

APPENDIX B

JUDGMENT OF THE UNITED STATES
DISTRICT COURT
DATED JUNE 30, 2016

JS 6

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

LESTER OCHOA,
Plaintiff,

vs.

RON DAVIS, Acting Warden,
California State Prison at San Quentin,
Defendant

Case No.: CV 99-11129 DSF
JUDGMENT

For the reasons set forth in the Memorandum and Order Denying and Dismissing Third Amended Petition for Writ of Habeas Corpus, issued simultaneously with this judgment, Petitioner Lester Ochoa's Third Amended Petition for Writ for Habeas Corpus, filed on December 18, 2007 is DENIED and DISMISSED. Pursuant to its own motion, the Court declines to issue a certificate of appealability. This order constitutes the final disposition of the Third Amended Petition by the Court. Consistent with this order, the Court vacates the stay of execution entered on November 18, 1999.

IT IS SO ORDERED.

Dated: 6/30/16

Dale S. Fischer

DALE S. FISCHER
UNITED STATES DISTRICT JUDGE

JS 6

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

LESTER OCHOA,

Petitioner,

v.

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

Respondent.

Case No. CV 99-11129 DSF

DEATH PENALTY CASE

**MEMORANDUM AND ORDER
DENYING AND DISMISSING
THIRD AMENDED PETITION FOR
WRIT OF HABEAS CORPUS**

I. INTRODUCTION

Petitioner, Lester Ochoa, commenced habeas corpus proceedings in this Court with the filing of a Request for Appointment of Counsel and for Stay of Execution on October 22, 1999. (Docket No. 1.) After litigation on the question of equitable tolling, Petitioner filed his Petition for Writ of Habeas Corpus on May 16, 2001. (Docket No. 49.) On June 20, 2002, the case was stayed and held in abeyance so that Petitioner could return to state court to exhaust claims. (Docket No. 77.) Petitioner filed his First Amended Petition for Writ of Habeas Corpus, removing the unexhausted claims on August 6, 2002. (Docket No. 78.) On March 31, 2003, Petitioner notified the Court that the California Supreme Court had denied relief on the exhaustion petition. (Docket No. 82.) On April 28, 2003, Petitioner filed a Second Amended Petition for Writ of Habeas Corpus,

1 reincorporating the now exhausted claims. (Docket No. 84.) Respondent filed his
2 answer to the Second Amended Petition on September 13, 2005. (Docket No.
3 114.) Petitioner filed his Traverse on November 10, 2005. (Docket No. 117.)

4 Once the initial round of pleadings was complete, Petitioner filed his
5 Motion for Evidentiary Hearing on Selected Claims on January 20, 2006. (Docket
6 No. 119.) Respondent's Opposition to that motion was filed on December 6, 2006
7 and Petitioner filed his Reply on January 10, 2007. (Docket Nos. 133 & 134.) On
8 December 12, 2007 the Hon. Stephen G. Larson granted Petitioner's Motion to
9 Amend the Petition for Writ of Habeas Corpus and the Third Amended Petition
10 was filed on December 18, 2007. (Docket Nos. 149 & 151.) The Third Amended
11 Petition ("TAP") is the operative pleading in this action. Respondent filed his
12 Answer on February 14, 2008 and Petitioner filed his Traverse on March 18,
13 2008. (Docket Nos. 154 & 156.)

14 Judge Larson denied Petitioner's Motion for Evidentiary Hearing on
15 October 20, 2009 (Docket No. 158.) After Judge Larson left the bench, the case
16 was reassigned to the Hon. Valerie Baker Fairbank. (Docket No. 160.) Judge
17 Fairbank entertained briefing on Petitioner's Motion for Reconsideration of Order
18 by District Court Denying Evidentiary Hearing and Discovery Motion (Docket
19 No. 175) and ultimately denied that motion on July 1, 2011. (Docket No. 191.)
20 Judge Fairbank then set a schedule for merits briefing. (Docket No. 198.) This
21 case was reassigned to this Court on March 9, 2012 on Judge Fairbank's election
22 to take senior status. (Docket No. 204.) Merits briefing is now complete and for
23 the reasons set forth below, the Court DENIES and DISMISSES the Third
24 Amended Petition for Writ of Habeas Corpus.

25
26 * * *

1 * * *

2
3
4
5
6
7
8
9
10 S. Petitioner Cannot Prevail on His Claims That His Rights
11 Were Violated by the Court's Refusal to Give an
12 Instruction on Sympathy For Petitioner's Family
13 (CLAIM 23)

14 Petitioner asserts that his rights were violated when the trial court refused to
15 give an instruction telling the jury that it could consider sympathy for Petitioner's
16 family as a factor in sentencing and then also allowing the prosecution to argue
17 that the jury could not consider that sympathy. (TAP at 91.)

18 At the time that the court was considering what instructions to give the jury
19 at the penalty phase, defense counsel proposed, and the prosecutor objected to, an
20 instruction that would have included sympathy for Petitioner's family as a factor.
21 (RT at 5488.) The proposed instruction read, "You may take sympathy for the
22 defendant and his family into consideration in determining whether or not to
23 extend mercy to the defendant." (CT at 984, RT at 5491.) The court, citing
24 relevant federal and state case law, pointed out that the sentencing consideration
25 was supposed to be individualized and based on the conduct of the defendant and
26 the circumstances of his life and actions, not on family factors. (RT at 5488-89.)
27 The judge also noted that just as the jury could not consider Petitioner's family's
28 actions as an aggravating factor, so too they could not consider his family or the

1 impact of the death sentence on them in mitigation. (RT at 5489.) Finally, he
2 noted, and defense counsel conceded, that there was no authority holding that the
3 jury should take sympathy for the defendant's family into consideration. (RT at
4 5489.) Counsel did point out, however, that there was also no authority stating
5 that they could not take sympathy for the family into consideration. (RT at 5489.)

6 Based on the evidence that the defense had presented, the trial judge
7 pointed out that:

8 [T]he jury is going to be aware of the effect on the defendant's family.
9 Now whether they, as human beings, consider it unconsciously, that's
10 up to – you know, what can I do? That's whatever's going to affect
11 (sic) them. ¶ But as far as the law is concerned, we can instruct them
12 on what the law is, and the law is that the defendant should be
13 punished based upon his individual record, his individual background
14 and his individual involvement.

15 (RT at 5490.)

16 The judge then struck the "and his family" portion of the requested
17 instruction but invited counsel to provide any authority to the contrary for his
18 consideration. (RT at 5491.) The jury was instructed however that, consistent
19 with factor (k) in Penal Code section 190.3, it could consider:

20 Any other circumstance which extenuates the gravity of the crime
21 even though it is not a legal excuse for the crime [and any sympathetic
22 or other aspect of the defendant's character or record [that the
23 defendant offers] as a basis for a sentence less than death, whether or
24 not related to the offense for which he is on trial.

25 (CT at 974.)

26 Further, the jury was instructed at Petitioner's request that it was "free to
27 assign whatever moral or sympathetic value you deem appropriate to each and all
28 of the various factors you are permitted to consider." (CT at 985.) They were
also told, "[M]itigating factors are unlimited. Anything mitigating should be
considered. Mitigating factors included in the instructions are merely examples of
some of the factors you may take into account in deciding whether or not to
impose a death penalty." (CT at 986.) These instructions demonstrate that the

1 jury was aware that it was free to consider factors in mitigation outside of the
2 examples given, to include "anything" that they thought was mitigating.

3 There is nothing in the record to support Petitioner's contention that the
4 trial court told his counsel that sympathy for his family could not be argued. The
5 court merely refused to give an explicit instruction that it could be considered in
6 mitigation. Petitioner's assertion that he was somehow prejudiced by the
7 prosecutor's argument that sympathy for the defendant did not mean sympathy for
8 the family does not equate with the trial court allegedly barring the defense from
9 making its family sympathy argument. The argument was factually and legally
10 correct as to what sympathy for the defendant means. Counsel's arguments are
11 just that, and are neither evidence nor binding instructions on the jury.

12 After noting all of the preceding instructions and facts, the California
13 Supreme Court also pointed out that the emotional impact of the case and possible
14 death sentence on Petitioner's family was before the jury.

15 In discussing the proposed instruction, defense counsel noted that
16 "evidence is before the jury" of "the family's emotional state and their
17 reaction to the situation" The court agreed that this evidence
18 existed. "But ... the law is that the defendant should be punished based
19 upon his individual record, his individual background and his
20 individual involvement. That's the basis for punishing in a certain
21 way or ... in another way."

22 At summation of the case, the prosecutor urged that "sympathy for the
23 defendant means exactly that. It does not mean sympathy for his
24 family. It does not mean sympathy for the victim or the victim's
25 family. [¶] Now, it's obvious that ... some of the defendant's family
26 members.... are very touched. They are very emotional. They are very
27 hurt, and that is understandable."

28 *Ochoa*, 19 Cal. 4th at 454-55.

The state court also pointed out that "[n]either the [federal] high court nor
[we] yet [have] decided whether the jury may consider evidence of the impact a
judgment of death would have upon the defendant's family." *Id.* at 455 (internal
citations omitted). The court then went on to hold that "sympathy for a
defendant's family is not a matter that a capital jury can consider in mitigation,

1 but that family members may offer testimony of the impact of an execution on
2 them if by so doing they illuminate some positive quality of the defendant's
3 background or character." *Id.* at 456. In other words, the trial court's striking of
4 the "and his family" portion of the proposed instruction was appropriate under
5 state law.

6 Petitioner's complaint that the failure to give this instruction ran afoul of
7 federal law is incorrect. As the California Supreme Court pointed out, there is no
8 clearly established federal law that required the giving of a "sympathy for the
9 family" instruction. The only requirement is that the sentence handed down be
10 based on the jury having been permitted to give "particularized consideration of
11 relevant aspects of the character and record of each convicted defendant."
12 *Woodson v North Carolina*, 428 U.S. 286, 303 (1976). Though Petitioner relies
13 on *Lockett v. Ohio*, 438 U.S. 586, 604 (1978), that case is not controlling because
14 Petitioner was not denied the ability to have the jury consider any aspect of his
15 character or record and any of the circumstances of the offense. To the contrary,
16 the record demonstrates that the impact on his family was before the jury and the
17 jury was instructed that it could consider "anything" in mitigation.

18 The California Supreme Court's denial of this claim on the merits did not
19 amount to an unreasonable application of clearly established federal law nor was it
20 an unreasonable determination of the facts in light of all the evidence. Petitioner's
21 request for relief on Claim 23 is **DENIED**.

22
23
24 * * *

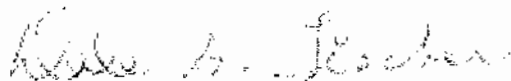
* * *

VII. CONCLUSION AND ORDER

The California Supreme Court's denial of each of Petitioner's claims on the merits did not amount to 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; nor did it result in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. The Third Amended Petition for Writ of Habeas Corpus of a Prisoner in State Custody is dismissed with prejudice. The Court declines to reach the question of procedural default because it is unnecessary to do so. The Court declines to issue a certificate of appealability because Petitioner has not made a substantial showing of the denial of a constitutional right.

IT IS SO ORDERED.

Date: 6/30/16



DALE S. FISCHER
UNITED STATES DISTRICT JUDGE