 6 was given at petitioner's trial, *Brown* remains relevant here to the extent it
 7 reiterates United States Supreme Court authority regarding claims of instructional
 8 error, *i.e.*, that jury instructions must be viewed as a whole to see if the entire
 9 charge delivered a correct statement of the law, and (conversely) that courts
 10 should avoid interpretations that are inconsistent with the clear import of the
 11 instructions taken in their entirety. *Id.* at 541-542.

12 Here, in addition to the instructions cited by the California Supreme Court
 13 in its opinion, the instructions at petitioner's trial included these:

14 The weighing of aggravating and mitigating
 15 circumstances does not mean a mere mechanical counting of
 16 factors on each side of an imaginary scale or the arbitrary
 17 assignment of weights to any of them.

18 You are free to assign whatever moral or sympathetic
 19 value you deem appropriate to each and all of the various
 20 factors that you are permitted to consider.

21 20 RT 3005. These instructions conveyed the gist of the instruction advocated by
 22 petitioner.⁴² Certainly, no instructions precluded jurors from applying mercy even
 23 if aggravation outweighed mitigation.

24 Petitioner cites no United States Supreme Court case authority requiring the
 25 use of the instruction he proposes. Indeed, the Supreme Court has rejected the
 26 notion that a jury must be instructed "on its obligation and authority to consider"

27 ⁴² For this reason, it was not an unreasonable application of *Strickland* to deny the
 28 aspect of Claim 11R alleging ineffective assistance of counsel based on counsel's
 failure to request a mercy instruction. It is not reasonably probable that the absence
 of this instruction affected the verdict.

1 particular mitigating factors. *Buchanan v. Angelone*, 522 U.S. 269, 275 (1998).
 2 “[T]he State may shape and structure the jury’s consideration of mitigation so
 3 long as it does not preclude the jury from giving effect to any relevant mitigating
 4 evidence.” *Id.* at 276. Petitioner thus fails to show that the California Supreme
 5 Court’s holding is contrary to clearly established federal law. Accordingly, Claim
 6 13 must be denied.

7 **B. Failure to Instruct Jury that Love of Petitioner’s Family,**
 8 **Standing Alone, Is Sufficient Basis For Imposing Life Sentence**
 9 **(Claim 14)**

10 At trial, defense counsel proposed the following jury instruction:

11 During the penalty phase of this trial, the defense has presented
 12 evidence from members of the defendant’s family. Those
 13 witnesses have testified to their love of the defendant and the
 14 fact that they do not wish him to be put to death. You are
 15 instructed that you may consider and take into account as
 16 mitigating factors, these expressions of love and concern for
 17 the defendant and in determining [*sic*] whether he should be
 18 sentenced to death or life without possibility of parole. This
 19 evidence may be sufficient standing alone to warrant the return
 20 of a verdict of life imprisonment without the possibility of
 21 parole, if you should believe that it outweighs the aggravating
 22 circumstances found by you to be present in this case.

18 20 RT 2936-2938. The trial court rejected the proposed instruction:

19 THE COURT: I don’t think there is any necessity for
 20 giving that specific instruction. On that “L”, I will cover that
 21 [*sic*]. I think that is favorable to you.

22 COUNSEL: I would request the court give it because I
 23 think even in “L” sometimes that is not enough.

24 THE COURT: Well, I will cover it in “L”.

25 *Id.* at 2938. “L” apparently refers Penal Code §190.3(l) (also known as “Factor
 26 L”) which, as recited to petitioner’s jury, states: “Also you may consider a
 27 defendant’s background, character, history and any devotion and affection from
 28 his family and they for him, and anything favorable to him during his life or any

1 other mitigating circumstance.” 20 RT 3003.

2 On appeal, the California Supreme Court addressed petitioner’s claim as
3 follows:

4 The court instructed the jury that it was not to
5 mechanically count the factors, but that it was “free to assign
6 whatever moral or sympathetic value you deem appropriate to
7 each and all of the various factors that you are permitted to
8 consider.” This correctly instructed the jury on the weight to
be given any factor. There is no duty to tell the jury that any
specific fact alone might warrant a verdict of life.

8 *Livaditis*, 2 Cal. 4th at 782 (citations omitted).

9 Petitioner provides no case authority from the United States Supreme Court
10 or any other court showing that it was unreasonable for the California Supreme
11 Court to conclude that the instructions given by the trial judge already adequately
12 conveyed the substance of petitioner’s proposed instruction. Therefore, Claim 14
13 must be denied.

14 **C. Failure to Instruct Jury that Evidence of Petitioner’s Alleged**
15 **Oral Admissions Should Be Viewed with Caution (Claim 15)**

16 At trial, Beverly Hills Police Officer Dennis De Cuir testified about
17 statements petitioner allegedly made to police officers after the murders. Among
18 other things, he claimed that during the first interview, which (unlike later
19 interviews) was not tape recorded, petitioner stated that when he stabbed William
20 Smith “the knife went in just like butter.” 18 RT 2757. The prosecutor cited this
21 evidence in her closing argument:

22 [H]e walks over and picks up a survival knife and goes over to
23 a man who is 54 years old, whose hands are tied and taped
24 behind his back, whose legs are taped together and that man is
25 trying, struggling to get out of the tape. He plunges the knife
in his back. As he describes it to the detective, “it went in like
butter.” That is the person you are dealing with here.

26 20 RT 2957. Defense counsel did not object.

27 Prior to petitioner’s trial, the California Supreme Court had held in a non-
28 capital case that when the prosecution introduces evidence of a defendant’s oral

admission, the trial court has a sua sponte duty to instruct the jury that the evidence “must be viewed with caution.” *People v. Beagle*, 6 Cal. 3d 441, 455 (1971). Therefore, the trial court would ordinarily have been required to give the standard pattern instruction: “Evidence of an oral admission of the defendant should be viewed with caution.” CALJIC 2.71 (5th ed.).⁴³ However, at the time of petitioner’s trial, the state court had not yet resolved the question of whether the duty to give this instruction applied to the penalty phase of a capital case. The California Supreme Court addressed this question in petitioner’s appeal, concluding that “[b]ecause of the differences between guilt and penalty trials, we now hold that the court is required to give the cautionary instruction at the penalty phase only upon defense request.” *Livaditis*, 2 Cal. 4th at 783. Because trial counsel did not request the instruction, there was no error. *Id.* at 784. The court also concluded that even if the instruction should have been given, its absence here was harmless:

The purpose of the cautionary instruction is to assist the jury in determining if the statement was in fact made. The testimony concerning defendant’s oral admission was uncontradicted; defendant adduced no evidence that the statement was not made, was fabricated, or was inaccurately remembered or reported. There was no conflicting testimony concerning the precise words used, their context or their meaning. In addition, as noted, the defense, as well as the prosecution, relied on the statements. There is no reasonable possibility that the failure to give the cautionary instruction affected the penalty verdict.

Id. at 784 (citations and internal quotation marks omitted).

In Claim 15, petitioner contends that this instruction should have been given sua sponte by the trial judge. However, petitioner does not identify any clearly established federal law that would require such an instruction. In general,

⁴³ The current version of CALJIC 2.71 is slightly different: “Evidence of an oral admission of the defendant not contained in an audio or video recording and not made in court should be viewed with caution.” CALJIC 2.71 (2013). In either form, the instruction is intended to “assist the jury in determining whether the statement was in fact made.” *Beagle*, 6 Cal. 3d at 456.

1 to obtain federal habeas corpus relief based on an erroneous jury instruction, a
 2 petitioner must show that “the ailing instruction by itself so infected the entire trial
 3 that the resulting conviction violates due process.” *Estelle*, 502 U.S. at 72. In
 4 making this determination, the instruction must not be viewed in “artificial
 5 isolation,” but instead must be considered “in the context of the instructions as a
 6 whole and the trial record.” *Id.* The Supreme Court has recognized that failing to
 7 give an instruction is generally likely to be less prejudicial than giving an
 8 erroneous instruction. *Henderson v. Kibbe*, 431 U.S. 145, 155 (1977). The
 9 California Supreme Court’s harmlessness analysis reflects a reasonable conclusion
 10 that the absence of the cautionary instruction from petitioner’s penalty trial did not
 11 “so infect[] the entire trial that the resulting [death sentence] violates due process.”
 12 *Estelle*, 502 U.S. at 72.

13 In capital cases, any jury instruction that prevents the jury from
 14 “considering . . . any constitutionally relevant mitigating evidence” or
 15 “preclude[s] the jury from being able to give effect to mitigating evidence” is
 16 unconstitutional. *Buchanan*, 522 U.S. at 276. In reviewing whether a challenged
 17 instruction satisfies that standard, the court must determine “‘whether there is a
 18 reasonable likelihood that the jury has applied the challenged instruction in a way
 19 that prevents the consideration of constitutionally relevant evidence.’” *Id.*
 20 (quoting *Boyde*, 494 U.S. at 380). There is no possibility that the failure to give
 21 the cautionary instruction requested by petitioner could have had this effect on
 22 petitioner’s jury.

23 Because petitioner has failed to show that the California Supreme Court’s
 24 rejection of Claim 15 was contrary to or an unreasonable application of clearly
 25 established federal law, the claim must be denied.⁴⁴

27 ⁴⁴ Petitioner also alleges counsel was deficient for failing to request the instruction.
 28 This claim fails for reasons stated by the California Supreme Court in explaining
 why the instruction should be given at the penalty phase only at a defendant’s

D. Trial Judge's Misleading Comments to Jurors About Penalty Process that Allegedly Mandated Imposition of Death Sentence (Claim 16)

Petitioner claims the trial judge made comments to jurors that “described the penalty process as *mandating* death upon certain circumstances.” SAP ¶ 126 (emphasis added). Specifically, petitioner alleges that during the individual death qualification portion of voir dire, the judge explained to eight of the twelve jurors who were eventually seated that they would simply weigh the aggravating factors against the mitigating factors and impose a predetermined sentence based upon the outcome of that balancing test. *Id.* ¶ 127(a). The allegedly misleading remarks cited by petitioner include these:

THE COURT: You see, the law in California is that if the aggravating circumstances outweigh the mitigating circumstances, then you must bring in a verdict of death in the gas chamber. If on the other hand, mitigating circumstances outweigh the aggravating circumstances, then it is life without possibility of parole. Right?

[JUROR W.]: Uh-huh.

THE COURT: Good.

8 RT 1077. While addressing another juror, the judge explained, “Under the law of the State of California, if the aggravating circumstances outweigh the mitigating circumstances then the verdict must be death in the gas chamber. If the mitigating circumstances outweigh the aggravating circumstances, then the penalty shall be life without possibility of parole.” 9 RT 1183. In each of the

request. *See Livaditis*, 2 Cal. 4th at 783-84 (citing *People v. Vega*, 220 Cal. App.3d 310 (1990) and noting that petitioner’s trial counsel also relied on his alleged oral statements to the police as evidence of petitioner’s remorse). It is questionable whether reasonably competent trial counsel would have wanted to instruct the jury to view such potentially helpful evidence with caution.

1 remaining instances cited by petitioner, the judge's summary explanation to the
 2 prospective juror was substantially the same, *i.e.*, that if the circumstances in
 3 aggravation outweigh those in mitigation, then the verdict *must* be death. 9 RT
 4 1252-1253, 1267; 10 RT 1309, 1456; 11 RT 1533, 1611. Petitioner's trial counsel
 5 never objected.⁴⁵

6 Petitioner argues that the judge's statements during voir dire would have led
 7 these eight jurors to evaluate the evidence "with an improper predisposition to
 8 simply mechanically weigh [it]." Pet. Brief, Dkt. 280 at 117. This predisposition
 9 was not cured by subsequent instructions because the jurors "had already received
 10 the evidence with an improper concept of the applicable law." *Id.* And the
 11 prosecutor allegedly "exploited and exacerbated the trial court's erroneous
 12 description of the weighing process when she argued to the jury that the
 13 decisionmaking process was a mechanical one, the results of which would
 14 mandate either life or death." *Id.*; SAP ¶ 127(b).

15 **1. Applicable Law**

16 In California, a jury may not impose the death sentence unless it finds the
 17 factors in aggravation are "so substantial" in comparison to the factors in
 18 mitigation that death is warranted. *See People v. Brown*, 40 Cal. 3d 512, 540, 545
 19 (1985). The "so substantial" language was added to the capital penalty
 20 instructions to correct the fact that "under the bare language of the [death penalty]
 21 statute" a juror might have been led to believe that "if aggravating circumstances
 22 even slightly outweigh mitigating circumstances, death was mandatory."
 23 *Murtishaw v. Woodford*, 255 F.3d 926, 961 (9th Cir. 2001); *People v. Brown*, 40
 24 Cal. 3d at 545 & n.19. *See* Pet. Brief, Dkt. 288 at 27-28. Also, the instructions
 25

26 ⁴⁵ The "mercy instruction" later proposed by trial counsel (*see* Claim 13, *supra*)
 27 might be viewed as an effort to ameliorate the judge's remarks in voir dire; however,
 28 counsel did not indicate the proposed instruction was intended to remedy any
 misstatements by the judge.

1 should sufficiently inform the jury that it remains empowered to conclude that a
 2 life sentence is appropriate even if the aggravating evidence substantially
 3 outweighs the mitigating evidence. *Id.*

4 “When a jury is the final sentencer, it is essential that the jurors be properly
 5 instructed regarding all facets of the sentencing process.” *Walton v. Arizona*, 497
 6 U.S. 639, 653 (1990), *overruled on other grounds*, *Ring v. Arizona*, 536 U.S. 584
 7 (2002). Jurors must be given a clear statement of “what they must find to impose
 8 the death penalty.” *Maynard v. Cartwright*, 486 U.S. 356, 362 (1988).

9 In contrast to rules that guide or limit the jury’s consideration of
 10 aggravating factors, any instruction or court directive that limits the jury’s
 11 consideration of potential mitigation evidence is generally unconstitutional:

12
 13 In contrast to the carefully defined standards that must narrow
 14 a sentencer’s discretion to *impose* the death sentence, the
 15 Constitution limits a State’s ability to narrow a sentencer’s
 16 discretion to consider relevant evidence that might cause it to
 17 *decline to impose* the death sentence. “[T]he sentencer . . .
 18 [cannot] be precluded from considering, *as a mitigating factor*,
 19 any aspect of a defendant’s character or record and any of the
 circumstances of the offense that the defendant proffers as a
 basis for a sentence less than death.” Any exclusion of the
 “compassionate or mitigating factors stemming from the
 diverse frailties of humankind” that are relevant to the
 sentencer’s decision would fail to treat all persons as “uniquely
 individual human beings.”

20 *McCleskey v. Kemp*, 481 U.S. 279, 304 (1987) (emphasis and brackets in original)
 21 (quoting *Lockett v. Ohio*, 438 U.S. 586, 604 (1978)). According to petitioner, the
 22 trial judge’s statements violated these standards by misleading the jurors about the
 23 preconditions for imposing death, and the extent of their power to show mercy
 24 based on their consideration of any relevant evidence. In short, petitioner asserts
 25 that the judge’s description of the deliberative process was overly mechanistic.
 26 See Pet. Briefs, Dkt. 280 at 117, Dkt. 288 at 28.

27 On petitioner’s direct appeal, the California Supreme Court analyzed and
 28 rejected this claim as follows:

1 During jury selection, the court briefly summarized the
 2 penalty phase process to the prospective jurors. Defendant
 3 contends that the explanation to many of the prospective
 4 jurors, including several who actually served on the jury, was
 5 defective. As an example, defendant cites this explanation to
 6 one juror: "You see, the law in California is that if the
 7 aggravating circumstances outweigh the mitigating
 8 circumstances, then you must bring in a verdict of death in the
 9 gas chamber." Defendant contends this improperly imposed a
 10 mandatory death penalty. (See *People v. Brown* (1985) 40 Cal.
 11 3d 512, 540-545, revd. on other grounds *sub nom. California v.*
 12 *Brown* (1987) 479 U.S. 538.

13 We need not decide whether these summary comments,
 14 by themselves, fully and correctly instructed on the
 15 deliberative process. The comments were not the actual
 16 complete jury instructions. The full instructions came at the
 17 end of the trial, and fully satisfied the concerns addressed in
 18 *People v. Brown*, 40 Cal. 3d 512. Indeed, the court gave
 19 instructions substantially identical to those approved in *Brown*.
 20 (*Id.* at p. 545, fn. 19.)

21 "The purpose of these comments was to give prospective
 22 jurors, most of whom had little or no familiarity with courts in
 23 general and penalty phase death penalty trials in particular, a
 24 general idea of the nature of the proceeding. The comments
 25 were not intended to be, and were not, a substitute for full
 26 instructions at the end of trial." (*People v. Edwards, supra*, 54
 27 Cal. 3d at p. 840.) "If defendant wanted the court to give a
 28 fuller explanation during jury selection, he should have
 requested it." (*Id.* at p. 841.) He did not do so.

Livaditis, 2 Cal. 4th at 780-781⁴⁶

Although not cited by the state court in its 1992 denial of petitioner's direct appeal, the United States Supreme Court had issued a decision two years earlier addressing the use of mandatory language in sentencing instructions in another California capital case. In *Boyde*, 494 U.S. 370, the defendant argued that the trial

⁴⁶ In *Edwards*, the trial judge repeatedly referred during voir dire to mitigating evidence as "good evidence" and aggravating evidence as "bad evidence." The defendant argued on appeal that the remarks were improper. The California Supreme Court rejected the claim for the reasons quoted above, and stated: "Defendant is correct that the terms 'good' and 'bad' do not thoroughly explain the nature of mitigating and aggravating factors, but he does not demonstrate error." *Edwards*, 54 Cal. 3d at 841.

1 court erred in giving an instruction stating that the jury “shall impose” a sentence
 2 either of death or of life in prison depending upon whether the aggravating
 3 circumstances outweighed the mitigating circumstances. The Supreme Court
 4 upheld the use of this instruction, concluding that the “shall impose” language did
 5 not prevent the jury from making an individualized assessment of death penalty’s
 6 appropriateness, and that the instruction did not prevent consideration of
 7 constitutionally relevant evidence, including mitigating evidence of the
 8 defendant’s background and character. The Court held that there is no
 9 “constitutional requirement of unfettered sentencing discretion in the jury, and
 10 States are free to structure and shape consideration of mitigating evidence in an
 11 effort to achieve a more rational and equitable administration of the death
 12 penalty.” *Id.* at 378 (citation and internal quotation marks omitted).

13 2. Analysis

14 The judge’s allegedly improper comments to the future jurors occurred
 15 between May 4 and May 7, 1987, inclusive. 8 RT 1077, 11 RT 1611. The formal
 16 jury instructions were given after the conclusion of closing arguments on June 16,
 17 1987, some 40 days later. 20 RT 2985 *et seq.* The jury instructions concluded
 18 with the following:

19
 20 It is now your duty to determine which of the two
 21 penalties, death or confinement in the state prison for life
 22 without possibility of parole, shall be imposed on the
 23 defendant. After having heard all of the evidence and
 24 after having heard and considered the arguments of
 25 counsel, you shall consider, take into account and be
 26 guided by the applicable factors of aggravating and
 27 mitigating circumstances, upon which you have been
 28 instructed.

*The weighing of aggravating and mitigating
 circumstances does not mean a mere mechanical counting
 of factors on each side of an imaginary scale or the
 arbitrary assignment of weights to any of them.*

*You are free to assign whatever moral or
 sympathetic value you deem appropriate to each and all
 of the various factors that you are permitted to consider.*
 In weighing the various circumstances, you simply

determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances.

To return a verdict of death, each of you must be persuaded that the aggravating evidence or circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without possibility of parole.

20 RT 3005-3006 (emphasis added). These were the last substantive instructions the jury received immediately before beginning their deliberations. Two days later, the jury sent a note requesting clarification on an issue unrelated to this claim, quoting a portion of an instruction immediately preceding the above-quoted language. *Id.* at 3008-30010. It is thus clear that the jurors had a printed copy of the instructions and were paying close attention to them.

As shown by the above-cited authorities, it is not clear that the judge's remarks during *voir dire* even amounted to an incorrect statement of the law; at worst, the remarks may have been incomplete. But assuming the judge's comments were incorrect or misleading, petitioner would still not be entitled to relief. The California Supreme Court effectively held that any fault in the judge's pretrial description of the deliberative process was later cured when the jury was formally instructed; those final instructions included the appropriate standards for weighing and deliberating on the question of penalty. As stated by the California Supreme Court, the jurors were "fully and correctly instructed on the deliberative process" at the end of the trial, with language substantially identical to that approved by the California Supreme Court less than two years before petitioner's trial. *Livaditis*, 2 Cal. 4th at 781 (citing *People v. Brown*, 40 Cal. 3d at 540-45).⁴⁷

In the analogous context of an instruction that conveyed an erroneous

⁴⁷ Moreover, as previously discussed, the instructions that were given adequately conveyed the jury's ability to apply mercy in choosing an appropriate sentence. See discussion of Claim 13, *supra*.

1 burden-shifting rule to the defendant's detriment in a capital case, the United
2 States Supreme Court explained:

3 Analysis must focus initially on the specific language
4 challenged, but the inquiry does not end there. If a specific
5 portion of the jury charge, considered in isolation, could
6 reasonably have been understood as creating a presumption
7 that relieves the State of its burden of persuasion on an element
8 of an offense, the potentially offending words must be
 considered in the context of the charge as a whole. Other
 instructions might explain the particular infirm language to the
 extent that a reasonable juror could not have considered the
 charge to have created an unconstitutional presumption.

9 *Francis v. Franklin*, 471 U.S. 307, 315 (1985) (finding error based on an incorrect
10 instruction where the remaining instructions did not sufficiently cure or dissipate
11 the error). In the present case, a reasonable jurist could conclude that the giving
12 of the correct instructions, almost six weeks after the judge's brief remarks and
13 immediately before deliberations began, was certainly enough to "cure" or at least
14 sufficiently "dissipate" any potential confusion. *Cf. Boyde*, 494 U.S. at 378 ("[A]
15 single instruction to a jury may not be judged in artificial isolation, but must be
16 viewed in the context of the overall charge."); *Siripongs v. California*, 35 F.3d
17 1308, 1323 (9th Cir. 1994) ("The instructions as a whole . . . did not mandate an
18 improperly mechanical weighing process, or prevent the jury's exercise of
19 discretion. . . . The trial court tempered its 'shall impose death' instruction by
20 other instructions.").

21 Nor did the prosecutor's final argument compound the error asserted by
22 petitioner. The prosecutor argued:

23 If you find that the aggravating factors, and the words
24 are "are so substantial in comparison to the mitigating factors,"
25 then the law finds the appropriate penalty to be the death
26 penalty. That is a standard you will all be weighing, whether
27 or not what you have heard in aggravation is so substantial in
28 comparison to what you have heard and what you consider to
 be mitigation, then the law will basically guide you and tell
 you what the appropriate penalty is. . . .

1 And if you find the aggravating factors so substantial in
 2 comparison to the mitigating, that you vote what the law
requires you to vote and that is the death penalty in this case.

3 20 RT 2944-2945. While the single use of the word “requires” might be
 4 objectionable out of context, the argument viewed as a whole sets forth a correct
 5 and appropriate description of the jury’s task. See 20 RT 2941-2965; *Middleton v.*
 6 *McNeil*, 541 U.S. 433, 434-35 (2004) (where three other instructions correctly
 7 stated law, no reasonable likelihood jury misled by single contrary instruction).
 8 Moreover, jurors are presumed to follow the court’s instructions over the
 9 arguments of counsel. *Boyde*, 494 U.S. at 384; *Murtishaw*, 255 F.3d at 969 n.26.

10 The judge’s pretrial remarks, in hindsight, may have been ill-advised.
 11 However, an examination of the trial record as a whole shows that the California
 12 Supreme Court’s denial of this claim was not unreasonable. It would be rational
 13 to conclude that, in light of the final jury instructions given immediately before
 14 deliberations began, there was no reasonable likelihood any jurors believed they
 15 were prohibited from considering any and all constitutionally relevant evidence,
 16 or were otherwise “mandated” to impose death. See *Boyde*, 494 U.S. at 380.
 17 Accordingly, Claim 16 must be denied.

18 **E. Misleading Instructions on Penalty Phase Deliberative Process**
 19 **(Claim 17)**

20 Petitioner asserts three additional errors in the penalty instructions. First,
 21 the court allegedly erred in instructing the jury that it was “simply” to determine
 22 the penalty by using a balancing test, which trivialized the enormity of the
 23 sentencing task and undermined the the jury’s sense of responsibility for its role.
 24 SAP ¶ 131(a). Second, the court allegedly erred by instructing the jury to weigh
 25 factors and impose death if the evidence in aggravation was “so substantial that it
 26 warranted death,” without informing the jury that it must impose life if it found
 27 that mitigation outweighed aggravation, even if aggravation was so substantial
 28 that it warranted death. SAP ¶ 131(b). Third, petitioner contends the use of the

1 terms “so substantial” and “warrants death” were vague and overbroad. SAP
2 ¶ 131(c).

3 Petitioner presents his most thorough discussion of Claim 17 in his Reply
4 on Remaining Non-Evidentiary Claims. Dkt. 288 at 27-29. There, petitioner
5 argues:

6 The gravamen of [Claim 17] is that the vague and overbroad
7 language of the jury instruction failed adequately to inform the jury, and
8 impress upon them the limits and extent, of their sentencing authority. On
9 the one hand, the jurors were prohibited from imposing death unless
10 aggravation so substantially outweighed mitigation that it warranted death.
11 At the same time, a conclusion that aggravation was “so substantial” did not
12 *mandate* a sentence of death. Any individual juror was still empowered to
13 conclude that a life sentence was appropriate [citing *People v. Brown*, 40
14 Cal. 3d 512, *supra*]. The “so substantial” language in the instruction was
15 intended to correct the fact that “under the bare language of the 1978 [death
16 penalty] statute,” a juror would have been misled to conclude that “if
17 aggravating circumstances even *slightly* outweigh mitigating circumstances,
18 death was mandatory” [citing *Murtishaw*, 255 F.3d 926, *supra*, and *People*
19 *v. Brown*]. The [given] instruction, however, did not inform the jurors
20 explicitly that aggravation actually had to *outweigh* mitigation as a
21 precondition to imposing death; nor did the instruction in any way inform
22 the jurors that they at all times retained the power to impose life.

23 Among the irreducible minimum protections required for a
24 constitutional capital sentencing scheme are jury instructions that clearly
25 inform the jurors of their role and scope of discretion [repeating quotations
26 and citations from *Walton*, 497 U.S. 639, *Maynard*, 486 U.S. 356, *etc.*,
27 *supra*]. The instructions here violated ... these constitutional mandates by
28 failing to inform the jurors of the preconditions for imposing death, or the

1 extent of their power to show mercy based on their consideration of any
2 evidence.

3 The state court's rejection of this claim constituted an unreasonable
4 application of established federal law to the facts of this case. On direct
5 appeal, neither the state court, nor the cases cited in its denial of the claim,
6 addressed or analyzed the failure of the instruction to inform the jury of its
7 discretion to impose life even if aggravation outweighed mitigation. In
8 turn, the state court rejected the notion that the instruction's language
9 telling the jurors "simply" to weigh the aggravation and mitigation risked
10 trivializing their task. Instead, the state court suggested that the use of
11 "simply" "merely" served to "'describe[] the mechanics of the jury's
12 normative process.'" The state court's conclusion is an unreasonably
13 expansive interpretation of the meaning a rational juror would give to the
14 adverb.

15 *Id.* (citations omitted except as indicated). Claim 17 is thus an amalgam of
16 arguments, some of which are duplicative of claims previously addressed. The
17 legal authorities relevant to this claim were set forth in the discussion of Claims
18 13, 14 and 16, *supra*.

19 The essence of petitioner's vagueness and overbreadth claim appears to be
20 that the instructions did not clearly inform the jury that even if aggravation is "so
21 substantial" as to *permit* a sentence of death, it does not necessarily *mandate* a
22 sentence of death. This claim is similar to those asserted in the prior claims,
23 except petitioner now expresses it as an issue of vagueness and overbreadth,
24 which petitioner contends is the gravamen of Claim 17. However, he again fails
25 to identify any clearly established Federal law in support of that argument.

26 The closest the Supreme Court has come to addressing this issue is in *Boyd*
27 *v. California*, where the Court analyzed whether a similar instruction was so
28 vague and ambiguous as to preclude the jury from properly considering mitigating

1 evidence consisting of the defendant's background and character. The Court
2 found it did not, explaining:

3 The claim is that the instruction is ambiguous and therefore
4 subject to an erroneous interpretation. We think the proper
5 inquiry in such a case is whether there is a reasonable
6 likelihood that the jury has applied the challenged instruction
7 in a way that prevents the consideration of constitutionally
8 relevant evidence. Although a defendant need not establish that
9 the jury was more likely than not to have been impermissibly
10 inhibited by the instruction, a capital sentencing proceeding is
11 not inconsistent with the Eighth Amendment if there is only a
12 possibility of such an inhibition. . . . There is, of course, a
13 strong policy in favor of accurate determination of the
14 appropriate sentence in a capital case, but there is an equally
15 strong policy against retrials years after the first trial where the
16 claimed error amounts to no more than speculation. Jurors do
17 not sit in solitary isolation booths parsing instructions for
18 subtle shades of meaning in the same way that lawyers might.
19 Differences among them in interpretation of instructions may
20 be thrashed out in the deliberative process, with commonsense
21 understanding of the instructions in the light of all that has
22 taken place at the trial likely to prevail over technical
23 hairsplitting.

24 *Boyd*, 494 U.S. at 380-81. Plainly, *Boyd* provides no support for petitioner's
25 claim.

26 Petitioner's core contention is that the Constitution requires capital
27 sentencing instructions to be more precise than those given at his trial. However,
28 the Supreme Court has upheld instructions with less clarity than those used here
(see, e.g., *Boyd v. California*), so long as they were "structured so as to prevent
the penalty from being administered in an arbitrary and unpredictable fashion,"
and allowed the jury to consider "any relevant mitigating evidence regarding [the
defendant's] character or record and any circumstances of the offense."
California v. Brown, 479 U.S. 538, 541 (1987). The Supreme Court has also
made clear that there is no constitutional obligation to provide separate or
individualized instructions on particular mitigating factors. *Buchanan*, 522 U.S. at
273-74. Therefore, with respect to petitioner's claims that the instructions were
impermissibly vague and overbroad, and were not refined enough to adequately

1 convey that any single mitigation factor may justify a life sentence, petitioner has
2 not shown that the California Supreme Court's rejection of these claims was
3 unreasonable.

4 As for the trial judge's use of the word "simply," petitioner fails to identify
5 any clearly established federal law prohibiting such terminology in a capital
6 sentencing instruction. The judge did not spontaneously interject the word
7 "simply." It was explicitly part of the approved instruction in existence at the
8 time of petitioner's trial: "In weighing the various circumstances, you *simply*
9 determine under the relevant evidence which penalty is justified and appropriate
10 by considering the totality of the aggravating circumstances with the totality of the
11 mitigating circumstances." 20 RT 3005 (emphasis added). The instruction
12 contained the same language as was suggested by the California Supreme Court in
13 *People v. Brown*, and deemed acceptable by the United States Supreme Court in
14 *Boyde. Boyde*, 494 U.S. at 375 n.3. While the instruction is perhaps improved by
15 dropping the word "simply" (as was later done⁴⁸), no federal law clearly
16 establishes that its presence in the instruction at the time of petitioner's trial was
17 constitutionally impermissible.

18 In *Caldwell v. Mississippi*, the Supreme Court held that it was error to
19 instruct a capital sentencing jury that its penalty decision might not be final
20 because it would ultimately be reviewed by an appellate court, because this led the
21 jury "to believe that the responsibility for determining the appropriateness of the
22 defendant's death rests elsewhere." *Caldwell*, 472 U.S. 320, 323, 328-29 (1985).
23 The *Caldwell* holding has sometimes been described as prohibiting comments that
24 "mislead the jury as to its role in the sentencing process in a way that allows the
25 jury to *feel less responsible than it should* for the sentencing decision." *Darden v.*
26 *Wainwright*, 477 U.S. 168, 183 n.15 (1986) (emphasis added). Nevertheless,
27
28

⁴⁸ See current CALJIC 8.88.

1 “clearly established Federal law for purposes of § 2254(d)(1) includes only the
 2 holdings, as opposed to the dicta, of [the Supreme] Court’s decisions.” *White v.*
 3 *Woodall*, 134 S. Ct. 1697, 1702 (2014) (citation and internal quotation marks
 4 omitted). It is neither contrary to nor an unreasonable application of the *Caldwell*
 5 rule to conclude that using the word “simply” in describing for capital sentencing
 6 jurors the process of balancing aggravating and mitigating factors has no potential
 7 to lead them to “believe that the responsibility for determining the appropriateness
 8 of the defendant’s death *rests elsewhere*.” *Caldwell*, 472 U.S. at 329 (emphasis
 9 added). *Cf. Woodall*, 134 S. Ct at 1706 (“Section 2254(d)(1) provides a remedy
 10 for instances in which a state court unreasonably applies this Court’s precedent; it
 11 does not require state courts to *extend* that precedent or license federal courts to
 12 treat the failure to do so as error.”).⁴⁹

13 For the foregoing reasons, the state court’s denial of Claim 17 was not
 14 unreasonable.

15 **F. Failure to Define “Aggravating” and “Mitigating” Factors**
 16 **(Claim 20)**

17 Petitioner contends that the trial court should have provided the jury with
 18 definitions of “aggravating” and “mitigating” circumstances. SAP ¶ 143
 19 (emphasis added). He claims the failure to do so permitted the jury to consider
 20 factors that were not aggravating and disregard circumstances that were
 21 mitigating. *Id.* ¶ 146. Specifically, he argues that the trial court should have
 22 given an instruction substantially identical to one given in *People v. Dyer*, 45 Cal.
 23 3d 26 (1988), which was a special jury instruction that supplemented the standard

24
 25 ⁴⁹ The California Supreme Court could also have reasonably concluded that counsel
 26 was not ineffective for failing to object to the use of the word “simply” or requesting
 27 clarification of the “so substantial” instruction because it is not reasonably probable
 28 that the jurors were misled about their duty to weigh the aggravating and mitigating
 circumstances in view of the entire trial record, including counsel’s arguments and
 the other jury instructions.

1 penalty phase instructions by defining the terms “aggravating circumstance” and
 2 “mitigating circumstance.” *Id.* at 77. That instruction provided that “an
 3 aggravating circumstance is any fact, condition or event attending the commission
 4 of a crime which increases its guilt or enormity, or adds to its injurious
 5 consequences which is above and beyond the elements of the offense itself” and
 6 “a mitigating circumstance is any fact, condition or event which, as such, does not
 7 constitute a justification or excuse for the offense in question, but which may be
 8 considered as an extenuating circumstance in determining the appropriateness of
 9 the death penalty.” *Id.* In *Dyer*, the defendant *objected* to the instruction. The
 10 California Supreme Court rejected the claim of error because the definitions
 11 “provided a helpful framework within which the jury could consider the specific
 12 circumstances in aggravation and mitigation set forth in [Penal Code § 190.3].”
 13 *Id.* at 78. The state court has repeatedly held, however, that such an instruction is
 14 not required. *See, e.g., People v. Whalen*, 56 Cal. 4th 1, 88 (2013). The United
 15 States Supreme Court has also rejected the idea that “the Eighth Amendment
 16 requires that a capital jury be instructed on the concept of mitigating evidence
 17 generally, or on particular statutory mitigating factors.” *Buchanan*, 522 U.S. at
 18 270.⁵⁰

19 Petitioner also fails to identify what evidence his jury might have
 20 improperly considered or disregarded due to the lack of the desired definitions.
 21 The state court could therefore have reasonably denied this claim on the ground

22
 23 ⁵⁰ Petitioner’s argument based on *Walton*, 497 U.S. 639, and *Richmond v. Lewis*,
 24 506 U.S. 40 (1992) is unavailing. Those cases involved a facially vague aggravating
 25 factor under Arizona law — whether the killing was “heinous, cruel or depraved” —
 26 that the Arizona Supreme Court had saved from unconstitutionality by providing a
 27 narrowing construction. In the course of its decision, the Supreme Court observed
 28 that “it is essential that the jurors be properly instructed regarding all facets of the
 sentencing process,” and “[i]t is not enough to instruct the jury in the bare terms of
 an aggravating circumstance that is unconstitutionally vague on its face.” *Walton*,
 497 U.S. at 653.

1 that petitioner's allegations failed to establish that the asserted error had any
2 impact on the jury's penalty verdict.

3 Because the failure to more specifically define the terms "aggravating" and
4 "mitigating" was contrary to neither state nor federal law, and petitioner has failed
5 to show why the particular circumstances of his trial made it necessary to provide
6 such a definition in order to ensure that the jury considered his mitigating
7 evidence, the California Supreme Court's denial of both the instructional error
8 claim and the associated claims of ineffective assistance of counsel was not an
9 unreasonable application of clearly established federal law.

10 **G. Failure to Explain Jurors' Duties During Penalty Phase (Claim**
11 **24)**

12 Petitioner claims a standard jury instruction cautioning jurors not to be
13 influenced by bias or public opinion was erroneously omitted from his penalty
14 trial, leaving the jurors uninstructed on an important aspect of the deliberative
15 process. The portion of the instruction that petitioner alleges was crucial to a fair
16 penalty determination was this: "You must neither be influenced by bias nor
17 prejudice against the defendant, nor swayed by public opinion or public feelings."
18 SAP ¶ 162 (quoting CALJIC 8.84.1 (6th ed.)). Petitioner argues that the failure to
19 provide such an instruction "resulted in the trial court never informing the jury
20 that it must accept and follow the law as stated by the trial court, that it not be
21 swayed by bias or prejudice against Petitioner and that they had an obligation to
22 consider all the evidence, follow the law and to exercise its discretion in a
23 conscientious manner." SAP ¶ 162(b).

24 Applying the test set forth in *Boyde*, 494 U.S. 370, the question is whether
25 there is a reasonable likelihood that without this admonition the jurors might have
26 concluded that it was acceptable to base their verdict on bias, prejudice, or public
27 opinion. *See id.* at 380. There is no reason to suspect that the jurors — after
28 extensive voir dire, repeated admonitions, closing arguments, and final

1 instructions — would believe this. They were clearly instructed to limit their
 2 deliberations to the evidence presented and follow the law as stated in the court’s
 3 instructions. *See, e.g.*, 20 RT 2987-2989. The California Supreme Court’s
 4 rejection of this claim therefore was not an unreasonable application of clearly
 5 established federal law. For similar reasons, the state court could reasonably have
 6 concluded that petitioner suffered no prejudice from counsel’s failure to request
 7 this instruction, and accordingly denied this aspect of Claim 11R.

8 **IX. Jury Misconduct (Claim 29)**

9 Petitioner alleges three instances of juror misconduct. Based on post-trial
 10 interviews of some of the jurors, he claims: (a) one of the jurors decided to vote
 11 for the death penalty before hearing any testimony; (b) another juror heard “a
 12 rumor circulating during the trial that the defendant’s buddies from New York or
 13 Las Vegas might try and help him escape,” which caused the juror to “realize that
 14 the defendant was dangerous” and made him “feel good that the security was
 15 tight”; and (c) during deliberations, the jury foreman told other jurors “that he
 16 checked with the judge or someone else and that the judge had already decided
 17 that there was no issue regarding insanity.” SAP ¶ 182.

18 “In essence, the right to jury trial guarantees to the criminally accused a fair
 19 trial by a panel of impartial, ‘indifferent’ jurors.” *Turner v. Louisiana*, 379 U.S.
 20 466, 471 (1965) (quoting *Irvin v. Dowd*, 366 U.S. 717, 722 (1961)). A jury’s
 21 verdict “must be based upon the evidence developed at the trial.” *Id.* Due process
 22 requires that a defendant be tried by a jury capable and willing to decide the case
 23 solely on the evidence before it. *Smith v. Phillips*, 455 U.S. 209, 217 (1982). A
 24 jury’s exposure to facts not in evidence deprives a defendant of the rights to
 25 confrontation, cross-examination, and assistance of counsel. *Lawson v. Borg*, 60
 26 F.3d 608, 612 (9th Cir. 1995).

27 However, a petitioner is entitled to habeas relief for juror misconduct only
 28 if it can be established that the constitutional error had a “substantial and injurious

1 effect or influence in determining the jury's verdict." *Id.* (quoting *Brecht v.*
2 *Abrahamson*, 507 U.S. at 637); accord *Estrada v. Scribner*, 512 F.3d 1227, 1235
3 (9th Cir. 2008). In assessing prejudice from juror misconduct, the Ninth Circuit
4 places great weight on the nature of the extraneous information. *Lawson*, 60 F.3d
5 at 612. Generally, to warrant relief, the misconduct must relate directly to a
6 material aspect of the case. *United States v. Bagnariol*, 665 F.2d 877, 885 (9th
7 Cir. 1981). Nevertheless, the introduction of extraneous material that is
8 duplicative or cumulative of facts properly in evidence may render juror
9 misconduct harmless. *Hughes v. Borg*, 898 F.2d 695, 700 (9th Cir. 1990).
10 Misconduct may also be deemed harmless where the other evidence amassed at
11 trial was so overwhelming that the jury would have reached the same result even
12 had it not considered the extraneous material. *Id.*

13 The common law restriction on using juror testimony to impeach the verdict
14 is reflected in both federal and California law. See Fed. R. Evid. 606(b); Cal.
15 Evid. Code § 1150. In general, post-trial statements by jurors about their thought
16 processes or subjective views of the evidence are inadmissible. *Tanner v. United*
17 *States*, 483 U.S. 107, 120 (1987); *People v. Steele*, 27 Cal. 4th 1230, 1260-64
18 (2002). Juror testimony is admissible, however, to establish that jurors were
19 exposed to extrinsic evidence, *i.e.*, evidence that was not introduced in evidence
20 and that the defendant therefore had no opportunity to confront. Cal. Evid. Code
21 § 1150 ("Upon an inquiry as to the validity of a verdict, any otherwise admissible
22 evidence may be received as to statements made, or conduct, conditions, or events
23 occurring, either within or without the jury room, of such a character as is likely to
24 have influenced the verdict improperly."); see also *Estrada v. Scribner*, 512 F.3d
25 1227, 1237 (9th Cir. 2008) ("A long line of precedent distinguishes juror
26 testimony about the consideration of extrinsic evidence, which we may consider,
27 from juror testimony about the subjective effect of evidence on any of the
28 particular jurors here, which we may not consider.").

1 In support of the first instance of alleged jury misconduct, petitioner
2 presented a declaration from a juror stating: “Once I heard the facts, it was history
3 to me; that he killed two, and a third was killed out of stupidity, there was nothing
4 in mitigation that could have saved his life.” SAP Ex.144. This statement relates
5 only to the juror’s intrinsic thought processes and subjective reaction to the
6 evidence. The California Supreme Court would have found it inadmissible under
7 Evidence Code § 1150, and could reasonably have denied the claim on that basis.
8 *See, e.g., Steele*, 27 Cal. 4th at 1264 (evidence that jurors misunderstood judge’s
9 instructions inadmissible). Since a federal court would have reached the same
10 result applying Federal Rule of Evidence 606(b), the state court’s decision is not
11 an unreasonable application of clearly established federal law.

12 The alleged “rumor circulating during the trial” about a possible escape
13 plan presents a different issue. Juror Mark said that when he heard the rumor, he
14 “fe[lt] good that security was tight.” SAP Ex. 145. Mr. Mark’s comment about
15 how the security made him feel is evidence of his subjective thought processes,
16 which is inadmissible. *See Steele*, 27 Cal. 4th at 1235. However, the rest of juror
17 Mark’s statement appears to describe extrinsic evidence that related to a material
18 concern of a reasonable juror in selecting death or life imprisonment: petitioner’s
19 future dangerousness while incarcerated. *Cf. Skipper v. South Carolina*, 476 U.S.
20 1, 4-5 (1986) (discussing significance of future dangerousness in capital
21 sentencing). Nevertheless, the California Supreme Court could reasonably have
22 concluded that the juror’s exposure to a “rumor” about petitioner’s plans to escape
23 was not prejudicial because it did not give rise to “a substantial likelihood of juror
24 bias.” *In re Carpenter*, 9 Cal. 4th 634, 653 (1995) (explaining state harmless error
25 test for juror exposure to extraneous information); *cf. Estrada*, 512 F.3d at 1235
26 (question is “whether the error had ‘substantial and injurious’ effect or influence
27 in determining the jury’s verdict”) (quoting *Brecht*, 507 U.S. at 638). First, juror
28 Mark characterized the evidence as a “rumor,” a word that conveys doubt about

1 the reliability of the purported information. There is no evidence that he or any
 2 other juror was exposed to anything more substantial. *Cf. Lawson*, 60 F.3d at 610
 3 n.2 (juror spoke directly to several people with first-hand knowledge of murder
 4 defendant's propensity for violence, and shared this information with fellow
 5 jurors). Second, it was unlikely that the jurors discussed or considered the escape
 6 rumor to any significant degree. *Cf. id.* at 612 (factor relevant to prejudice inquiry
 7 is "the extent to which the jury discussed and considered" the extraneous
 8 material). Juror Mark does not indicate that any other juror heard the rumor.
 9 None of the other three jurors whose declarations petitioner submitted in support
 10 of his claims even mentions the rumor. SAP Exs. 2, 3, 144. Significantly, while
 11 juror Mark described certain aspects of the jury deliberations in his declaration, he
 12 did not say that anyone discussed the rumor.⁵¹ Finally, as discussed above in
 13 connection with petitioner's shackling claim, the jury heard substantial evidence
 14 about petitioner's multiple prior attempts to resist arrest and escape from law
 15 enforcement authorities, and the jury was unavoidably aware of the high level of
 16 courtroom security measures in place during the trial. Indeed, the facts of the case
 17 itself included an audacious escape attempt by petitioner. Thus, a "rumor" of yet
 18 another possible escape attempt was unlikely to have added to the jurors'
 19 awareness of petitioner's proclivity for escape attempts. In light of these
 20 circumstances, the California Supreme Court's rejection of this claim was not an

21
 22 ⁵¹ While juror Marks's description of the deliberations is not admissible for the
 23 purpose of assessing jurors' attitudes towards the evidence or statements made
 24 during their deliberations, it is admissible for the purpose of evaluating the prejudice
 25 factors, which include "the length of time [the information] was available to the jury
 26 . . . , the extent to which the jury discussed and considered it . . . , and . . . at what
 27 point in the deliberations it was introduced." *Lawson*, 60 F.3d at 612; *Sassounian v.*
 28 *Roe*, 230 F.3d 1097, 1109 (9th Cir. 2000) ("[A]lthough we may consider testimony
 concerning *whether the improper evidence was considered*, we may not consider the
 jurors' testimony about the subjective impact of the improperly admitted evidence.")
 (emphasis added).

1 unreasonable application of clearly established federal law.

2 Juror Mark also stated that “[t]he foreman of the jury told us that he
3 checked with the judge *or someone else* and that the judge had already decided
4 that there was no issue regarding sanity.” SAP Ex. 145 at 1009 (emphasis added).
5 On its face, this statement indicates uncertainty as to the ultimate source of the
6 information that “there was no issue regarding insanity.” It is highly doubtful that
7 the trial judge would have engaged in *ex parte* banter with a juror on such a topic.
8 In any event, because petitioner did not claim insanity or assert any mental state
9 defenses, the alleged statement by the foreman was essentially correct, and did not
10 contradict any evidence or argument presented in petitioner’s defense. Therefore
11 it would have been reasonable for the California Supreme Court to conclude that
12 this communication from the foreman could not have had any substantial effect on
13 the jury’s deliberations.

14 **X. Additional Claims**

15 **A. Trial Judge’s Reliance on Probation Report (Claim 30)**

16 Petitioner claims the trial judge, when considering petitioner’s automatic
17 post-trial motion to reduce the sentence from death to life without parole,
18 improperly relied on a report submitted by the Los Angeles County Probation
19 Office. SAP ¶ 185. He claims he was prejudiced because the report contains
20 evidence that was not introduced at trial. The probation report contains statements
21 from various individuals who did not testify, as well as the opinions and
22 conclusions of the probation officer who authored the report. Petitioner fails to
23 specify which portions of the report were prejudicial; however, the report includes
24 emotional statements by the surviving hostages and relatives of the deceased
25 hostages, and concludes with the probation officer’s personal opinion that
26 petitioner had showed no remorse or acceptance of responsibility. 2 CT 352-376.

27 Under California law, when a jury returns a death verdict, the defendant is
28 automatically deemed to have moved for modification of the sentence, to reduce it

1 to life imprisonment without the possibility of parole. Cal. Penal Code § 190.4(e).
2 In ruling on this motion, the trial judge is required “to independently reweigh the
3 evidence of aggravating and mitigating circumstances and then to determine
4 whether, in the judge’s independent judgment, the weight of the evidence supports
5 the jury verdict” *People v. Clark*, 50 Cal. 3d 583, 634-35 (1990). Because
6 the judge’s function is to determine whether the evidence supports the jury’s
7 verdict, “the only evidence the court is to review is that which was before the
8 jury.” *Id.*

9 On direct appeal, the California Supreme Court rejected this claim as
10 follows:

11 The record indicates that the court had read the
12 probation report before ruling on the automatic motion.
13 However, absent a contrary indication in the record, we assume
14 that the court was not influenced by the report in ruling on the
15 motion. (*People v. Lewis* (1990) 50 Cal. 3d 262, 287.) Here,
16 we need not rely on such an assumption; the record
17 affirmatively shows the court was not influenced by the report.

18 At the outset of its ruling, the court stated, “I am
19 required under the law in ruling on the application to review
20 the *evidence*, which I have, and I have considered and am
21 taking that into account. . . .” (*Italics added.*) The court then
22 discussed the reasons it was denying the motion, all of which
23 were based on, and amply supported by, the evidence
24 presented at trial. After this discussion, the court expressly
25 stated that these were its “reasons for ruling on the
26 application”; it directed that they be entered in the clerk’s
27 minutes.

28 *After* the court denied the automatic motion, and after
the defense waived arraignment for judgment and stated there
was no legal cause why judgment should not be pronounced,
the court discussed whether it should modify the judgment on
its “own motion.” It concluded that there was no basis upon
which to do so. Only during this discussion did the court refer
to the contents of the probation report. The record thus shows
that the court was aware of, and properly performed, its duty to
base the modification motion solely on the evidence presented
to the jury. Its consideration of the report only came after that
ruling in discussing whether there was any other basis upon
which to modify the judgment. There was no error, and
certainly no prejudice.

Livaditis, 2 Cal. 4th at 786-87 (emphasis original).

1 This Court’s review of the trial transcript confirms the accuracy of the
 2 California Supreme Court’s description. The trial judge made it clear, with
 3 repeated references to evidence presented at trial, that his decision on the
 4 modification motion was limited to and supported by the trial record. 20 RT
 5 3035-3037. As required by state law, the judge carefully enumerated the various
 6 grounds for denying the motion, all of which were based on trial evidence. *Id.*
 7 After the trial court had expressly denied the modification motion, he moved on to
 8 address the separate question of “whether [he] should modify the verdict on [his]
 9 own motion,” and at this point for the first time referred to the probation report.
 10 20 RT 3037. Petitioner points to nothing in the record that suggests a contrary
 11 reading. For this reason, trial counsel was not deficient for failing to object to the
 12 judge relying on the report after he denied the modification motion. (See Claim
 13 11Q, *supra*.)

14 Even if the judge erred, and even if his error was more than merely a
 15 mistake in the application of state law,⁵² petitioner does not attempt to show how
 16 he was prejudiced. While the probation report was far from favorable, petitioner
 17 must still show at least a reasonable likelihood that the trial judge would have
 18 reduced the sentence to life if he had not relied on the report. He has not done so.
 19 Thus, the California Supreme Court reasonably denied this claim.

20 **B. Ineffective Assistance of Post-Conviction Counsel (Claim 35)**

21 The petition includes a claim conditionally alleging that petitioner’s state
 22 post-conviction counsel was ineffective. SAP ¶¶ 200-203. The claim is
 23 conditional in that it does not specifically identify any failing by appellate counsel
 24 or state habeas counsel, but instead asserts hypothetically that “[i]f the Court
 25

26 ⁵² See *Turner v. Calderon*, 281 F.3d 851, 871 (9th Cir. 2002) (denying certificate of
 27 appealability on claim that trial judge erred in evaluating evidence when ruling on
 28 § 190.4(e) motion because “at most the trial court’s error would be one of state
 law.”).

1 determines that any of [the habeas claims that were not raised on appeal] should
 2 have been presented by Petitioner in his state post-conviction proceedings, the
 3 failure to present these claims is the result of ineffective assistance of post-
 4 conviction counsel” SAP ¶ 202(a).⁵³ Read literally, this states no claim of
 5 ineffective assistance of post-conviction counsel, since this Court has made no
 6 antecedent determination that any claim “should have been presented by Petitioner
 7 in his state post-conviction proceedings.” It may be, however, that petitioner
 8 intended to say that if the *California Supreme Court* determined that any of his
 9 habeas claims should have been presented on direct appeal but were not, *see In re*
 10 *Dixon*, 41 Cal.2d 756 (1953), then he alleges that the failure to do so is the result
 11 of ineffective assistance of appellate counsel. But if this was petitioner’s
 12 intention, he could easily have said so in his Second Amended Petition in a less
 13 conclusory fashion. The state court has already announced its decision about
 14 which claims were defaulted under the *Dixon* bar, so petitioner could have
 15 identified those claims in his federal petition and more specifically alleged the
 16 manner in which he alleges appellate counsel was ineffective. He has not done so.
 17 “Conclusory allegations which are not supported by a statement of specific facts
 18 do not warrant habeas relief.” *James v. Borg*, 24 F.3d 20, 26 (9th Cir. 1994).

19 Even if Claim 35 were interpreted to raise a claim of ineffective assistance
 20 of appellate counsel, it would fail. The standard for assessing whether appellate
 21 counsel was ineffective is the same as for trial counsel and is found in *Strickland*’s
 22 two part test of deficient performance plus resulting prejudice. *Smith v. Robbins*,

24 ⁵³ To the extent the claim alleges ineffective assistance of *state habeas counsel*, it
 25 does not present a cognizable claim for federal habeas corpus relief. *Bonin v.*
 26 *Calderon*, 77 F.3d 1155 (9th Cir. 1996); *see also Coleman v. Thompson*, 501 U.S.
 27 722, 752 (1991) (“There is no constitutional right to an attorney in state
 28 post-conviction proceedings.”). The “narrow exception” to the *Coleman* rule
 recognized in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012) does not apply here. *Id.* at
 1315.

1 528 U.S. 259, 285 (2000). In determining prejudice, the question is whether
 2 petitioner would have prevailed on appeal but for appellate counsel's errors. *Id.*
 3 For reasons that are readily discernable from the Court's discussion of the other
 4 claims in this petition, appellate counsel was not constitutionally ineffective for
 5 failing to raise these claims on direct appeal. Therefore, Claim 35 must be denied.

6 **C. Discrimination on Basis of Socioeconomic Status (Claim 36)**

7 Petitioner claims that a defendant's socioeconomic background plays "a
 8 significant and sometimes dispositive role in capital charging and sentencing
 9 decisions," and that as an indigent defendant, he was prejudiced by "the inevitably
 10 inconsistent and discriminatory use of the death penalty in violation of the
 11 fundamental principles of the Bill of Rights." SAP ¶¶ 205-206. However,
 12 petitioner concedes that this claim is not supported by "existing case law." SAP
 13 ¶ 206 n.18. Given the lack of any evidence that the prosecutor or the jurors or the
 14 judge "in [*this*] case acted with discriminatory purpose," this claim must fail.
 15 *McCleskey v. Kemp*, 481 U.S. at 292.

16 **D. Inherent Unconstitutionality of Death Penalty (Claim 37)**

17 Petitioner claims the death penalty is inherently unconstitutional due to the
 18 irreconcilable mandates of *Furman v. Georgia*, 408 U.S. 238 (1972), which held a
 19 sentencer's discretion must be channeled to avoid arbitrary and capricious
 20 outcomes, and *Lockett v. Ohio*, 438 U.S. 586 (1978), which held a sentencer must
 21 be allowed to consider any and all mitigating factors, unfettered by any
 22 channeling that might otherwise compel a verdict of death. SAP ¶ 208. This
 23 claim finds support in Justice Blackmun's dissent from the denial of certiorari in
 24 *Callins v. Collins*, 510 U.S. 1141, 1143 (1994) (mem). The United States
 25 Supreme Court has acknowledged that "[t]he tension between general rules [that
 26 ensure consistency in determining who receives a death sentence] and
 27 case-specific circumstances has produced results not altogether satisfactory," but
 28 the Court has not yet jettisoned the jurisprudence it built atop *Furman* and *Lockett*.

1 *Kennedy v. Louisiana*, 554 U.S. 407, 436 (2008).

2 **XI. Cumulative Error (Claim 1)**

3 Petitioner asserts cumulative error based on all the claims in his Second
4 Amended Petition: “This combination, *inter alia*, of ineffective assistance of
5 counsel, trial court error, prosecutorial misconduct and jury misconduct had a
6 substantial and injurious effect or influence in determining the jury’s sentencing
7 verdict and rendered Petitioner’s guilty plea and the penalty phase of Petitioner’s
8 trial unfair and the sentencing and trial process unreliable.” SAP ¶ 3.

9 As reflected above, the majority of petitioner’s claims must be denied
10 because their supporting allegations do not demonstrate a federal constitutional
11 violation together with an unreasonable denial of relief by the California Supreme
12 Court that satisfies the requirements of 28 U.S.C. § 2254(d). This applies also to
13 many aspects of petitioner’s omnibus ineffective assistance of counsel claim.
14 These denials based on the lack of any error do not enter into the cumulative error
15 analysis because “there is nothing to accumulate to a level of a constitutional
16 violation.” *Mancuso v. Olivarez*, 292 F.3d 939, 957 (9th Cir. 2002).

17 In contrast, in its analysis of Claims 2, 8, 15, 16, and 29 — and the aspects
18 of Claim 11 based on counsel’s approach to the mitigating evidence and the
19 instructions relating to how the jurors should weigh that evidence — the Court
20 assumed (or as an alternative grounds assumed) that there was constitutional error.
21 The Court concluded, however, that the California Supreme Court could have
22 reasonably denied those claims on the ground that there was no reasonable
23 probability that the errors affected the jurors’ decision to vote for the death
24 penalty. The same is true when these claims are considered together. A
25 reasonable jurist could conclude that their aggregate impact on petitioner’s trial
26 did not create a reasonable probability of a different result or have a “substantial
27 and injurious effect or influence in determining the jury’s verdict.” *Strickland*,
28 466 U.S. at 693-94; *Brecht*, 507 U.S. at 638; *cf. United States v. Karterman*, 60

1 F.3d 576, 579-80 (9th Cir. 1995) (“Because each error is, at best, marginal, we
2 cannot conclude that their cumulative effect was so prejudicial . . . that reversal is
3 warranted.”) (citation and internal quotation marks omitted). The error, if any,
4 that would have had the greatest potential for prejudice was counsel’s alleged
5 failure to marshal all the available mitigating evidence. The other errors identified
6 in Claims 2, 8, 11R, 15, 16, and 29 would only have influenced the jury’s penalty
7 deliberations at the margins. Under these circumstances, the California Supreme
8 Court could reasonably have concluded that the additional mitigating evidence
9 identified by petitioner in his state habeas corpus petition was unlikely to have
10 altered the jurors’ assessment of the balance of aggravating and mitigating factors
11 in this robbery and kidnapping scheme that resulted in three murders, even if the
12 jurors had been instructed exactly as petitioner contends they should have been.
13 Therefore, Claim 1 must also be denied.

14 **XII. Order**

15 For the foregoing reasons, the Second Amended Petition is DENIED.

16 IT IS SO ORDERED.

17
18 Dated: July 8, 2014



19
20 **STEPHEN V. WILSON**
21 United States District Judge
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Caution

As of: January 23, 2020 3:44 AM Z

People v. Livaditis

Supreme Court of California

June 18, 1992, Decided

No. S004767. Crim. No. 26407

Reporter

2 Cal. 4th 759 *; 831 P.2d 297 **; 9 Cal. Rptr. 2d 72 ***; 1992 Cal. LEXIS 2585 ****; 92 Daily Journal DAR 8217; 92 Cal. Daily Op. Service 5236

THE PEOPLE, Plaintiff and Respondent, v. STEVEN **LIVADITIS**, Defendant and Appellant.

prospective juror, circumstances, arrest, district attorney, instructions, violence, brace, blanket, sorry, see people, briefcase, jewelry, remorse, juror, gun, leg, defense counsel

Subsequent History: Rehearing Denied August 13, 1992, Reported at [1992 Cal. LEXIS 4097](#).

Rehearing denied by [People v. Livaditis, 1992 Cal. LEXIS 4097 \(Cal., Aug. 13, 1992\)](#)

Writ of certiorari denied **Livaditis v. California**, 507 U.S. 975, 113 S. Ct. 1421, 122 L. Ed. 2d 790, 1993 U.S. LEXIS 2018 (Mar. 8, 1993)

Writ of habeas corpus denied [Livaditis v. Davis, 2019 U.S. App. LEXIS 23797 \(9th Cir. Cal., Aug. 9, 2019\)](#)

Prior History: [****1] Superior Court of Los Angeles County, No. A095327, Laurence J. Rittenband, Judge.

[People v. Livaditis, 1992 Cal. LEXIS 3146 \(Cal., June 18, 1992\)](#)

Disposition: The judgment is affirmed.

Core Terms

hostages, contends, aggravating, mitigating, oral admission, trial court, guilt, death penalty, caution, hearsay, killed, murder, cautionary instruction,

Case Summary

Procedural Posture

By automatic appeal, defendant challenged his death penalty sentence imposed in the Superior Court of Los Angeles County (California), after he pleaded guilty to three counts of first degree murder, five counts of robbery, three counts of kidnapping, and one count of second degree burglary. Defendant admitted allegations of murder during the commission of robbery and burglary and multiple murder, and weapons enhancement allegations.

Overview

During the robbery of a jewelry store defendant took five hostages, killing two of them. During defendant's escape attempt, one hostage was shot by police. Defendant pleaded guilty to three counts of first degree murder; five counts of robbery; three counts of kidnapping; and one count of second degree burglary. The trial court imposed the death penalty. The court affirmed, finding no error in the dismissal for cause of one prospective juror because of her views on the death penalty, or in defendant's physical restraint during the trial. The court found no error in the court's refusal to instruct the jury on the restraints, on mercy, on defendant's devotion to his family, on defendant's oral admissions, and on age as a factor. The court found no error in the instruction on

resisting arrest and battery on a peace officer. The court denied defendant's constitutional challenges to the death penalty law, and rejected his argument for a comparative sentence review. The court held that the trial court was not improperly influenced by the probation report. The court held that evidence of three instances in which defendant forcibly resisted arrest was properly admitted.

Outcome

The court affirmed defendant's conviction and death sentence for murder, robbery, kidnapping, and burglary, holding that the trial court did not commit error in dismissing a prospective juror because of her views on the death penalty, or in ordering defendant's physical restraint during trial. The court found no error in the court's jury instructions or denial of defendant's constitutional challenges to his sentence.

or substantially impair the performance of her duties as a juror in accordance with her instructions and her oath. On appeal, if the prospective juror's responses are equivocal, that is, capable of multiple inferences, or conflicting, the trial court's determination of that juror's state of mind is binding.

Criminal Law & Procedure > Sentencing > Capital Punishment > Death-Qualified Jurors

Criminal Law & Procedure > ... > Challenges to Jury Venire > Death Penalty > General Overview

Criminal Law & Procedure > Juries & Jurors > Disqualification & Removal of Jurors > General Overview

[HN2](#) Capital Punishment, Death-Qualified Jurors

A court may properly excuse a prospective juror who would automatically vote against the death penalty in the case before him, regardless of his willingness to consider the death penalty in other cases.

LexisNexis® Headnotes

Criminal Law & Procedure > Sentencing > Capital Punishment > Death-Qualified Jurors

Criminal Law & Procedure > ... > Challenges to Jury Venire > Death Penalty > General Overview

Criminal Law & Procedure > Juries & Jurors > Disqualification & Removal of Jurors > General Overview

Criminal Law & Procedure > ... > Jury Instructions > Particular Instructions > General Overview

Criminal Law & Procedure > Sentencing > Capital Punishment > General Overview

[HN1](#) Capital Punishment, Death-Qualified Jurors

The trial court may excuse a prospective juror for cause if that juror's views on capital punishment would prevent

Criminal Law & Procedure > Appeals > Reversible Error > General Overview

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > General Overview

[HN3](#) Appeals, Reversible Error

Because of its potentially prejudicial impact on the jury, shackling should be ordered only as a last resort and only upon a showing of a manifest need for such restraints. Any restraints should be as unobtrusive as possible, although as effective as necessary under the circumstances. Although these restrictions make the trial court's discretion to order restraints relatively narrow, the court's ruling will be upheld on appeal absent a showing of a manifest abuse of that discretion.

Criminal Law & Procedure > Trials > Jury Instructions > Requests to Charge

[HN4](#) Jury Instructions, Requests to Charge

When the restraints are concealed from the jury's view, the instruction cautioning the jury not to be influenced by

restraints should not be given unless requested by defendant since it might invite initial attention to the restraints and thus create prejudice which would otherwise be avoided.

Criminal Law &
Procedure > ... > Reviewability > Preservation for
Review > General Overview

Evidence > Relevance > Preservation of Relevant
Evidence > Exclusion & Preservation by
Prosecutors

HN5 [Reviewability, Preservation for Review](#)

An appellate court may not reverse a judgment because of the erroneous exclusion of evidence unless the substance, purpose, and relevance of the excluded evidence was made known to the court by the questions asked, an offer of proof, or by any other means.

Evidence > Admissibility > Character Evidence

Evidence > ... > Hearsay > Exceptions > General
Overview

Evidence > ... > Hearsay > Exceptions > Statements
Against Interest

Evidence > ... > Statements as
Evidence > Hearsay > Rule Components

Evidence > ... > Hearsay > Rule
Components > General Overview

HN6 [Admissibility, Character Evidence](#)

The proponent of hearsay has to alert the court to the exception relied upon and has the burden of laying the proper foundation. Under [Cal. Evid. Code §§ 403](#) and [405](#), if a hearsay objection is properly made, the burden shifts to the party offering the hearsay to lay a proper foundation for its admissibility under an exception to the hearsay rule.

Evidence > Admissibility > Character Evidence

Evidence > ... > Procedural Matters > Preliminary
Questions > General Overview

Evidence > ... > Preliminary

Questions > Admissibility of Evidence > General
Overview

HN7 [Admissibility, Character Evidence](#)

See [Cal. Evid. Code § 405](#).

Evidence > Rule Application & Interpretation

Evidence > Admissibility > Procedural
Matters > Rulings on Evidence

HN8 [Evidence, Rule Application & Interpretation](#)

A state is generally not required to admit evidence in a form inadmissible under state law.

Criminal Law & Procedure > Sentencing > Capital
Punishment > Bifurcated Trials

Criminal Law & Procedure > Trials > Jury
Instructions > Objections

Criminal Law & Procedure > ... > Jury
Instructions > Particular Instructions > General
Overview

Criminal Law & Procedure > Sentencing > Capital
Punishment > Death-Qualified Jurors

Criminal Law &
Procedure > ... > Reviewability > Preservation for
Review > General Overview

HN9 [Capital Punishment, Bifurcated Trials](#)

The purpose of comments to prospective jurors is to give prospective jurors, most of whom have little or no familiarity with courts in general and penalty phase death penalty trials in particular, a general idea of the nature of the proceeding. The comments are not intended to be, and are not, a substitute for full instructions at the end of trial. If defendant wanted the court to give a fuller explanation during jury selection, he should have requested it.

Criminal Law & Procedure > Sentencing > Capital
Punishment > Mitigating Circumstances

Criminal Law & Procedure > Trials > Jury
Instructions > Requests to Charge

[HN10](#) **Capital Punishment, Mitigating Circumstances**

There is no duty to tell the jury that any specific fact alone might warrant a verdict of life.

Criminal Law & Procedure > Trials > Jury
Instructions > Cautionary Instructions

Criminal Law & Procedure > ... > Jury
Instructions > Particular Instructions > Use of
Particular Evidence

Criminal Law & Procedure > Trials > Jury
Instructions > Requests to Charge

Criminal Law & Procedure > ... > Standards of
Review > Harmless & Invited Error > General
Overview

[HN11](#) **Jury Instructions, Cautionary Instructions**

The court is required to give the cautionary instruction on a defendant's oral admissions at the penalty phase only upon defense request.

Criminal Law & Procedure > Sentencing > Capital
Punishment > Aggravating Circumstances

[HN12](#) **Capital Punishment, Aggravating Circumstances**

Criminal behavior condensed into a short time period could reasonably be considered more serious than the same behavior spread out over a long time.

Criminal Law &
Procedure > Sentencing > Imposition of
Sentence > General Overview

Criminal Law & Procedure > ... > Jury
Instructions > Particular Instructions > Use of
Particular Evidence

Criminal Law &
Procedure > Trials > Verdicts > Unanimity

[HN13](#) **Sentencing, Imposition of Sentence**

The court need not instruct the jury it could consider other crimes evidence only if it unanimously found such crimes had been proved beyond a reasonable doubt.

Criminal Law & Procedure > Sentencing > Capital
Punishment > Aggravating Circumstances

Criminal Law & Procedure > Trials > Jury
Instructions > Requests to Charge

Criminal Law & Procedure > Sentencing > Capital
Punishment > Mitigating Circumstances

[HN14](#) **Capital Punishment, Aggravating Circumstances**

The court need not instruct the jury that it could return a verdict of death only if it were persuaded beyond a reasonable doubt (i) of the existence of each aggravating factor, (ii) that the aggravating factors outweighed the mitigating factors, and (iii) that death was the appropriate penalty.

Criminal Law & Procedure > Sentencing > Capital
Punishment > General Overview

Criminal Law &
Procedure > Trials > Verdicts > Polling of Jury

Criminal Law &
Procedure > Trials > Verdicts > Special Verdicts

[HN15](#) **Sentencing, Capital Punishment**

The court need not require a written statement from the jury detailing the evidence upon which it relied and the reasons for imposing the death penalty.

Criminal Law & Procedure > Sentencing > Capital
Punishment > Aggravating Circumstances

Criminal Law & Procedure > Trials > Jury
Instructions > Requests to Charge

[HN16](#) **Capital Punishment, Aggravating Circumstances**

The court need not clarify the [Cal. Penal Code § 190.3\(b\)](#), instruction to state that it refers to violent criminal conduct other than the crimes charged in this proceeding.

Criminal Law & Procedure > Sentencing > Capital Punishment > Mitigating Circumstances

Criminal Law & Procedure > Trials > Jury Instructions > Objections

[HN17](#) **Capital Punishment, Mitigating Circumstances**

The court need not delete inapplicable mitigating factors from its instructions.

Criminal Law & Procedure > Appeals > Right to Appeal > Defendants

Criminal Law & Procedure > ... > Sentencing Alternatives > Probation > General Overview

Criminal Law & Procedure > Sentencing > Appeals > General Overview

[HN18](#) **Right to Appeal, Defendants**

In ruling on an automatic motion to modify the verdict under [Cal. Penal Code § 190.4\(e\)](#), the court reviews only the evidence presented to the jury, which does not include the probation report.

Headnotes/Summary

Summary

CALIFORNIA OFFICIAL REPORTS SUMMARY

In a prosecution under the 1978 death penalty law, defendant pleaded guilty to the first degree murder of three persons ([Pen. Code, § 187](#)), to five counts of robbery ([Pen. Code, § 211](#)), to three counts of kidnapping ([Pen. Code, § 207, subd. \(a\)](#)), and to one count of second degree burglary ([Pen. Code, § 459](#)), arising out of a robbery of a jewelry store in which

defendant took five hostages, three of whom were killed. Defendant admitted special circumstance allegations of murder during the commission of robbery and burglary as to two of the murders ([Pen. Code, § 190.2, subd. \(a\)\(17\)](#)), and multiple murder ([Pen. Code, § 190.2, subd. \(a\)\(3\)](#)). After a penalty trial, the jury imposed the death penalty. (Superior Court of Los Angeles County, No. A095327, Laurence J. Rittenband, Judge.)

The Supreme Court affirmed. It held that the trial court did not err in excusing for cause a prospective juror who, although she indicated a willingness to consider the death penalty under hypothetical facts not applicable to the case (a prior murder by an older defendant), her ability to perform her duty was substantially impaired by her stated predisposition to have already made up her mind to vote for life without possibility of parole. The court also held that the trial court did not abuse its discretion in ordering a temporary leg brace placed on defendant during one day of jury selection in view of information regarding a possible escape plan by defendant, together with defendant's history of prior escape attempts, or in ordering defendant handcuffed during the testimony of a former hostage who was afraid of defendant and would not come into the courtroom unless he was restrained. The court further held that the trial court did not err, during the penalty phase, in which some unrecorded statements defendant made to the police about the crime were admitted, in failing to instruct sua sponte that evidence of his oral admission should be viewed with caution; if there was error, the court held, it was harmless. Because of the differences between guilt and penalty trials, the trial court is required to give the cautionary instruction at the penalty phase only on defense request. The court also held there was no error as to exclusion of defense hearsay evidence, the admission of evidence of prior unadjudicated crimes, or as to jury instructions. (Opinion by Arabian, J., with Lucas, C. J., Panelli, Kennard, Baxter and George, JJ., concurring. Separate opinion by Mosk, J., concurring in the judgment.)

Headnotes

CALIFORNIA OFFICIAL REPORTS HEADNOTES

Classified to California Digest of Official Reports

[CA\(1a\)](#)  (1a) [CA\(1b\)](#)  (1b)

Jury § 43—Challenges—For Cause—View on Capital Punishment.

--In a capital murder prosecution, the trial court did not

err in excusing for cause a prospective juror who, although she indicated a willingness to consider the death penalty under hypothetical facts not applicable to the case (a prior murder by an older defendant), her ability to perform her duty was substantially impaired by her stated predisposition to have already made up her mind to vote for life without possibility of parole. A court may properly excuse a prospective juror who would automatically vote against the death penalty in the case before him or her, regardless of his or her willingness to consider the death penalty in other cases.

[CA\(2\)](#) [↓] (2)

Jury § 43—Challenges—For Cause—View on Capital Punishment—Equivocal Responses.

--The trial court may excuse a prospective juror for cause if that juror's views on capital punishment would prevent or substantially impair the performance of his or her duties as a juror in accordance with the juror's instructions and oath. On appeal, if the prospective juror's responses are equivocal, i.e., capable of multiple inferences, or conflicting, the trial court's determination of that juror's state of mind is binding.

[CA\(3\)](#) [↓] (3)

Criminal Law § 44—Rights of Accused—Fair Trial—Physical Restraints on Defendant—Shackling.

--Because of its potentially prejudicial impact on the jury, shackling of a criminal defendant at trial should be ordered only as a last resort and only on a showing of a manifest need for such restraints. Any restraints should be as unobtrusive as possible, although as effective as necessary under the circumstances. Although these restrictions make the trial court's discretion to order restraints relatively narrow, the court's ruling will be upheld on appeal absent a showing of manifest abuse of that discretion.

[CA\(4\)](#) [↓] (4)

Criminal Law § 44—Rights of Accused—Fair Trial—Physical Restraints on Defendant—Escape Plans.

--In a capital murder prosecution, the trial court did not abuse its discretion in ordering a temporary leg brace placed on defendant during one day of jury selection in view of information regarding a possible escape plan by

defendant, together with defendant's history of prior escape attempts. It is not necessary that the restraint be based on the conduct of the defendant at the time of trial. The trial court attempted to make the restraint as unobtrusive as possible, and promptly ordered it removed as soon as it was satisfied there was sufficient courtroom security to make it unnecessary. Moreover, it was inevitable that the jury would learn of defendant's prior escape attempts, and such evidence, coupled with the evidence of the crime, would make it obvious to the jury that defendant was a security risk. Thus, the leg brace, even if noticed by one or more prospective jurors, would have had little prejudicial effect under the circumstances.

[CA\(5\)](#) [↓] (5)

Criminal Law § 44—Rights of Accused—Fair Trial—Physical Restraints on Defendant—Handcuffs—Fear of Witness.

--In a capital murder prosecution of a defendant who killed two jewelry store employee hostages during a holdup, the trial court did not abuse its discretion in ordering defendant handcuffed during the testimony of a former hostage who was afraid of defendant and would not come into the courtroom unless he was restrained. Although the restraint was not imposed for reasons of courtroom security, there was still a sufficient showing of need to support the court's exercise of discretion. Defendant had terrorized the witness for 13 hours, during which time he cold-bloodedly murdered 2 other bound hostages while the witness lay helpless on the floor next to them. Under the circumstances, the trial court's carefully limited attempt to alleviate her fear by requiring handcuffs, invisible to the jury and worn only for a short time, was within its discretion.

[See 5 **Witkin & Epstein**, Cal. Criminal Law (2d ed. 1989) §§ 2483, 2484.]

[CA\(6\)](#) [↓] (6)

Criminal Law § 246—Trial—Instructions—Duty to Instruct Sua Sponte—Restraints on Defendant.

--In a capital murder prosecution in which defendant was restrained with a leg brace for a day during jury selection, and with handcuffs during one witness's testimony at trial, the trial court did not err in not instructing the jury sua sponte that the restraints should

not influence its determination. There was no evidence that any juror actually observed the leg brace, and there was no suggestion that the handcuffs were noticeable. When restraints are concealed from the jury's view, the cautionary instruction should not be given unless requested by defendant, since it might invite initial attention to the restraints and thus create prejudice which could otherwise be avoided.

[CA\(7\)](#) [↓] (7)

Criminal Law § 521—Punishment—Penalty Trial—Evidence—Nonviolent Felony.

--Although any prior felony conviction, even of a nonviolent felony, is admissible in the penalty phase of a capital case under [Pen. Code, § 190.3, factor \(c\)](#), only the fact of the conviction is admissible, not the underlying facts of the crime. Evidence of the facts of criminal activity, whether or not accompanied by a conviction, is admissible under [Pen. Code, § 190.3, factor \(b\)](#), but only if the activity involves force or violence. Accordingly, evidence of defendant's possession of stolen computers and of suspected cocaine when he was arrested was admissible under [§ 190.3, factor \(b\)](#), in connection with evidence that defendant forcibly resisted those arrests. The prosecution could show the reason for defendant's arrests and the subsequent batteries, which involved force or violence. Although the possessions of the computers and cocaine did not themselves involve force or violence, they were the crimes leading to the arrests that defendant resisted and were thus part of the same continuous course of criminal activity that included force or violence.

[CA\(8\)](#) [↓] (8)

Criminal Law § 523—Punishment—Penalty Trial—Instructions—Resisting Arrest.

--In the penalty phase of a capital case in which evidence was introduced that defendant forcibly resisted arrest on three occasions, as a prior violent felony under [Pen. Code, § 190.3, factor \(b\)](#), the trial court did not err in instructing on the elements of resisting arrest and battery on a police officer, even though resisting arrest, standing alone, does not necessarily involve force or violence. The statute does not require that any specific crime inherently involve force or violence, only that the actual criminal activity be violent, and the evidence

supported a finding that defendant committed the offenses of resisting arrest and battery, with the requisite force or violence, at least once.

[CA\(9\)](#) [↓] (9)

Criminal Law § 567—Appellate Review—Presenting and Reserving Objections—Exclusion of Hearsay.

--The proponent of hearsay has to alert the trial court to the exception relied on and has the burden of laying the proper foundation for its admission to preserve the issue of its exclusion for appeal. Accordingly, in the penalty phase of a capital murder prosecution in which the trial court sustained an objection to hearsay testimony by defendant's mother, uncle and brother that he expressed remorse while in jail, defendant failed to preserve the issue for appeal, where he did not even suggest to the trial court that the hearsay statements were admissible under some exception, let alone show that the evidence qualified for admission under the state-of-mind exception as he claimed on appeal. This was especially important since, if the issue had been properly presented to the trial court, it would have had discretion to exclude the expression of remorse ([Evid. Code, § 1250](#)) if it was made under circumstances such as to indicate its lack of trustworthiness ([Evid. Code, § 1252](#)).

[CA\(10\)](#) [↓] (10)

Criminal Law § 521—Punishment—Penalty Trial—Evidence—Remorse—Hearsay.

--In the penalty phase of a capital case, the trial court's exclusion of hearsay statements by defendant expressing remorse did not violate his federal constitutional right to have the sentencer consider all relevant mitigating evidence. A state is generally not required to admit evidence in a form inadmissible under state law, as the same lack of reliability that makes the statements excludable under state law makes them excludable under the federal Constitution. The exclusion also did not violate defendant's due process rights. The trial court did not prevent defendant from presenting evidence of remorse, but only evidence in the form of inadmissible hearsay not subject to cross-examination.

[CA\(11\)](#) [↓] (11)

Criminal Law § 520—Punishment—Penalty Trial—Jury Selection—Explanation to Jury.

--It was not necessary to decide on appeal whether, in the jury selection process at the penalty phase of a capital case, the trial court's brief summary of the penalty phase process to prospective jurors fully and correctly instructed the jury on the deliberative process. The comments were not the actual complete jury instructions, which came at the end of the trial and fully satisfied the necessary requirements. The purpose of the initial comments was to give prospective jurors a general idea of the nature of the proceeding, and were not intended to be, and were not, a substitute for full instructions at the end of the trial. If defendant wanted the court to give a fuller explanation during jury selection, he should have requested it.

[CA\(12\)](#) [📄] (12)**Criminal Law § 523—Punishment—Penalty Trial—Instructions—Mercy.**

--In the penalty phase of a capital trial, the trial court did not err in failing to instruct the jury sua sponte that it had the absolute discretion to exercise mercy and impose a life sentence even if it found that death was appropriate. The trial court gave an expansive instruction that sufficed to advise the jury of the full range of mitigating evidence it could consider, and nothing more is required.

[CA\(13\)](#) [📄] (13)**Criminal Law § 523—Punishment—Penalty Trial—Instructions—Love of Family.**

--In the penalty phase of a capital prosecution, the trial court did not err in refusing defendant's request to tell the jury that evidence of his family's love and affection for him and his love for his family could be sufficient standing alone to warrant the return of a verdict of life. The trial court correctly instructed the jury on the weight to be given any factor, and it had no duty to tell the jury that any specific fact alone might warrant a verdict of life.

[CA\(14\)](#) [📄] (14)**Criminal Law § 523—Punishment—Penalty Trial—Instructions—Admissions—Viewing With Caution.**

--In the penalty phase of a capital prosecution in which some unrecorded statements defendant made to the police about the crime were admitted, the trial court did not err in failing to instruct sua sponte that evidence of his oral admission should be viewed with caution. Because of the differences between guilt and penalty trials, the court is required to give the cautionary instruction at the penalty phase only on defense request. The only relevance of the defendant's extrajudicial statements in the penalty phase is as either aggravating or mitigating evidence, not as evidence of guilt, and whether a particular statement is aggravating or mitigating is often open to interpretation.

[CA\(15\)](#) [📄] (15)**Criminal Law § 677.2—Appellate Review—Harmless and Reversible Error—Instructions—Failure or Refusal to Give—Capital Case Penalty Trial—Defendant's Admissions—Caution.**

--In the penalty phase of a capital murder prosecution, any error by the trial court in failing to instruct the jury that admissions by defendant should be viewed with caution was harmless, as there was no reasonable possibility that the failure to give the cautionary instruction affected the penalty verdict. The purpose of the cautionary instruction is to assist the jury in determining if the statements were in fact made, and the testimony concerning defendant's oral admissions was uncontradicted. Defendant adduced no evidence that the statements were not made, were fabricated, or were inaccurately remembered or reported. There was no conflicting testimony concerning the precise words used, their context or their meaning, and the defense, as well as the prosecution, relied on the statements.

[CA\(16\)](#) [📄] (16)**Criminal Law § 523—Punishment—Penalty Trial—Instructions—Absence of Mitigating Factor.**

--Although it is a correct statement of the law that the absence of a mitigating factor is not itself aggravating, a specific instruction to that effect is not required at the penalty phase of a capital prosecution, at least not unless the court or parties make an improper contrary suggestion. A jury properly advised about the broad scope of its sentencing discretion is unlikely to conclude that the absence of such unusual factors as "extreme" emotional disturbance, victim consent, or reasonable

belief in moral justification is entitled to significant aggravating weight.

[CA\(17\)](#) [📄] (17)

Criminal Law § 523—Punishment—Penalty Trial—Instructions—Mitigating Factor—Age.

--At the penalty phase of a capital prosecution of a defendant who was 22 years old at the time of the murders, the trial court did not err in failing to instruct the jury that age can only be considered mitigating or neutral but never aggravating. The district attorney did not improperly argue that chronological age alone was aggravating, but argued that although the chronological age suggested mitigation, the jury should consider how much criminal behavior defendant had committed in a short time. This was proper, just as it would have been proper for the defense to argue the age factor was mitigating. Criminal behavior condensed into a short time period could reasonably be considered more serious than the same behavior spread out over a long time.

[CA\(18\)](#) [📄] (18)

Criminal Law § 521—Punishment—Penalty Trial—Evidence—Automatic Modification Motion—Probation Report.

--The trial court, in ruling on a defendant's automatic motion to modify a death verdict under [Pen. Code, § 190.4, subd. \(e\)](#), reviews only the evidence presented to the jury, which does not include the probation report. However, in a capital murder prosecution, the fact the trial court had read the probation report before ruling on the automatic motion was not error absent an indication in the record to contradict the assumption that the court was not influenced by the report in ruling on the motion. Moreover, the record affirmatively showed the trial court was not influenced by the report by its statement that it was required under the law in ruling on the application to review the evidence; only after it denied the automatic motion did the trial court refer to the probation report in discussing whether it should modify the judgment on its "own motion." The court was thus aware of, and properly performed, its duty to base the modification motion solely on the evidence presented to the jury, and its consideration of the probation report only came after that ruling in discussing whether there was any other basis on which to modify the judgment.

Counsel: Fern M. Laethem, State Public Defender, under appointment by the Court of Appeal, Adrian K. Panton, Chief Assistant State Public Defender, W. Dean Freeman, Patricia L. Reber and Richard D. Marino, Deputy State Public Defenders, for Defendant and Appellant.

Daniel E. Lungren, Attorney General, George Williamson, Chief Assistant Attorney General, Carol Wendelin Pollack, Acting Assistant Attorney General, Susan Lee Frierson and John R. Gorey, Deputy Attorneys General, for Plaintiff and Respondent.

Judges: Opinion by Arabian, J., with Lucas, C. J., Panelli, Kennard, Baxter and George, JJ., concurring. Separate opinion by Mosk, J., concurring in the judgment.

Opinion by: ARABIAN, J.

Opinion

[*765] [299] [***74]** On June 23, 1986, defendant took five hostages during a robbery of the Van Cleef & Arpels jewelry store on Rodeo Drive in Beverly Hills. During the next tension-filled thirteen hours he stabbed one of the hostages to death, and fatally shot a second in the head. At the end of that time, the police were able to capture him as he tried to flee the area with the three surviving hostages. **[****2]** Tragically, a third hostage was accidentally killed by the police in the ensuing confusion.

In a case filed under the 1978 death penalty law, defendant pleaded guilty to the first degree murder of William Smith, Ann Heilperin, and Hugh Skinner ([Pen. Code, § 187](#))¹ ; to five counts of robbery ([§ 211](#)); to three counts of kidnapping ([§ 207, subd. \(a\)](#)); and to one

¹ Further unspecified statutory references are to this code.

count of second degree burglary (§ 459). He admitted [**300] [***75] special circumstance allegations of murder during the commission of robbery and burglary as to two of the murders (§ 190.2, subd. (a)(17)), and multiple murder (§ 190.2, subd. (a)(3)). He also admitted certain weapons enhancement allegations.

After a penalty trial, the jury imposed the death penalty. The trial court denied the automatic motion to modify the verdict (§ 190.4, subd. (e)), and entered a judgment of death. This appeal is automatic. (§ 1239.) We affirm.

I. FACTS

A. The Crime

Van Cleef & Arpels opened for business [****3] as usual at 10 a.m. on June 23, 1986. A short time later, defendant entered carrying a briefcase, intent on robbing the store. A security guard, murder victim William Smith, and three sales clerks--murder victims Ann Heilperin and Hugh Skinner and one of the surviving hostages, Carol Lambert--were inside the main sales area. Defendant asked Heilperin to show him some watches, and the two entered the adjoining watch boutique.

A few minutes later, Heilperin screamed, and yelled, "Please don't hurt me." Defendant then forced her back into the main sales room at gunpoint. He told everybody not to move, Smith, the security guard, tried to draw his own firearm, but defendant forced him to his knees and disarmed him. Robert Taylor, the shipping clerk, heard Heilperin's scream and ran to the sales room from his office in the rear. Defendant saw Taylor, and ordered him to enter the room. Taylor, seeing defendant's revolver, complied. Everyone else in the building heard that a robbery was in progress, and escaped. The police were alerted, and quickly arrived at the scene.

A standoff ensued. The police surrounded the building. Defendant was inside with five hostages, the three sales [****4] clerks (Heilperin, Skinner and [**767] Lambert), the security guard (Smith), and the shipping clerk (Taylor). The crisis was not to be resolved for another 13 hours.

Defendant ordered the hostages into the watch boutique. He then ordered them to lie face down on the floor except for Lambert and Taylor. Defendant forced these two to bind the other hostages' ankles and also bind their hands behind their backs with rolls of plastic tape defendant had brought in his briefcase. When they finished, defendant ordered them to fill his briefcase with

watches from the store.

Defendant started to leave the building accompanied by Taylor, but he observed the police outside and returned to the watch boutique. He appeared to be angry that the police were present. He forced Lambert to tape Taylor like the others, except in a sitting position. Next, he had her dial 911. From that location followed the first of many telephone conversations between defendant and the police.

Defendant said his name was "John," and demanded that the police leave, that he be put on the television news, and that he be provided with a television set. He threatened to "execute these people one at a time." He [****5] described Smith as an "old, weak, fragile man." At some point after this conversation, defendant also bound Lambert with the tape.

Defendant turned his attention to Smith. He told Smith that he was too old to be a security guard and that his gun was "outdated." Smith responded, "You think you are a big man with that gun." This angered defendant. He told Smith that he talked too much, retrieved a hunting knife from his briefcase, and told the others to look away. He then stabbed Smith in the middle of the back with the knife. Blood from the wound spurted onto Taylor's face. Smith gasped for breath twice, tried to rise onto his shoulders, then slumped down. Still bound and lying face down, he bled to death in the presence of the other hostages, who were powerless to assist him. Defendant covered the body and the knife with a coat; the body remained that way until the incident was over.

Defendant told a correspondent for United Press International by telephone that he had only intended to rob the store and leave. He said he had stabbed Smith in the [**301] [***76] back because Smith did not follow orders and "kept talking." He felt "no remorse" for the stabbing; it was an "appropriate [****6] thing to do at the time." Defendant also threatened to shoot the remaining hostages if the police "storm the place," and said he might soon "have to execute somebody else" if his "demands [were] not met." He allowed some of the hostages to speak to the correspondent. He ended the conversation by telling the correspondent, "have a nice day."

[**768] At one point, defendant forced Heilperin to lie down next to Smith's body and face the wall. Since she was still taped, she had to "scoot[] on her rear" to comply. Defendant seemed angry with her because she had screamed at the outset of the robbery. He called her "Big Mouth Annie." About half an hour after

defendant forced Heilperin to face the wall, during the early afternoon, he spoke with a person from Channel 5. During the conversation, defendant told the listener, "Quiet, just a minute," and "walked over, put the gun to Annie's head and pulled the trigger." Heilperin was killed instantly. Defendant resumed his telephone conversation, telling the listener that his gun had "misfired."

After he killed Heilperin, defendant's attitude changed, as if he was relieved by shooting her. He covered the body. About 45 minutes later, [****7] he allowed Skinner to tell the police that Heilperin had been killed. Around this time, defendant tied Skinner and Taylor together on two chairs to act as a "shield" in case anyone tried to enter the boutique.

By this time, Taylor thought that the hostages' only chance of surviving the ordeal was for everyone somehow to leave the building. Skinner devised a plan. Several pieces of cloth used in displays were available inside the store. Skinner suggested to defendant that they sew the pieces together into a sort of blanket, then use the blanket to cover defendant and the hostages as they left the store. The police would not be able to distinguish who was a hostage and who was the gunman, and thus could not shoot defendant. They could then safely walk to a nearby car owned by the store and drive away. Taylor had the keys to the car. Attempting to make defendant happy, Skinner also suggested that defendant take more expensive items of jewelry instead of the watches he had already taken.

Defendant agreed to the suggestions. Skinner went to another room and collected more expensive jewelry for defendant. Lambert used a ball point pen and some string from defendant's briefcase [****8] to stitch the pieces of cloth together. She started the job in the early evening; it took about three or four hours.

When the blanket was finished to defendant's satisfaction, he and the three surviving hostages practiced walking under it. The hostages would be tied together at the waist with defendant in the middle. Defendant said that when they got to the car, Lambert would drive, and defendant would be in the middle of the front seat, with Skinner to his right. Taylor was supposed to be in the middle of the back seat to act as a shield from the rear. The four practiced with the blanket for a couple of hours. Defendant was in no hurry because he wanted to wait until it got dark. During this time, defendant placed more jewelry into the briefcase.

[*769] Eventually, the time came to leave. Defendant tied the hostages together around the hands and waist, and got in the middle. Around 11:30 p.m., they walked out of the store in this formation covered by the improvised blanket, which reached to the ground. Defendant carried his briefcase and the gun. On the way out, defendant had Skinner remove some loose stones and big rings from a safe. Since defendant could not get [****9] into his briefcase, he told Skinner to place this jewelry into Skinner's pocket.

Outside, the four walked to the nearby parking lot where the car was located. Skinner and Taylor yelled that they were hostages and pleaded for no one to shoot them. Taylor could hear the "murmuring" of people in the background. Defendant threatened to kill the hostages if the police tried to stop them.

[**302] [***77] In the meantime, law enforcement personnel, including members of the Los Angeles County Sheriff's Department, had secured the area. They had decided not to allow the group to get away in a vehicle and thus "go mobile." Two deputies were armed with "flash bangs"--"diversion device[s]" that go off like "large firecracker[s]" when ignited by a pin mechanism--and were instructed to throw them at the group when it reached the car. Deputy Sheriff George Johnson, a sharpshooter with the SWAT team, was stationed on the seventh level of a nearby parking structure.

The law enforcement officials had been erroneously informed that both of the male hostages were Black. (In fact, Taylor is Black, but Skinner was White.) The error was never corrected. Thus, Deputy Johnson was informed that the only [****10] White male in the group was the gunman. To compound the confusion, Skinner's appearance generally matched the sketchy description of the gunman that was available.

When the group under the blanket reached the car, the two deputies threw the flash-bangs as planned. They exploded. The blast knocked defendant, Lambert and Taylor to the ground under the blanket. Skinner was separated from the others. A moment later, Skinner pointed to the defendant and yelled, "Here he is."

Deputy Johnson was watching these events through the scope of his rifle. He saw the blast "spin" one person away from the others and onto his back. Deputy Johnson's view was briefly obscured by smoke. When the smoke cleared, he observed that the person separated from the others was a White male similar in appearance to the description of the gunman. Believing

this person to be the gunman, Deputy Johnson "locked in" on him "like a heat seeking missile." He focused the cross hairs of his rifle scope on the center [*770] of the man's chest. He heard his spotter say something like "shiny object," and heard someone else yell "gun." Then he saw the person who had been separated start to rise and point toward [****11] the group underneath the blanket. In fact, it was the hostage Skinner pointing toward defendant.

Deputy Johnson had to concentrate on the cross hairs of the scope; thus he could not look closely at the man's hands but could only perceive that he pointed toward the group under the blanket. Johnson was convinced that Skinner was the gunman, and that he was "going to start killing hostages as he stated he would." To prevent this, Deputy Johnson "terminated" the man by a single shot through the chest.

A moment later, when other officers lifted the blanket, and Deputy Johnson could see another White male (defendant), he commented, "Where did he come from?" He soon learned that he had not shot the gunman but, by mistake, one of the hostages. Skinner died of the wound.

The officers quickly rescued the surviving hostages and arrested defendant. Defendant's gun was found on the ground between two cars. It was loaded with six .357 magnum bullets and was cocked, ready to fire. Nearby were a switchblade knife and a "speedy loader," a device used to quickly reload the gun. The covered bodies of Heilperin and Smith were found where they had been left inside the store. The knife was still [****12] stuck in Smith's back. Inside defendant's briefcase, in addition to the jewelry, were another speedy loader, two rolls of tape, some white twine, and a pair of gloves.

After his arrest, defendant told the police he stabbed Smith because Smith had been "uncooperative and antagonistic"; defendant felt he had to kill him "to keep control of the situation." He said that the "knife went in just like butter." After the stabbing, Smith had strained at his bonds, and appeared close to freeing his hands. Defendant got his gun and pointed it at Smith, intending to shoot him if he got free. It was not necessary.

Defendant said he shot Heilperin because "he felt that he had to kill another hostage in order to prove that his demands should be taken seriously." He selected Heilperin because she had been uncooperative with him and had created the hostage situation by screaming at the outset of the robbery.

[**303] [***78] Defendant also said he was sorry, and that his plan had been only to tie up the employees, take the jewelry, and leave. He expressed regret when he was erroneously told that Taylor, one of the survivors, had been killed.

B. Other Crimes

The prosecution presented evidence [****13] of three prior instances in 1984 and 1985 in which defendant forcibly resisted arrest in Las Vegas, Nevada. On [*771] the first occasion, a police officer was attempting to handcuff defendant in a crowded computer store after defendant had attempted to sell two computers that had been stolen in a recent burglary. Defendant fled. He pushed his way through two officers, broke through a sliding glass door, knocked down some store customers, and escaped after breaking the store's front door off its hinges. On the second occasion, defendant also resisted when an officer tried to handcuff him. On the third occasion, defendant was arrested for suspected possession of cocaine. He fled on foot, and then kicked and resisted the officers when he was eventually captured. It took several officers to subdue him.

On February 2, 1986, defendant robbed a jewelry store in Las Vegas at gunpoint. He forced the two employees to lie on the floor and taped their hands and feet. He threatened to kill the employees, abused them verbally, and kicked one of them repeatedly. He eventually escaped with jewelry worth over \$ 400,000 retail, or \$ 177,555 wholesale. The employees identified defendant [****14] as the gunman, and his palm print was found on a roll of tape recovered from the store.

Defendant had two prior felony convictions in Nevada, one each for burglary and possession of stolen property.

C. Defense Evidence

Defendant's mother and other family members testified about defendant's childhood, some coming from Greece to do so. The marriage of defendant's parents, both natives of Greece, had been arranged, and was never a success. The father abused the family, including defendant and his three older siblings. His mother divorced his father when defendant was five years old. Thereafter, the family generally lived in poverty, often relying on welfare. Defendant was a good child, and was supportive of his mother and the family. For a while defendant lived at a Greek Orthodox Church orphanage, where he was unhappy. Defendant also lived in Greece for a few years. Later, he was in the United States

Army. Defendant's brother testified that defendant became involved with the wrong kind of friends in Las Vegas, and thereby got into trouble.

The family members testified that the family was close, that they all loved defendant, and that they wanted him to live.

II. DISCUSSION

[****15] A. Jury Selection Issues

[CA\(1a\)](#)^[↑] (1a) Defendant contends the court erred in excusing for cause one prospective juror because of her views on the death penalty. The applicable [*772] law is settled. [CA\(2\)](#)^[↑] (2) [HN1](#)^[↑] The trial court may excuse a prospective juror for cause if that juror's views on capital punishment would prevent or substantially impair the performance of her duties as a juror in accordance with her instructions and her oath. ([Wainwright v. Witt \(1985\) 469 U.S. 412, 424 \[83 L.Ed.2d 841, 851-852, 105 S.Ct. 844\]; People v. Cooper \(1991\) 53 Cal.3d 771, 809 \[281 Cal.Rptr. 90, 809 P.2d 865\]](#).) "On appeal, if the prospective juror's responses are equivocal, i.e., capable of multiple inferences, or conflicting, the trial court's determination of that juror's state of mind is binding." ([Cooper, supra, at p. 809](#).)

[CA\(1b\)](#)^[↑] (1b) Early in the voir dire, the prospective juror at issue stated that she had a "predisposition to have already made up [her] mind" to vote for life without possibility of parole. Further questioning revealed [****16] that she might vote for the death penalty for an older defendant who had previously committed murder. She said that her views would "impair [her] ability to be totally objective" in a case like this that did not involve a repeat murderer. At [**304] [***79] one point, she stated that she could not vote for the death penalty in this case given the absence of a prior murder. Other portions of the voir dire, particularly the responses to questions by defense counsel, were more equivocal, but her final statement was that defendant's age and lack of prior murder "makes me feel as though sitting right here right now, if I had to vote, I would vote for not giving the death penalty. And that is what my feeling is."

Defendant contends that the prospective juror was merely predisposed "to assign greater than average weight to the mitigating factors" of age and absence of a previous murder, and that such predisposition alone did not warrant her excusal. ([People v. Kaurish \(1990\) 52 Cal.3d 648, 699 \[276 Cal.Rptr. 788, 802 P.2d 278\]](#).) However, these statements, although equivocal, support

the court's finding that her views would prevent [****17] or substantially impair the performance of her duties as a juror.

The fact that the prospective juror may have considered the death penalty in other cases also did not prevent her excusal. [HN2](#)^[↑] "[A] court may properly excuse a prospective juror who would automatically vote against the death penalty in the case before him, regardless of his willingness to consider the death penalty in other cases." ([People v. Fields \(1983\) 35 Cal.3d 329, 357-358 \[197 Cal.Rptr. 803, 673 P.2d 680\]](#); accord [People v. Pinholster \(1992\) 1 Cal.4th 865, 917-918 \[4 Cal.Rptr.2d 765, 824 P.2d 571\]](#).) That was the situation here. Although the prospective juror indicated a willingness to consider the death penalty under facts not applicable to the case (a prior murder), the trial court properly found that her ability to perform her duty was substantially impaired in *this* case. (See also [People v. Pinholster, supra, \[***773\] 1 Cal.4th at pp. 916-918](#) [trial court properly excused a prospective juror who indicated an inability to consider [****18] the death penalty in a burglary- murder case, even though the juror could consider it in other situations].)

Defendant also contends the district attorney improperly used peremptory challenges to exclude potential jurors who expressed reservations about the death penalty. We have repeatedly rejected the contention, and continue to do so. (E.g., [People v. Edwards \(1991\) 54 Cal.3d 787, 831 \[1 Cal.Rptr.2d 696, 819 P.2d 436\]](#).)

B. Physical Restraint of Defendant During Trial

Defendant contends the trial court prejudicially erred in ordering him physically restrained on two occasions during the trial.

1. The Facts

During jury selection, the deputy district attorney notified the court that the sheriff's department had received information from a confidential informant regarding a possible escape attempt by defendant with outside help. Because of this information and defendant's history of escape attempts, she requested that defendant be shackled with an "unobtrusive" leg brace to be worn under his pants. Defense counsel objected, and claimed that the brace was noticeable and uncomfortable. After hearing from defense [****19] counsel and the deputy sheriff the court ordered the leg brace worn for the rest of the day pending a final decision that evening.

At the end of the jury selection proceedings that day, another hearing was held. Over objection of the district attorney, the court decided that with increased security the leg brace would not be necessary, and ordered it removed. The leg brace was thus worn only during one day of jury selection. Nothing in the record suggests that any prospective juror observed the brace.

During the evidence portion of trial, the district attorney requested that defendant be restrained in some fashion during the testimony of the two surviving hostages. She said that Carol Lambert told her that "she will not come into court and testify unless he is [restrained]. She is that fearful of him." Both of the hostages were still "in therapy" because of the crime. The district attorney said that although Robert Taylor had also requested defendant be restrained, she could talk him into **[**305]** **[***80]** testifying without the restraints. Lambert, however, would "absolutely not come into the courtroom unless he is somehow restrained." The defense objected that there was no necessity **[****20]** for the restraint. The court responded that "a person who has gone through that **[*774]** particular trauma has ideas that don't occur to an ordinary person. We have to respect that feeling"; and that "obviously there is no necessity because there is security, but we are dealing with a subjective frame of mind of a woman who has gone through a terrible trauma so, therefore, we have got to humor her. It might not be objectively the thing to do but under the circumstances, I think we ought to do that."

The court ordered that during the testimony of Lambert only, not that of Taylor, defendant be handcuffed to his chair in a fashion that would not be visible to the jury. Defendant was not otherwise physically restrained during the trial.

2. Discussion

Defendant contends the court erred in ordering the leg brace for the one day during jury selection and the handcuffing during the testimony of Lambert. We disagree.

CA(3)^[↑] **(3)** It is settled that **HN3**^[↑] because of its potentially prejudicial impact on the jury, shackling should be ordered only as a last resort and only upon a showing of a manifest need for such restraints. (*People v. Stankewitz* (1990) 51 Cal.3d 72, 94-95 [270 Cal.Rptr. 817, 793 P.2d 23]; **[****21]** *People v. Duran* (1976) 16 Cal.3d 282, 290-291 [127 Cal.Rptr. 618, 545 P.2d 1322, 90 A.L.R.3d 1.]) Any restraints should be as "unobtrusive as possible, although as effective as necessary under

the circumstances." (*People v. Duran, supra*, 16 Cal.3d at p. 291.) Although these restrictions make the trial court's discretion to order restraints "relatively narrow" (*People v. Cox* (1991) 53 Cal.3d 618, 651 [280 Cal.Rptr. 692, 809 P.2d 351]), the court's ruling will be upheld on appeal absent a showing of a manifest abuse of that discretion. (*People v. Stankewitz, supra*, 51 Cal.3d at p. 95.)

CA(4)^[↑] **(4)** The court did not abuse its discretion in this case. The information regarding the possible escape plans, together with defendant's history of prior escape attempts, was a sufficient basis for the temporary leg brace. (*People v. Sheldon* (1989) 48 Cal.3d 935, 945-946 [258 Cal.Rptr. 242, 771 P.2d 1330].) **[****22]** It is not necessary that the restraint be based on the conduct of the defendant at the time of trial. (*Kennedy v. Cardwell* (6th Cir. 1973) 487 F.2d 101, 111.)² The trial court attempted to make the restraint as unobtrusive as possible, and promptly ordered it removed as soon as it was satisfied there was sufficient courtroom security to make it unnecessary. Moreover, it **[*775]** was inevitable that the jury would learn of defendant's prior escape attempts. (*Kennedy v. Cardwell, supra*, 487 F.2d at p. 111.) Evidence of the prior escape attempts, coupled with the evidence of the crime, would make it obvious to the jury that defendant was a security risk. The leg brace, even if noticed by one or more prospective jurors (the record does not suggest that any did notice it), would have had little prejudicial effect under the circumstances.

[**23]** **CA(5)**^[↑] **(5)** Defendant has also not shown error regarding the handcuffing during the testimony of former hostage Lambert. Although the restraint was not imposed for reasons of courtroom security, there was still a sufficient showing of need to support the court's exercise of discretion. Defendant had terrorized Lambert for 13 harrowing hours, during which time he coldbloodedly murdered 2 other bound hostages while she lay helpless on the floor next to them. Her fear at trial was understandable. Under these circumstances, the trial court's carefully limited attempt to alleviate this fear by requiring handcuffs, invisible **[**306]** **[***81]** to the jury and worn only for a short time, was within its discretion.

² In *People v. Duran, supra*, 16 Cal.3d 282, the leading California case on shackling, we relied heavily on *Kennedy v. Cardwell, supra*, 487 F.2d 101, and specifically commended its "enlightening" analysis. (16 Cal.3d at p. 293, fn. 13.)

[CA\(6\)](#)^[↑] (6) Defendant also contends the court erred in not cautioning the jury sua sponte that the restraints should not influence its determination. "However, [HN4](#)^[↑] when the restraints are concealed from the jury's view, this instruction should not be given unless requested by defendant since it might invite initial attention to the restraints and thus create prejudice which would otherwise be avoided." ([People v. Duran, supra, 16 Cal.3d at p. 292](#); [****24] accord [People v. Cox, supra, 53 Cal.3d at p. 655](#).) Although defense counsel claimed at trial that the leg brace was noticeable, the court and district attorney disagreed. The record contains no evidence that any juror actually observed the leg brace. There is no suggestion at all that the handcuffs were noticeable. Under the circumstances, defendant should have requested the cautionary instruction if he wanted it. ([People v. Cox, supra, 53 Cal.3d at p. 655](#).)

C. Evidence of Prior Unadjudicated Crimes

Over objection, the court admitted evidence of the three instances in which defendant forcibly resisted arrest, including evidence that on one of the occasions defendant had attempted to sell two computers stolen in an earlier burglary, and that on another of the occasions defendant possessed what the arresting officer believed was cocaine.³ Evidence of the circumstances preceding the arrests was also admitted. The theft and possession of the computers underlay defendant's felony convictions for possession of stolen property and burglary.

[****25] [*776] Defendant contends that the evidence regarding the possession of stolen property and the suspected cocaine, and the circumstances surrounding the arrests, should not have been admitted because it did not show "criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence" under [section 190.3](#), factor (b). He further argues that [section 190.3](#), factor (c), which allows evidence of any "prior felony conviction," does not permit evidence of the facts underlying the conviction.

[CA\(7\)](#)^[↑] (7) Defendant is correct that the evidence regarding the computers was not admissible to show the

circumstances surrounding his felony convictions. Any "prior felony conviction," even of a nonviolent felony, is admissible under [section 190.3](#), factor (c). However, under factor (c), only the fact of the conviction is admissible, not the underlying facts of the crime. (See [People v. Gates \(1987\) 43 Cal.3d 1168, 1203 \[240 Cal.Rptr. 666, 743 P.2d 301\]](#) ["Defendant's contention [that the facts underlying a felony conviction were inadmissible] might have [****26] had merit had the convictions involved *nonviolent* conduct, since the admission of such evidence is strictly limited by *subdivision (c) of section 190.3*." Italics in the original.].) Evidence of the facts of criminal activity, whether or not accompanied by a conviction, is admissible under [section 190.3](#), factor (b), but only if the activity involves force or violence. (See [People v. Cooper, supra, 53 Cal.3d at p. 840](#); [People v. McDowell \(1988\) 46 Cal.3d 551, 567-568 \[250 Cal.Rptr. 530, 758 P.2d 1060\]](#).)

Although the record is not completely clear, it appears the court did believe the prosecution was entitled to admit evidence of the underlying facts of felony convictions under [section 190.3](#), factor (c). Admission of the evidence solely on this basis would have been error. The evidence of the possession of the stolen computers and of the suspected cocaine was, however, admissible under [section 190.3](#), factor (b).

The prosecution was not limited under [section 190.3](#), factor (b), to showing only [**307] [***82] that defendant was arrested for no apparent reason, [****27] and that he then violently resisted those arrests. "[Section 190.3](#), factor (b), refers to 'criminal activity,' not specific crimes." ([People v. Cooper, supra, 53 Cal.3d at p. 840](#).) Therefore, although the activity must involve specific crimes, "all crimes committed during a continuous course of criminal activity which includes force or violence may be considered in aggravation even if some portions thereof, in isolation, may be nonviolent." (*Id. at p. 841*.) The resisting of the arrests and the subsequent batteries certainly involved force or violence. The [*777] possessions of the computers and cocaine did not themselves involve force or violence, but they were the crimes leading to the arrests which defendant resisted, and were thus part of the same "continuous course of criminal activity which includes force or violence." (*Ibid.*) The underlying crimes and surrounding circumstances "were admissible to give context to defendant's subsequent violent episode[s]" of resistance. ([People v. Keenan \(1988\) 46 Cal.3d 478, 526 \[250 Cal.Rptr. 550, 758 P.2d 1081\]](#); see also [People v. Pinholster, supra, 1 Cal.4th at p. 961](#).) [****28]

³ Although defendant did not specifically object to the evidence regarding the cocaine, we believe that defendant's general objections on the grounds argued on appeal to all of this evidence, which were overruled, were sufficient to satisfy the contemporaneous objection rule. ([Evid. Code, § 353](#).)

[CA\(8\)](#)^[↑] (8) Defendant next contends the court erred in instructing on the elements of both resisting arrest and battery on a peace officer. He argues that resisting arrest, standing alone, does not necessarily involve force or violence. [Section 190.3](#), factor (b), however, does not require that any specific crime *inherently* involve force or violence, only that the *actual* criminal activity be violent. (See [People v. Cooper, supra, 53 Cal.3d at pp. 840-841](#).) He also argues the jury might have found on each occasion that he committed both crimes, thus leading to impermissible double counting of aggravating factors. The court did not, however, specify for the jury which evidence could be considered as to each crime on which it was instructed. Nor was it required to do so absent a request. ([People v. Hardy \(1992\) 2 Cal.4th 86, 205-206 \[5 Cal.Rptr.2d 796, 825 P.2d 781\]](#).) The evidence supported a finding that defendant committed each offense, with the requisite force or violence, at least once. The instructions were proper.⁴

[****29] Defendant finally contends the admission of the prior unadjudicated crimes denied him due process and a reliable death judgment. He recognizes that we rejected these contentions in [People v. Balderas \(1985\) 41 Cal.3d 144, 204-205 \[222 Cal.Rptr. 184, 711 P.2d 480\]](#), but urges us to overrule that decision. We decline to do so. (See [People v. Medina \(1990\) 51 Cal.3d 870, 906-907 \[274 Cal.Rptr. 849, 799 P.2d 1282\]](#).)

D. Exclusion of Defense Evidence

Defendant's mother testified that when she visited defendant in jail, he said he was "very sorry" about what he did. The court sustained a hearsay objection to the testimony, but the district attorney did not request it be stricken. On redirect examination, the mother testified without objection that defendant "tells me how sorry he is."

During the examination of defendant's uncle, the court sustained hearsay objections to questions about the contents of letters defendant wrote after his [*778] arrest, about statements he allegedly made in jail, and about whether the defendant is "sorry" for what he did.

Defense [****30] counsel asked defendant's brother whether defendant has shown remorse. He answered, "I

believe so, very much so." The court sustained an objection to the testimony, but the district attorney did not request it be stricken.

Defendant argues that the court prejudicially erred in sustaining the objections. For the first time on appeal, he contends the evidence was admissible under the state-of-mind exception to the hearsay rule ([Evid. Code, § 1250](#)), and that its exclusion violated his rights under the [Eighth](#) and [Fourteenth Amendments to the federal \[**308\] \[***83\] Constitution](#). The Attorney General preliminarily argues that defendant has waived the contention for failure to make an offer of proof at trial. We agree that the matter has not been preserved for appeal.

[HN5](#)^[↑] An appellate court may not reverse a judgment because of the erroneous exclusion of evidence unless the "substance, purpose, and relevance of the excluded evidence was made known to the court by the questions asked, an offer of proof, or by *any other means*." ([Evid. Code, § 354, subd. \(a\)](#), italics added; see [People v. Whitt \(1990\) 51 Cal.3d 620, 648 \[274 Cal.Rptr. 252, 798 P.2d 849\]](#).) [****31] Defendant did not make an offer of proof. However, two of the witnesses actually answered the questions before the objections were sustained. The answers, together with the questions asked, were "other means" which made it known to the court that the excluded evidence was offered to show remorse as a mitigating factor. This satisfied part of the [Evidence Code section 354](#) requirement. However, defendant did not show that the testimony came within an exception to the hearsay rule, and did not attempt, by offer of proof or otherwise, to lay the proper foundation for that exception.

[CA\(9\)](#)^[↑] (9) [HN6](#)^[↑] The proponent of hearsay has to alert the court to the exception relied upon and has the burden of laying the proper foundation. In [People v. Rodriguez \(1969\) 274 Cal.App.2d 770 \[79 Cal.Rptr. 240\]](#), the defendant argued on appeal that certain excluded hearsay was admissible as a statement against penal interest. The Court of Appeal found the issue had not been properly preserved: "[A]fter the court sustained the objection, appellant's trial counsel failed to inform the court that he was offering the witness's testimony as an exception to the hearsay rule. [****32] Under [Evidence Code sections 403](#) and [405](#), if a hearsay objection is properly made, the burden shifts to the party offering the hearsay to lay a proper foundation for its admissibility under an exception to the hearsay rule." (*Id.* at p. 777; see also 3 Witkin, Cal. [****79] Evidence (3d ed. 1986) Introduction of Evidence at Trial,

⁴ It would have been improper to instruct on the elements of crimes, such as possession of stolen property and cocaine, that did not themselves involve actual violence. ([People v. Cooper, supra, 53 Cal.3d at p. 841](#).) The court did not do so.

§ 1726, p. 1681 ["[T]he conditions of admissibility [of hearsay], designed to exclude untrustworthy hearsay, are determined finally by the judge, and the proponent has the burden of proving them. ([Ev.C. 405](#), Comment;. ...)."])

[HN7](#)[↑] [Evidence Code section 405](#) provides with regard to preliminary fact determinations governed by that section: "(a) When the existence of a preliminary fact is disputed, the court shall indicate which party has the burden of producing evidence and the burden of proof on the issue as implied by the rule of law under which the question arises. The court shall determine the existence or nonexistence of the preliminary fact and shall admit or exclude the proffered evidence as required by the rule of law under which the question arises." The Law Revision Commission Comment to that section states that questions relating "to the existence [****33] of those circumstances that make the hearsay sufficiently trustworthy to be received in evidence--e.g., was the declaration spontaneous, the confession voluntary, the business record trustworthy?" are decided under that section.

Defendant did not even suggest the hearsay statements were admissible under some exception, and certainly did not show that the evidence qualified for admission under the state-of-mind exception. ([Evid. Code, § 1250](#).) This was especially important in this case, for if the issue had been properly presented to the court, it would have had discretion to exclude the evidence. Evidence of the declarant's state of mind, even if otherwise admissible under [Evidence Code section 1250](#), is inadmissible "if the statement was made under circumstances such as to indicate its lack of trustworthiness." ([Evid. Code, § 1252](#).)

In [People v. Edwards, supra, 54 Cal.3d at pages 818-821](#), the defense sought to introduce a taped statement by the defendant shortly after his arrest, and a notebook he compiled shortly after the crime. We rejected the defendant's arguments that the evidence, though hearsay, was admissible [****34] under the state-of-mind exception to the hearsay rule. We found that the postcrime [**309] [***84] statements were made at a time when the defendant "had a compelling motive to deceive and seek to exonerate himself from, or at least to minimize his responsibility for," the crimes. (*Id.* at p. 820.) There was thus " 'ample ground to suspect defendant's motives and sincerity' when he made the statements." (*Ibid.*, quoting [People v. Whitt, supra, 51 Cal.3d at p. 643](#).) "The need for cross-examination is especially strong in this situation, and fully warrants

exclusion of the hearsay evidence." ([Edwards, supra, at p. 820](#); see also [People v. Harris \(1984\) 36 Cal.3d 36, 69 \[201 Cal.Rptr. 782, 679 P.2d 433\]](#) (plur. opn. by Broussard, J.) ["A defendant in a criminal case may not introduce hearsay evidence for the purpose of testifying while avoiding cross-examination."].)

[*780] In this case, the trial court may well have excluded the evidence if given the opportunity to rule on the question. While defendant was [****35] in jail awaiting trial he certainly had a motive to claim remorse. His sincerity in telling potential defense witnesses he was sorry was suspect. The need for cross-examination was thus compelling. The court would have had discretion to find a lack of trustworthiness in the claims of remorse, and thus to exclude the evidence if asked to rule on the question. ([People v. Gordon \(1990\) 50 Cal.3d 1223, 1250-1251 \[270 Cal.Rptr. 451, 792 P.2d 251\]](#).) Since the court was never asked to exercise this discretion, the issue is not properly before us.

[CA\(10\)](#)[↑] (10) Defendant contends that exclusion of the evidence violated his federal constitutional right to have the sentencer consider all " 'relevant mitigating evidence.' " ([Payne v. Tennessee \(1991\) 501 U.S. , \[115\]111 S.Ct. 2597, 2606](#); L.Ed.2d 720, 733, [Skipper v. South Carolina \(1986\) 476 U.S. 1, 4, 6 \[90 L.Ed.2d 1, 6, 106 S.Ct. 1669\]](#).) Even if the contention were properly before us, we would reject it on the merits. As explained in [People v. Edwards, supra, 54 Cal.3d 787, \[****36\]](#) [HN8](#)[↑] a state is generally not required to admit evidence in a form inadmissible under state law. (*Id.* at pp. 837-838 [discussing a limited exception under [Green v. Georgia \(1979\) 442 U.S. 95 \(60 L.Ed.2d 738, 99 S.Ct. 2150\)\]](#).) The same lack of reliability that makes the statements excludable under state law makes them excludable under the federal Constitution.

Defendant also contends the rulings violated his due process rights. We would also reject that claim on the merits if it were properly before us. Based upon his statements during the hostage crisis itself, the district attorney argued that defendant was not remorseful for his crimes. Defendant contends the court's rulings prevented him from rebutting this evidence and argument. Again, we disagree. The court did not prevent defendant from presenting evidence of remorse, but only evidence in the form of inadmissible hearsay not subject to cross-examination. We note also that the jury did hear of defendant's statement to the police shortly after the arrest that he was sorry for the crimes. There was no constitutional violation.

E. Jury Instruction Issues

1. Instruction [****37] During Jury Selection

During jury selection, the court briefly summarized the penalty phase process to the prospective jurors. [CA\(11\)](#)^[↑] (11) Defendant contends that the explanation to many of the prospective jurors, including several who actually served on the jury, was defective. As an example, defendant cites this [*781] explanation to one juror: "You see, the law in California is that if the aggravating circumstances outweigh the mitigating circumstances, then you must bring in a verdict of death in the gas chamber." Defendant contends this improperly imposed a mandatory death penalty. (See [People v. Brown \(1985\) 40 Cal.3d 512, 540-545 \[220 Cal.Rptr. 637, 709 P.2d 440\]](#), revd. on other grounds *sub nom.* [California v. Brown \(1987\) 479 U.S. 538 \[93 L.Ed.2d 934, 107 S.Ct. 837\]](#).)

We need not decide whether these summary comments, by themselves, fully and correctly instructed on the deliberative [**310] [***85] process. The comments were not the actual complete jury instructions. The full instructions came at the end of the trial, and fully satisfied the concerns addressed [****38] in [People v. Brown, supra, 40 Cal.3d 512](#). Indeed, the court gave instructions substantially identical to those approved in *Brown*. (*Id.* at p. 545, fn. 19.)

[HN9](#)^[↑] "The purpose of these comments was to give prospective jurors, most of whom had little or no familiarity with courts in general and penalty phase death penalty trials in particular, a general idea of the nature of the proceeding. The comments were not intended to be, and were not, a substitute for full instructions at the end of trial." ([People v. Edwards, supra, 54 Cal.3d at p. 840](#).) "If defendant wanted the court to give a fuller explanation during jury selection, he should have requested it." (*Id.* at p. 841.) He did not do so.

2. Instruction on Mercy

[CA\(12\)](#)^[↑] (12) Defendant contends the court had a sua sponte duty to instruct the jury that it "had the absolute discretion to exercise mercy and impose a life sentence, even in the face of a finding on [its] part that death was appropriate." We have, however, repeatedly held that the court is not required to instruct on mercy. ([People v. Nicolaus \(1991\) 54 Cal.3d 551, 588-589 \[286 Cal.Rptr. 628, 817 P.2d 893\]](#); [****39] [People v. Benson \(1990\) 52 Cal.3d 754, 808-809 \[276 Cal.Rptr. 827, 802](#)

[P.2d 330\]](#); [People v. Andrews \(1989\) 49 Cal.3d 200, 227-228 \[260 Cal.Rptr. 583, 776 P.2d 285\]](#); [People v. Caro \(1988\) 46 Cal.3d 1035, 1067 \[251 Cal.Rptr. 757, 761 P.2d 680\]](#).)

The court here instructed the jury to consider "any other circumstance which extenuates the gravity of the crime, even though it is not a legal excuse for the crime and any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial"; and "defendant's background, character, history and any devotion and affection for his family and they for him and anything favorable to him during his life or any other mitigating circumstance." This instruction is even more expansive than the "catch-all" mitigation instruction suggested in [People v. Easley \[*782\] \(1983\) 34 Cal.3d 858, 878, footnote 10 \[196 Cal.Rptr. 309, 671 P.2d 813\]](#); [****40] it certainly suffices to advise the jury of the full range of mitigating evidence it could consider. Nothing more is required. ([People v. Sully \(1991\) 53 Cal.3d 1195, 1245-1246 \[283 Cal.Rptr. 144, 812 P.2d 163\]](#).)

Contrary to defendant's contention, the district attorney never suggested to the jury that it could not consider mercy. On the other hand, defense counsel in effect urged the jury to "try to show compassion, try to show mercy." There was no error.

3. Instruction on Evidence of the Love of Defendant's Family for Him

The court instructed the jury to consider in mitigation "any devotion and affection for [defendant's] family and they for him." [CA\(13\)](#)^[↑] (13) Defendant contends the court erred in refusing his request to also tell the jury that this evidence "may be sufficient standing alone to warrant the return of a verdict of life" We disagree.

The court instructed the jury that it was not to mechanically count the factors, but that it was "free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors that you are permitted to consider." This correctly instructed the [****41] jury on the weight to be given any factor. (See [People v. Sully, supra, 53 Cal.3d at pp. 1244-1245](#); [People v. Duncan \(1991\) 53 Cal.3d 955, 977-979 \[281 Cal.Rptr. 273, 810 P.2d 131\]](#); [People v. Brown, supra, 40 Cal.3d at p. 545, fn. 19](#).) [HN10](#)^[↑] There is no duty to tell the jury that any specific fact alone might warrant a verdict of life. ([People v. Breau \(1991\) 1 Cal.4th 281, 316-317 \[3 Cal.Rptr.2d 81, 821 P.2d 585\]](#); [People v. Mickey \(1991\) 54 Cal.3d 612, 696-698 \[286](#)

[Cal.Rptr. 801, 818 P.2d 84](#)]; see also [People v. Cooper, supra, 53 Cal.3d at p. 844](#) [****311**] [*****86**] [trial court properly refused to give any specific instruction regarding the impact of the verdict on the defendant's family].)

4. Instruction to View Defendant's Admissions With Caution

After his arrest, defendant talked about the crime to the police. Some of [******42**] the statements which were admitted at trial were not recorded. [CA\(14\)](#)^(↑) (14) Focusing on these nonrecorded statements, defendant contends the court erred in failing to instruct sua sponte that evidence of his oral admissions should be viewed with caution. (See [People v. Beagle \(1972\) 6 Cal.3d 441, 456](#) [99 Cal.Rptr. 313, 492 P.2d 1].) We have previously assumed that the same rule applies to the penalty phase of a capital trial as applies to a trial of guilt, but we have never actually addressed the question. ([People v. Pensinger \(1991\) 52 Cal.3d 1210, 1268](#) [278 Cal.Rptr. 640, 805 P.2d 899] [***783**] [noting that the issue was conceded, and engaging solely in a harmless error analysis]; [People v. Morales \(1989\) 48 Cal.3d 527, 569](#) [257 Cal.Rptr. 64, 770 P.2d 244].) Because of the differences between guilt and penalty trials, we now hold that [HN11](#)^(↑) the court is required to give the cautionary instruction at the penalty phase only upon defense request.

In the pattern CALJIC instructions, the cautionary admonition is part of [******43**] a longer instruction that also defines an admission as a statement which "tends to prove [the defendant's] guilt." ⁵ At the penalty phase, guilt is already established. The only relevance of the defendant's extrajudicial statements is as either aggravating or mitigating evidence, not as evidence of

guilt.

[******44**] Whether a particular statement is aggravating or mitigating is often open to interpretation. Defendant's statements in this case contained elements that were undoubtedly aggravating, such as his statements as to why he killed Smith and Heilperin. Other statements were arguably mitigating, such as his statements that he was sorry and that he had not intended to take hostages, and his expression of regret when erroneously told that Taylor had been killed. Indeed, virtually at the outset of his argument to the jury, defense counsel stressed defendant's expressions of remorse. ⁶ In light of this, it is far from clear that defendant would benefit from an instruction that his oral admissions should be viewed with caution.

[******45**] In [People v. Vega \(1990\) 220 Cal.App.3d 310](#) [269 Cal.Rptr. 413], a noncapital case, the defendant contended the trial court erred in giving [CALJIC No. 2.71](#). He argued that his statements were both inculpatory and exculpatory, and that the instruction prejudicially told the jury to view his exculpatory statements with caution. The appellate court rejected the argument, finding that because the instruction defined an admission as a statement tending to prove guilt, "a jury is capable of discerning whether an extrajudicial statement is an admission, which they are instructed to view [***784**] with caution, or whether the statement is not an admission, to which the cautionary language does not apply." ([220 Cal.App.3d at p. 318.](#))

At a penalty phase, the distinction between mitigation and aggravation is often [****312**] [*****87**] more blurred than the distinction between a statement that incriminates and one that does not. A statement, for example, that the defendant is sorry he stabbed the victim to death is both mitigating and aggravating. It admits guilt but also expresses remorse. It is unclear whether [******46**] the defense would desire the court to tell the jury to view such a statement with caution. Therefore, the guilt-phase sua sponte duty should not apply to the penalty phase. The cautionary instruction need be given at a penalty phase only upon request. Since there was no request in this case, there was no error.

⁵The entire standard instruction states: "An admission is a statement by the defendant other than at his trial which does not by itself acknowledge his guilt of the crimes for which such defendant is on trial, but which statement tends to prove his guilt when considered with the rest of the evidence.

"You are the exclusive judges as to whether the defendant made an admission, and if so, whether such statement is true in whole or in part. If you should find that the defendant did not make the statement, you must reject it. If you find that it is true in whole or in part, you may consider that part which you find to be true.

"Evidence of an oral admission of the defendant should be viewed with caution." ([CALJIC No. 2.71](#) (5th ed.), as adapted to fit this case.)

⁶ Defense counsel argued: "Steven [Livaditis](#) was taken to the Beverly Hills jail and then taken to the hospital ward of the county jail and he was there and there were several officers there with him and he rambled and he said, 'This is a tragedy. I am sorry. I am sorry this happened.' He rambled on in that nature for quite a while."

[CA\(15\)](#)^[↑] (15) Any error would additionally have been harmless. "The purpose of the cautionary instruction is to assist the jury in determining if the statement was in fact made." ([People v. Beagle, supra, 6 Cal.3d at p. 456.](#)) "The testimony concerning defendant's oral admission was uncontradicted; defendant adduced no evidence that the statement was not made, was fabricated, or was inaccurately remembered or reported. There was no conflicting testimony concerning the precise words used, their context or their meaning." ([People v. Stankewitz, supra, 51 Cal.3d at p. 94](#); see also [People v. Pensinger, supra, 52 Cal.3d 1210, 1268.](#)) In addition, as noted, the defense, as well as the prosecution, relied on the [****47] statements. There is no reasonable possibility that the failure to give the cautionary instruction affected the penalty verdict. ([People v. Stankewitz, supra, at p. 94.](#))

5. Failure to Label the Factors as Either Mitigating or Aggravating

Defendant contends the trial court was required to label the sentencing factors as either mitigating or aggravating. We have repeatedly rejected this contention. ([People v. Bacigalupo \(1991\) 1 Cal.4th 103, 148 \[2 Cal.Rptr.2d 335, 820 P.2d 559\]](#); [People v. Gallego \(1990\) 52 Cal.3d 115, 198 \[276 Cal.Rptr. 679, 802 P.2d 169\]](#).)

[CA\(16\)](#)^[↑] (16) Defendant also claims the court was required to instruct the jury that the absence of a mitigating factor is not itself aggravating. Although that would be a correct statement of the law ([People v. Davenport \(1985\) 41 Cal.3d 247, 289-290 \[221 Cal.Rptr. 794, 710 P.2d 861\]](#)), a specific instruction to that effect is not required, at least not unless the court or parties make an improper [****48] contrary suggestion. "A jury properly advised about the broad scope of its sentencing discretion is unlikely to conclude that the absence of such unusual factors as 'extreme' emotional disturbance, victim consent, or reasonable belief in moral justification [citations] is entitled to significant [*785] aggravating weight." ([People v. Melton \(1988\) 44 Cal.3d 713, 769 \[244 Cal.Rptr. 867, 750 P.2d 741\]](#), italics in original.) No one suggested here that the mere absence of a mitigating factor was aggravating.

6. Age as an Aggravating Factor

The district attorney argued that defendant's age, 22 years at the time of the crime, could be considered as either mitigating or aggravating. She argued that although defendant was very young, "look at what he

has done," and commented that if someone committed three murders by defendant's age, some might conclude that "there is no hope for that person."

[CA\(17\)](#)^[↑] (17) Defendant argues that the court should have instructed the jury that age can only be considered mitigating or neutral but never aggravating. That is not the law. ([People v. Visciotti \(1992\) 2 Cal.4th 1, 76-77 \[5 Cal.Rptr.2d 495, 825 P.2d 388\]](#); [****49] [People v. Medina, supra, 51 Cal.3d at p. 909](#); [People v. Lucky \(1988\) 45 Cal.3d 259, 302 \[247 Cal.Rptr. 1, 753 P.2d 1052\]](#); see also [People v. Bacigalupo, supra, 1 Cal.4th at p. 153](#) (conc. opn. of Mosk, J.).)

The district attorney did not improperly argue that "chronological age alone" was aggravating. ([People v. Visciotti, supra, 2 Cal.4th at p. 76.](#)) Rather, she argued that although the chronological age [**313] [***88] suggested mitigation, the jury should consider how much criminal behavior defendant had committed in a short time. This was proper, just as it would be proper for the defense to argue the age factor was mitigating. (See [People v. Edwards, supra, 54 Cal.3d at p. 844.](#)) [HN12](#)^[↑] Criminal behavior condensed into a short time period could reasonably be considered more serious than the same behavior spread out over a long time. Contrary to defendant's claim, we also find no impermissible [****50] double counting of penalty factors.

7. Miscellaneous Instructional Contentions

We reiterate the following holdings:

(a) [HN13](#)^[↑] The court need not instruct the jury it could consider other crimes evidence only if it *unanimously* found such crimes had been proved beyond a reasonable doubt. ([People v. Gordon supra, 50 Cal.3d at p. 1273](#); [People v. Miranda \(1987\) 44 Cal.3d 57, 99 \[241 Cal.Rptr. 594, 744 P.2d 1127\]](#).)

(b) The instructions on the deliberative process approved in [People v. Brown, supra, 40 Cal.3d at page 545](#), footnote 19, are constitutional. ([People v. Nicolaus, supra, 54 Cal.3d at pp. 590-591](#), and cases cited therein; [People v. Duncan, supra, 53 Cal.3d at pp. 978- 979.](#)) [*786]

(c) [HN14](#)^[↑] The court need not instruct the jury that it could return a verdict of death only if it were persuaded beyond a reasonable doubt (i) of the existence of each aggravating factor, (ii) that [****51] the aggravating factors outweighed the mitigating factors, and (iii) that death was the appropriate penalty. ([People v. Marshall](#)

(1990) 50 Cal.3d 907, 935- 936 [269 Cal.Rptr. 269, 790 P.2d 676].)

(d) **HN15**[↑] The court need not require a written statement from the jury detailing the evidence upon which it relied and the reasons for imposing the death penalty. (*People v. Kelly* (1990) 51 Cal.3d 931, 970 [275 Cal.Rptr. 160, 800 P.2d 516]; *People v. Medina, supra*, 51 Cal.3d at pp. 909-910.)

(e) **HN16**[↑] The court need not clarify the [section 190.3](#), factor (b), instruction to state that it refers to violent criminal conduct other than the crimes charged in this proceeding. (*People v. Sanders* (1990) 51 Cal.3d 471, 528 [273 Cal.Rptr. 537, 797 P.2d 561]; *People v. Bonin* (1988) 46 Cal.3d 659, 703-704 [250 Cal.Rptr. 687, 758 P.2d 1217].)

(f) **HN17**[↑] The court need not delete inapplicable mitigating factors from [****52] its instructions. (*People v. Kelly, supra*, 51 Cal.3d at p. 968.)

F. Accumulated Error

Defendant contends the cumulative effect of the asserted errors requires reversal of the penalty verdict. There was, however, no error to accumulate.

G. Propriety of the Death Penalty

Defendant reiterates constitutional challenges to the 1978 death penalty law which we have long since rejected, and which we continue to reject. (E.g., *People v. Rodriguez* (1986) 42 Cal.3d 730, 777- 779 [230 Cal.Rptr. 667, 726 P.2d 113].)

He also argues that we must engage in a comparative sentence review in order to determine whether his sentence is disproportionate. We have consistently declined to undertake such review, and continue to do so. (*People v. Cox, supra*, 53 Cal.3d at p. 691; *People v. Sanders, supra*, 51 Cal.3d at p. 529.) Given the extraordinarily heinous nature of defendant's crimes, the death sentence is certainly not so disproportionate that it [****53] shocks the conscience and offends fundamental notions of human dignity. (*People v. Cox, supra*, 53 Cal.3d at p. 690; *People v. Frierson* (1979) 25 Cal.3d 142, 183 [158 Cal.Rptr. 281, 599 P.2d 587] (plur. opn. by Richardson, J.).)

[**314] [***89] H. Automatic Motion to Modify Death Verdict

CA(18)[↑] (18) Defendant contends the court

erroneously read and considered the probation report prior to ruling on the automatic motion to modify the [**787] verdict under [section 190.4, subdivision \(e\)](#). He is correct that **HN18**[↑] in ruling on the motion, the court reviews only the evidence presented to the jury, which does not include the probation report. (*People v. Williams* (1988) 45 Cal.3d 1268, 1329 [248 Cal.Rptr. 834, 756 P.2d 221].)

The record indicates that the court had read the probation report before ruling on the automatic motion. However, absent a contrary indication in the record, we assume that the court was not influenced by the report in ruling on the motion. (*People v. Lewis* (1990) 50 Cal.3d 262, 287 [266 Cal.Rptr. 834, 786 P.2d 892]; [****54] *People v. Williams, supra*, 45 Cal.3d at p. 1329.) Here, we need not rely on such an assumption; the record affirmatively shows the court was not influenced by the report.

At the outset of its ruling, the court stated, "I am required under the law in ruling on the application to review the evidence, which I have, and I have considered and am taking that into account. ..." (Italics added.) The court then discussed the reasons it was denying the motion, all of which were based on, and amply supported by, the evidence presented at trial. After this discussion, the court expressly stated that these were its "reasons for ruling on the application"; it directed that they be entered in the clerk's minutes.

After the court denied the automatic motion, and after the defense waived arraignment for judgment and stated there was no legal cause why judgment should not be pronounced, the court discussed whether it should modify the judgment on its "own motion." It concluded that there was no basis upon which to do so. Only during this discussion did the court refer to the contents of the probation report. The record thus [****55] shows that the court was aware of, and properly performed, its duty to base the modification motion solely on the evidence presented to the jury. Its consideration of the report only came after that ruling in discussing whether there was any other basis upon which to modify the judgment. There was no error, and certainly no prejudice.

III. CONCLUSION

The judgment is affirmed.

Lucas, C. J., Panelli, J., Kennard, J., Baxter, J., and George, J., concurred.

Concur by: MOSK, J.

Concur

I concur in the judgment. After review, I have found no reversible error or other defect.

I also generally concur in the majority opinion. On most matters, its reasoning is persuasive and its result correct.

[*788] I write separately because, unlike the majority, I believe that the trial court erred by failing to instruct the jury, sua sponte, that they should view the evidence of defendant's oral admissions with caution.

In 1872, the Legislature enacted the Code of Civil Procedure. In pertinent part, [section 2061](#) of that code required trial courts to give certain cautionary instructions "on all proper occasions," in both civil and criminal cases. Its source was the common law. (Recommendation Proposing [****56] an Evidence Code (Jan. 1965) 7 Cal. Law Revision Com. Rep. (1965) p. 358.) Among the specified admonitions was this: "That ... the evidence of the oral admissions of a party [ought to be viewed] with caution" ([Code Civ. Proc., § 2061, subd. 4](#) (1872).) As relevant here, [section 1870](#) of the same code effectively defined "admission" as a statement adverse to the party's interest at trial. (*Id.*, subd. 2.) Its source, too, was the common law. (See *Hall v. Bark "Emily Banning"* (1867) 3 Cal. 522, 523-524 [impliedly recognizing substantially the same definition under the common law].)

The reason for requiring a cautionary instruction on oral admissions is virtually self-evident.

[**315] [***90] "... The dangers inherent in the use of [evidence of oral admissions] are well recognized by courts and text writers. 'It is a familiar rule that verbal admissions should be received with *caution* and subjected to careful scrutiny, as no class of evidence is more subject to error or abuse. Witnesses having the best motives are generally unable to state the exact language of an admission, and are liable, by the omission or the changing of words, to convey a [****57] false impression of the language used. No other class of testimony affords such temptations or opportunities for unscrupulous witnesses to torture the facts or commit open perjury, as it is often impossible to

contradict their testimony at all, or at least by any other witness than the party himself.' It was undoubtedly such considerations that led the Legislature to make the admitting of extrajudicial admissions into evidence conditional on the giving of a cautionary instruction." ([People v. Bemis](#) (1949) 33 Cal.2d 395, 398-399 [202 P.2d 82], italics in original and citation omitted; accord, e.g., [Smellie v. Southern Pacific Co.](#) (1931) 212 Cal. 540, 560 [299 P. 529]; see [Smith v. Whittier](#) (1892) 95 Cal. 279, 297 [30 P. 529] stating that "[a]dmissions are generally regarded as weak evidence for the proof of a fact, and are never conclusive of the facts stated, or of the inference to be drawn therefrom"; [Monsen v. Monsen](#) (1916) 174 Cal. 97, 103 [162 P. 90] [quoting *Smith* with approval].)

In 1965, [****58] the Legislature enacted the Evidence Code. (Stats. 1965, ch. 299, § 2, pp. 1297-1356.) In the same measure, it repealed [Code of Civil Procedure section 2061](#). (Stats. 1965, ch. 299, § 127, p. 1366.) It plainly intended [*789] its action to have "no effect on the giving of the [cautionary] instructions contained in" that provision, including the admonition on oral admissions. (Recommendation Proposing an Evidence Code, *supra*, 7 Cal. Law Revision Com. Rep. at p. 358.) Also in the same measure, it repealed [Code of Civil Procedure section 1870](#). (Stats. 1965, ch. 299, § 58, p. 1360.) That provision's definition of "admission," however, was substantially recodified in section 1220 of the just-enacted Evidence Code. (Stats. 1965, ch. 299, § 2, p. 1339.)

It is, accordingly, settled that the trial court commits error when it fails to give a cautionary instruction on oral admissions, even without a request, so long as the evidence warrants. We have so held both before ([People v. Ford](#) (1964) 60 Cal.2d 772, 799 [36 Cal.Rptr. 620, 388 P.2d 892]) and after ([People v. Pensinger](#) (1991) 52 Cal.3d 1210, 1268 [278 Cal.Rptr. 640, 805 P.2d 899]) [****59] the repeal of [Code of Civil Procedure section 2061](#).

I now turn to the case at bar. Evidence of oral admissions by defendant was received at trial. For example, there was testimony on defendant's postarrest "explanation" to the police for his decision to kill William Smith and Ann Heilperin: he stabbed Smith because he had been "uncooperative and antagonistic"; he shot Heilperin because "he felt that he had to kill another hostage in order to prove that his demands should be taken seriously." These statements were obviously "oral." They were just as obviously "admissions." The fundamental issue material to penalty is the defendant's

personal moral culpability. Here, defendant sought life and the People, death. Defendant's "explanation" was adverse to his interest at trial: it magnified his blameworthiness. Manifestly, the evidence warranted a cautionary instruction on oral admissions. The trial court, however, failed to deliver such an admonition. Its omission was error.

The majority conclude to the contrary, citing asserted "differences between guilt and penalty trials." (Maj. opn., ante, at p. 783.) Their analysis is flawed.

Heretofore, trial courts have been required [****60] to give a cautionary instruction on oral admissions--to quote Code of Civil Procedure section 2061--"on all proper occasions." (Italics added.) Such an "occasion" arises in any case, whether civil or criminal, at which evidence of this kind is introduced.

Trial courts have been subjected to this obligation because of the very nature of oral admissions. "[N]o class of evidence is [**316] [***91] more subject to error or abuse." (People v. Bemis, supra, 33 Cal.2d at p. 399, internal quotation marks omitted.) [*790]

Any "differences" between the determinations of guilt and penalty are of no consequence for present purposes. The reason is plain. The trial of penalty is indeed a *trial*. Of that there can be no doubt. In such a proceeding, oral admissions remain problematical: the threat of "error" and "abuse" does not disappear because the question is penalty rather than guilt.

The majority assert that "Whether a particular statement is aggravating or mitigating is often open to interpretation." (Maj. opn., ante, at p. 783.) That may well be. But what of it? Whether a particular statement is inculpatory or exculpatory is often [****61] open to interpretation as well. In People v. Vega (1990) 220 Cal.App.3d 310 [269 Cal.Rptr. 413], the Court of Appeal expressly recognized as much. It stated that "it is not uncommon that a single statement may tend to prove guilt or innocence" (Id. at p. 317.) But it was "convinced a jury is capable of discerning whether [and to what extent] an extrajudicial statement is an admission, which they are instructed to view with caution, or whether [and to what extent] the statement is not an admission, to which the cautionary language does not apply." (Id. at p. 318.) I share that conviction. So long as the term "admission" is properly defined--for example, as simply a statement adverse to the defendant's interest at trial--the jury will be able to

perform its obligations.¹

[****62] Although the trial court erred by failing to give a cautionary instruction on oral admissions, no prejudice could have arisen. The harm that an instruction of this sort is intended to prevent, viz., the jury's crediting of an untrue or inaccurate report of words the party allegedly spoke out of court, was not threatened in this case. It was not disputed at trial that the evidence reported statements defendant had actually made, and reported those statements accurately. Hence, there is no reasonable possibility that the error contributed to the verdict. (People v. Ashmus (1991) 54 Cal.3d 932, 965 [2 Cal.Rptr.2d 112, 820 P.2d 214.])

[*791] In conclusion, having found no reversible error or other defect, I concur in the judgment.

Appellant's petition for a rehearing was denied August 13, 1992.

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¹ The majority recognize that CALJIC No. 2.71 (5th ed. 1988 bound vol.) admonishes that "Evidence of an oral admission of [a] [the] defendant should be viewed with caution." Contrary to their implication, it is immaterial that the instruction defines "admission" narrowly in terms of the question of guilt in a criminal case: "An admission is a statement made by [a] [the] defendant other than at [his] [her] trial which does not by itself acknowledge [his] [her] guilt of the crime(s) for which such defendant is on trial, but which statement tends to prove [his] [her] guilt when considered with the rest of the evidence." The quoted language, of course, was drafted specifically to cover such a question in such a case.

I note in passing that BAJI No. 2.25 (7th ed. 1992 pocket pt.) defines "admission" more generally as "A statement made by a party before trial which tends to prove or disprove any material fact in this action and which is against such party's interest is an admission." It also admonishes that "Evidence of an oral admission not made under oath should be viewed with caution."

In re Livaditis

Supreme Court of California

November 24, 1998, Decided

S063733

Reporter

1998 Cal. LEXIS 7651 *

In re Steven Livaditis on Habeas Corpus

40 is denied because of the failure to object or otherwise raise the issue at trial. ([People v. Edwards \(1991\) 54 Cal. 3d 787, 827, 819 P.2d 436.](#)) Claim 1, a claim of cumulative error, is subject to the same procedural bars that apply to the individual claims.

Notice: [*1] DECISION WITHOUT PUBLISHED
OPINION

Mosk, J., and Brown, J., would deny the [*2] petition solely on the merits.

End of Document

Core Terms

merits

Judges: Mosk, J., and Brown, J., would deny the petition solely on the merits.

Opinion

The petition for writ of habeas corpus filed on August 20, 1997, is denied. All claims are denied on the merits. The following claims are also denied on the ground that they were raised and rejected on appeal: 3, 4, 6, 7, 8, 9, 28, 31. ([In re Waltreus \(1965\) 62 Cal. 2d 218, 225, 42 Cal. Rptr. 9, 397 P.2d 1001 \(Waltreus\).](#)) The following claims are also denied on the ground that they could have been, but were not, raised on appeal: 2, 10. ([In re Dixon \(1953\) 41 Cal. 2d 756, 759, 264 P.2d 513 \(Dixon\).](#)) Claim 5 is denied under [Waltreus, supra](#), to the extent is based on the appellate record. The following claims are denied under [Waltreus, supra](#), to the extent they were raised and rejected on appeal, and under [Dixon, supra](#), to the extent they were not raised on appeal: 13-23, 25-27. (Claim 24 was withdrawn.) Claim